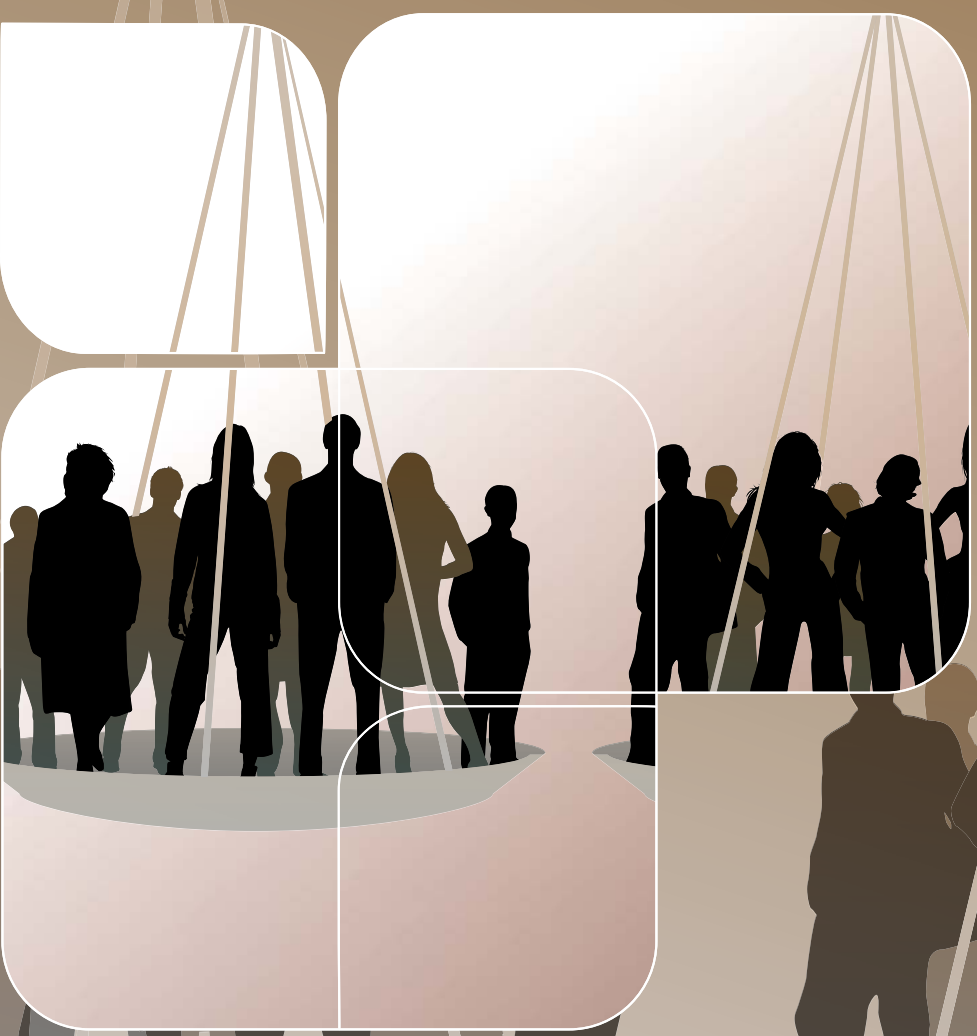
Compilation of case law on the equality of treatment between women and men and on non-discrimination in the European Union

Third edition



European Commission

This publication is commissioned under the European Union Programme for Employment and Social Solidarity (2007-2013). This programme is managed by the Directorate-General for Employment, social affairs and equal opportunities of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the EUROPE 2020 goals in these fields.

The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA-EEA and EU candidate and pre-candidate countries.

PROGRESS mission is to strengthen the EU contribution in support of Member States' commitments and efforts to create more and better jobs and to build a more cohesive society. To that effect, PROGRESS is instrumental in:

- providing analysis and policy advice on PROGRESS policy areas;
- monitoring and reporting on the implementation of EU legislation and policies in PROGRESS policy areas;
- promoting policy transfer, learning and support among Member States on EU objectives and priorities; and
- relaying the views of the stakeholders and society at large

For more information see:
http://ec.europa.eu/progress

Compilation of case law on the equality of treatment between women and men and on non-discrimination in the European Union

Third edition

European Commission

Directorate-General for Employment, Social Affairs and Equal Opportunities
Unit G2
Manuscript completed in July 2009

More information on the European Union is available on the Internet (http://europa.eu).

Cataloguing data as well as an abstract can be found at the end of this publication.

Luxembourg: Publications Office of the European Union, 2010

ISBN 978-92-79-14247-5
doi:10.2767/88042

Printed in Spain

Printed on elemental chlorine-free bleached paper (ECF)

TABLE OF CONTENTS

CHRONOLOGICAL TABLE OF RULINGS

Note

Rulings are listed by their full name, according to the date of the verdict and the number of the case. The name of the case is accompanied, in brackets, by the legal framework mainly referred to.

First part — Case-law in relation to equality between women and men

Second part — Case-law in relation to non-discrimination

ALPHABETICAL TABLE OF RULINGS

Note

Rulings are referred to by their common name.

The common name of the ruling is accompanied, in brackets, with the last two digits of the year of the verdict.

KEYWORD INDEX

Note

Rulings are listed in chronological order and are referred to by their common name. A table of these common names in alphabetical order can be found after the index.

The common name of the ruling is accompanied, in brackets, with the last two digits of the year of the verdict. The specific provision to which the key word corresponds, when necessary, is indicated in square brackets.

C

D

E

F

G

H

I

J

M

N

O

P

R

S

T

First part

Case law in relation to equality between men and women

Case 80/70
GABRIELLE DEFRENNE v BELGIAN STATE
(Defrenne I)
Date of judgment:
25 May 1971
Reference:
[1971] ECR 445
Content:
Equal pay (social security) (EEC Treaty, Article 119)

1. Facts and procedure

Ms Defrenne was engaged as an air hostess by the airline company Sabena on 10 December 1951. On 15 February 1968, Ms Defrenne's contract was terminated under Article 5 of the contract of employment of the air crew of Sabena, which provided that women should cease to be members of the crew on reaching the age of 40 years.

On 9 February 1970, Ms Defrenne made an application to the Belgian *Conseil d'État* for annulment of the Royal Decree of 3 November 1969, laying down special rules for civil aviation air crews on entitlement to pension and the special conditions of application of Royal Decree No 50 of 24 October 1967, concerning retirement pensions and survivors' pensions of employed workers. In support of her application, Ms Defrenne claimed the infringement of Article 14 of Royal Decree No 40 of 24 October 1967, under which any woman worker might, in accordance with Article 119 of the EEC Treaty, bring an action in the competent court for the application of the principle of equal pay for men and women.

2. Questions referred to the ECJ

By order dated 4 December 1970, the Belgian *Conseil d'État*, referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Does the retirement pension granted under the terms of the social security financed by contributions from workers, employers and by State subsidy constitute a consideration which the worker receives indirectly in respect of his employment from his employer?

2) Can the rules establish a different age limit for men and women crew in civil aviation?

3) Do air hostesses and stewards in civil aviation do the same work?

3. The judgment of the ECJ

The Court pointed out that, although consideration in the nature of social security was not in principle alien to the concept of pay, social security schemes or benefits, in particular retirement pensions, directly governed by legislation, could not be brought within the concept of pay as defined in Article 119, without any element of agreement within the undertaking or the occupational branch concerned.

The ECJ considered that, in view of the answer given to the first question, the other questions did not call for a reply.
In reply to the questions referred to it, the Court decided that:

1) A retirement pension established within the framework of a social security scheme laid down by legislation does not constitute consideration which the worker receives indirectly in respect of his employment from his employer within the meaning of the second paragraph of Article 119 of the EEC Treaty.

2) The other questions do not call for a reply.

Case 43/75
GABRIELLE DEFRENNE v SOCIÉTÉ ANONYME BELGE DE NAVIGATION AÉRIENNE SABENA (Defrenne II)
Date of judgment:
8 April 1976
Reference:
[1976] ECR 455
Content:
The principle that men and women should receive equal pay for equal work (EEC Treaty, Article 119)

1. Facts and procedure

The facts of this case are the same as for the previous case (Case 80/70 — *Defrenne I*), but here they refer to different legal issues.

On 13 March 1968, Ms Defrenne brought an action before the *Tribunal du travail,* Brussels, for compensation for the loss she had suffered in terms of salary, allowance on termination of service and pension as a result of the fact that air hostesses and male members of the air crew performing identical duties did not receive equal pay. On 17 December 1970, all Ms Defrenne's claims were dismissed as unfounded by the same tribunal. On 11 January 1971, she appealed against this judgment to the *Cour du travail,* Brussels, which upheld the judgment at first instance on the second and third heads of claim. As regards the question of arrears of salary, a reference for a preliminary ruling to the Court of Justice was made.

2. Questions referred to the ECJ

By a judgment of 23 April 1975, the *Cour du travail,* Brussels, referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Does Article 119 of the Treaty of Rome introduce directly into national law of each Member State of the European Community the principle that men and women should receive equal pay for equal work and does it, therefore, independently of any national provision, entitle workers to institute proceedings before national courts in order to ensure its observance, and if so as from what date?

2) Has Article 119 become applicable in the internal law of the Member States by virtue of measures adopted by the authorities of the European Economic Community (if so, which, and as from what date?) or must the national legislature be regarded as alone competent in this matter?

3. The judgment of the ECJ

To begin with the Court of Justice stated that, with regard to the question of the direct effect of Article 119, this Article pursued a double aim which was at once economic and social, thus showing that the principle of equal pay formed part of the foundations of the Community. It went on to hold that a distinction should be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination which might be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which could only be identified by reference to more explicit implementing provisions of a Community or national character. Moreover, the Court explicitly mentioned that among the forms of direct discrimination included should be those which had their origin in legislative provisions or in collective labour agreements and which could be detected on the basis of a purely legal analysis of the situation. Finally, the Court stated that since Article 119 was mandatory in nature, the prohibition on discrimination between men and women applied not only to the action of public authorities, but also to all agreements which were intended to regulate paid labour collectively, as well as to contracts between individuals.

In answer to the questions referred to it, the Court ruled that:

1) *The principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.*

2) *The application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty. The first of these time limits was not modified by the resolution of the Member States of 30 December 1961.*

3) *Council Directive No 75/117 does not prejudice the direct effect of Article 119 and the period fixed by that Directive for compliance therewith does not affect the time-limits laid down by Article 119 of the EEC Treaty and the Accession Treaty.*

4) *Even in the areas in which Article 119 has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be achieved by a combination of Community and national provisions.*

5) *Except as regards those workers who have already brought legal proceedings or made an equivalent claim, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment.*

Case 149/77
GABRIELLE DEFRENNE v SOCIÉTÉ ANONYME BELGE DE NAVIGATION AÉRIENNE SABENA (Defrenne III)
Date of judgment:
15 June 1978
Reference:
[1978] ECR 1365
Content:
Equal conditions of employment for men and women (EEC Treaty, Article 119).

1. Facts and procedure

The facts of this case are also the same as for the two previous cases (Cases 80/70 and 43/75 — *Defrenne I* and *II*) and, again, only the legal issues diverge.

On 16 September 1976, Ms Defrenne lodged an appeal before the *Cour de cassation,* Belgium, against the judgment of the *Cour du travail,* Brussels, of 23 April 1975, in so far as that judgment upheld the judgment of the *Tribunal du travail,* Brussels, of 17 December 1970, on the second and third heads of claim (which sought an order to Sabena to pay a supplementary allowance on termination of service and compensation for the damage suffered as regards her pension).

2. Question referred to the ECJ

By judgment of 28 November 1977, the *Cour de cassation* of Belgium referred a question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

Must Article 119 of the Treaty of Rome which lays down the principle that 'men and women should receive equal pay for equal work' be interpreted by reason of the dual economic and social aim of the Treaty as prescribing not only equal pay but also equal working conditions for men and women and, in particular, does the insertion into the contract of employment of an air hostess of a clause bringing the said contract to an end when she reaches the age of 40 years, it being established that no such limit is attached to the contract of male cabin attendants who are assumed to do the same work, constitute discrimination prohibited by the said Article 119 of the Treaty of Rome or by a principle of Community law if that clause may have pecuniary consequences, in particular, as regards the allowance on termination of service and pension?

3. The judgment of the ECJ

This preliminary question referred to the Court of Justice was worded in two parts, which are: (a) the determination of the field of application of Article 119 of the Treaty and, (b) the possible existence of a general principle of Community law, the aim of which is to eliminate discrimination between men and women workers as regards conditions of employment and working conditions other than remuneration in the strict sense.

In determining the scope of Article 119, the Court of Justice took the view that the field of application of Article 119 should be determined within the context of the system of the social provisions of the Treaty, which are set out in the chapter formed by Article 117 et seq. In addition, whereas Articles 117 and 118 are essentially in the nature of a programme, Article 119 was held to be limited to the question of pay discrimination between men and women workers and constituted, therefore, a special rule, whose application was linked to precise factors. Thus, in the opinion of the Court, it was impossible to extend the scope of Article 119 to elements of the employment relationship other than those expressly referred to therein as this could jeopardise the direct effect of the provision's own sphere and also intervene in an area reserved by Articles 117 and 118 to the discretion of the authorities referred to therein. As regards the existence of a general principle prohibiting discrimination based on sex in conditions of employment and working conditions, the Court argued that the

elimination of such discrimination formed part of the fundamental rights which was one of the general principles of Community law, the observance of which it had a duty to ensure. However, the Court stressed that, at the period under consideration, Community law contained only the provisions in the nature of a programme laid down by Articles 117 and 118 of the Treaty, which related to the general development of social welfare, in particular as regards conditions of employment and working conditions. No responsibility, therefore, could be assumed for supervising and guaranteeing the observance of the principle of equality for men and women in working conditions other than remuneration.

Based on this reasoning, the Court held that:

1) *Article 119 of the EEC Treaty cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women.*

2) *At the time of the events which form the basis of the main action there was, as regards the relationships between employer and employee under national law, no rule of Community law prohibiting discrimination between men and women in the matter of working conditions other than the requirements as to pay referred to in Article 119 of the Treaty.*

Case 129/79
MACARTHYS LTD v WENDY SMITH
Date of judgment:
27 March 1980
Reference:
[1980] ECR 1275
Content:
Equal pay for men and women (EEC Treaty, Article 119 and Article 1 of Council Directive 75/117/EEC of 10 February 1975)

1. Facts and procedure

Until 20 October 1975, the stockroom of the Wembley warehouse of Macarthys, a wholesale dealer in pharmaceutical products, was managed by Mr McCullough, who received a weekly salary of GBP 60.00. From 1 March 1976, until 9 March 1977, the management of the stockroom was entrusted to Mrs Smith whose salary was GBP 50.00 per week.

Mrs Smith brought proceedings before an industrial tribunal in London claiming that, by virtue of section 1 (1) and (2) of the Equal Pay Act 1970 as amended, her remuneration for the period worked should have been the same as that previously paid to Mr McCullough.

By decision of 27 June 1977, the industrial tribunal upheld this claim. Macarthys appealed against this decision to the Employment Appeal Tribunal which dismissed the appeal by decision of 14 December 1977. Macarthys then appealed to the Court of Appeal, Civil Division, of the Supreme Court of Judicature.

2. Questions referred to the ECJ

By order of 25 July 1979, the Court of Appeal in London referred four questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is the principle of equal pay for equal work, contained in Article 119 of the EEC Treaty and Article 1 of the EEC Council Directive of 10 February 1975 (75/117/EEC), confined to situations in which men and women are contemporaneously doing equal work for their employer?

2) If the answer to question (1) is in the negative, does the said principle apply where a worker can show that she receives less pay in respect of her employment from her employer:

   a) than she would have received if she were a man doing equal work for the employer; or

   b) than had been received by a male worker who had been employed prior to her period of employment and who had been doing equal work for the employer?

3) If the answer to question (2)(a) or (b) is in the affirmative, is that answer dependent upon the provisions of Article 1 of the said Directive?

4) If the answer to question (3) is in the affirmative, is Article 1 of the said Directive directly applicable in Member States?

3. The judgment of the ECJ

Based on the fact that the questions relating to the direct effect of Directive No 75/117 and to the interpretation of Article 1 thereof would only arise if the application of Article 119 of the Treaty should not permit the issue raised in the proceedings to be resolved, the Court decided to consider first how Article 119 was to be interpreted having regard to the legal situation in which the dispute had its origin. The Court started by saying that (a) Member States were obliged to ensure and maintain the application of the principle that men and women should receive equal pay for equal work (first paragraph of Article 119) and (b) as it had previously ruled in *Defrenne II,* Article 119 applied directly and without the need for more detailed

implementing measures on the part of the Community or Member States, to all forms of direct and overt discrimination which could be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question. According to the Court, in such a situation, the decisive test lay in establishing whether there was a difference in treatment for a man and a woman performing 'equal work' within the meaning of Article 119. Thus, the scope of that concept, which was entirely qualitative in character in that it was exclusively concerned with the nature of the services in question, could not be restricted by the introduction of a requirement of contemporaneity. The Court stressed, however, that it could not be ruled out that a difference in pay between two workers occupying the same post but at different periods in time could be explained by the operation of factors which were unconnected with any discrimination on grounds of sex. Such a question of fact was, however, to be decided by the national court.

The second question put by the Court of Appeal concerned the framework within which the existence of possible discrimination in pay could be established, i.e., whether a woman could claim not only the salary received by a man who previously did the same work for her employer but also, more generally, the salary to which she would be entitled were she a man, even in the absence of any man who was concurrently performing, or had previously performed, similar work. This proposition was classified by the Court as indirect and disguised discrimination. As explained in *Defrenne II,* this would imply comparative studies of entire branches of industry and therefore required, as a prerequisite, the elaboration by the Community and national legislative bodies of criteria of assessment. In cases of actual discrimination falling within the scope of the direct application of Article 119, comparisons were confined to parallels which could be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service.

Taking into account all these reasons, the Court concluded that the dispute brought before the national court should be decided within the framework of an interpretation of Article 119 of the Treaty alone.

In answer to the questions referred to it, the Court held that:

1) *The principle that men and women should receive equal pay for equal work, enshrined in Article 119 of the EEC Treaty, is not confined to situations in which men and women are contemporaneously doing equal work for the same employer.*

2) *The principle of equal pay enshrined in Article 119 applies to the case where it is established that, having regard to the nature of her services, a woman has received less pay than a man who was employed prior to the woman's period of employment and who did equal work for the employer.*

Case 69/80
SUSAN JANE WORRINGHAM AND MARGARET HUMPHREYS v LLOYDS BANK LIMITED
Date of judgment:
11 March 1981
Reference:
[1981] ECR 767
Content:
Equal pay (EEC Treaty, Article 119; Article 1 of Council Directive 75/117/EEC of 10 February 1975; and Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

Lloyds Bank Limited ('Lloyds') applied to its staff two contracted-out retirement benefits schemes, one for men and one for women. Membership of these schemes was compulsory for both male and female employees at the commencement of their employment. Although these schemes did not essentially involve a difference in the treatment of men and women as regards the benefit relating to the retirement pension, they laid down different rules as regards other aspects not related to that pension.

The unequal pay alleged by Ms Worringham and Ms Humphreys originated in the provisions of these two retirement benefits schemes relating to the requirement to contribute for staff who had not yet attained the age of 25. Men under 25 years of age were required to contribute 5 % of their salary to their scheme whereas women were not required to do so. In order to cover the contribution payable by the men, Lloyds added an additional 5 % to the gross salary paid to those workers which was then deducted and paid directly to the trustees of the retirement benefits scheme. Moreover, workers who left their employment and consented to the transfer of their accrued rights to the State pension scheme received a 'contributions equivalent premium', which entitled them to a refund, subject to deductions, with interest. That amount included, in the case of men under the age of 25, the 5 % contribution paid in their name by the employer. The amount of the salary in which the said 5 % contribution was included also helped to determine the amount of certain benefits and social advantages.

In May and September 1977, Ms Worringham and Ms Humphreys commenced proceedings before an industrial tribunal under the provisions of section 1(2)(a) of the Equal Pay Act 1970 seeking relief from the alleged contravention of the equality clause incorporated in their contracts of employment by virtue of the provisions of that Act. The claim was rejected by the tribunal and they appealed to the Employment Appeal Tribunal, which held that there was an inequality of pay within the meaning of the Equal Pay Act. Lloyds, in turn, appealed against that decision to the Court of Appeal, London.

2. Questions referred to the ECJ

By order of 19 February 1980, the Court of Appeal of London, referred four questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1) a) Are contributions paid by an employer to a retirement benefits scheme; or

   b) are rights and benefits of a worker under such a scheme 'pay' within the meaning of Article 119 of the EEC Treaty?

2) a) Are contributions paid by an employer to a retirement benefits scheme, or

   b) rights and benefits of a worker under such a scheme 'remuneration' within the meaning of Article 1 of the EEC Directive of 10 February 1975 (75/117/EEC)?

3) If the answers to questions (1) and (2) are in the affirmative, does Article 119 of the EEC Treaty or Article 1 of the said Directive, as the case may be, have direct effect in Member States so as to confer enforceable Communi-

ty rights upon individuals in the circumstances of the present case?

4) If the answers to questions (1) and (2) are in the negative:

   a) (i) are contributions paid by an employer to a retirement benefits scheme, or

      (ii) are rights and benefits of a worker under such a scheme within the scope of the principle of equal treatment for men and women as regards 'working conditions' contained in Article 1(1) and Article 5(1) of the EEC Directive of 9 February 1976 (76/207/EEC)?

   b) if so, does the said principle have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?

3. *The judgment of the ECJ*

In reply to question (1), and based on the concept of the term 'pay' contained in Article 119, the Court considered that sums such as those in question which were included in the calculation of the gross salary payable to the employee and which directly determined the calculation of other advantages linked to the salary, such as redundancy payments, unemployment benefits, family allowances and credit facilities, formed part of the worker's pay even if they were immediately deducted by the employer and paid to a pension fund on behalf of the employee. This applied a fortiori where those sums were refunded in certain circumstances, subject to certain deductions, to the employee if he ceased to belong to the contractual retirement benefits scheme under which they were deducted.

As far as the second question was concerned, the Court found that an examination of this question was not necessary, having regard to the interpretation already given to Article 119 of the EEC Treaty. The Court added that the objective of Directive 75/117/EEC was based on the concept of 'pay' as defined in the second paragraph of Article 119 of the Treaty and that although Article 1 of this Directive explained that the concept of 'same work' contained in the first paragraph of Article 119 of the Treaty included cases of 'work to which equal value was attributed', it in no way affected the concept of 'pay' contained in the second paragraph of Article 119 but referred by implication to that concept.

With reference to the direct effect of Article 119 (question (3)), the Court referred to its decision in Cases 43/75 — *Defrenne II* and 129/79 — *Macarthys:* Article 119 applied directly to all forms of discrimination which might be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit their application. The Court understood that the inequality between the gross salaries of men and women was a form of discrimination contrary to Article 119 of the Treaty since, because of that inequality, men received benefits from which women engaged in the same work or work of equal value were excluded, or received on that account greater benefits or social advantages than those to which women were entitled.

In considering Lloyds' request for limiting the temporal effect of this judgment, the Court took into account its findings in Case 43/75 — *Defrenne II.* According to the Court, the availability of information to the circles concerned as to the scope of Article 119 and the number of cases which would be affected by the direct effect of that provision did not justify a temporal restriction on the direct effect of Article 119.

The fourth question did not call for a reply as the two first questions were answered in the affirmative.

In answer to the questions referred to it, the Court of Justice ruled that:

1) *A contribution to a retirement benefits scheme which is paid by an employer in the name of employees by means of an addition to the gross salary and which therefore helps to determine the amount of that salary constitutes 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty.*

2) *Article 119 of the Treaty may be relied upon before the national courts and these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular in a case where, because of the requirement imposed only on men or only on women to contribute to a retirement benefits scheme, the contributions in question are paid by the employer in the name of the employee and deducted from the gross salary whose amount they determine.*

Case 96/80
J.P. JENKINS v KINGSGATE (Clothing Productions) Ltd
Date of judgment:
31 March 1981
Reference:
[1981] ECR 911
Content:
Equal pay (EEC Treaty, Article 119, and Article 1 Council Directive 75/117/EEC).

1. Facts and procedure

Kingsgate Ltd ('Kingsgate'), manufacturers of ladies' clothing, employed 89 people of whom 35 were male and 54 female. All the male employees except one, worked full-time; of the female employees, five worked part-time. Shortly before the entry into force of the Equal Pay Act 1970, Kingsgate fixed the hourly pay for full-time work at the same rate for both men and women. The pay for part-time work was fixed at a rate 10 % lower than that applicable to full-time work based on the need to (a) discourage absenteeism; (b) ensure that the expensive machinery in the factory was being used to its fullest extent; and (c) encourage greater productivity.

Mrs Jenkins, who worked part-time (approximately 30 hours per week), brought an action before an industrial tribunal because she took the view that she was unfairly prejudiced by the fact that, although she was engaged to perform the same work as that performed by one of her male colleagues (Mr Bannan), employed full-time, she drew an hourly rate of pay lower than that drawn by her colleague. She alleged that the difference in pay contravened the equality clause incorporated into her contract and the provisions of section 1(2)(a) of the Equal Pay Act, according to which the principle of equal pay for men and women applied in every case where a woman was employed on 'like work' with a man in the same employment. The employer acknowledged that Mrs Jenkins had been engaged to perform like work with that of Mr Bannan but maintained that there was a 'material difference, other than the difference of sex' between her case and his. The industrial tribunal rejected the complaint and held that working for a period representing 75 % of the full working hours constituted a 'material difference, other than the difference of sex' sufficient to justify an hourly rate of pay 10 % lower.

Mrs Jenkins appealed against that decision to the Employment Appeal Tribunal.

2. Questions referred to the ECJ

By an order dated 25 February 1980, the Employment Appeal Tribunal of the United Kingdom referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Does the principle of equal pay, contained in Article 119 of the EEC Treaty and Article 1 of the Council Directive of 10 February 1975, require that pay for work at time rates shall be the same, irrespective

   a) of the number of hours worked each week; or

   b) of whether it is of commercial benefit to the employer to encourage the doing of the maximum possible hours of work and consequently to pay higher rate to workers doing 40 hours per week than to workers doing fewer than 40 hours per week?

2) If the answer to question (1) (a) or (b) is in the negative, what criteria should be used in determining whether or not the principle of equal pay applies where there is a difference in the time rates of pay related to the total number of hours worked each week?

3) Would the answer to question (1) (a) or (b) be different (and, if so, in what respects) if it were

shown that a considerably smaller proportion of female workers than of male workers is able to perform the minimum number of hours each week required to qualify for the full hourly rate of pay?

4) Are the relevant provisions of Article 119 of the EEC Treaty or Article 1 of the said Directive, as the case may be, directly applicable in Member States in the circumstances of the present case?

3. The judgment of the ECJ

In answering the first three questions, the Court first pointed out that the differences in pay prohibited by Article 119 were exclusively those based on the difference of the sex of the workers. Consequently, said the Court, the fact that part-time work was paid at an hourly rate lower than paid for full-time work did not amount per se to discrimination prohibited by Article 119 provided that the hourly rates were applied to workers belonging to either category without distinction based on sex and in so far as the difference in pay between part-time work and full-time work was attributable to factors which were objectively justified, such as the endeavour of the employer, on economic grounds, to encourage full-time work irrespective of the sex of the worker. However, explained the Court, if it was established that a considerably smaller percentage of women than of men performed the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay would be contrary to Article 119 of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question could not be explained by factors other than discrimination based on sex. This was an issue to be decided by national courts, said the Court.

As for the fourth question, which concerned the direct effect of Article 119, the Court mentioned its decision in Cases 43/75 — *Defrenne II;* 129/79 — *Macarthys;* and 69/80 — *Worringham*. In relation to Article 1 of Council Directive 75/117, the Court said that this provision which was principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty in no way altered the content or scope of that principle as defined in the Treaty.

In answer to the questions referred to it the ECJ held that:

1) *A difference in pay between full-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.*

2) *Where the national court is able, by using the criteria of equal work and equal pay without the operation of Community or national measures, to establish that the payment of lower hourly rates of remuneration for part-time work than for full-time work represents discrimination based on difference of sex, the provisions of Article 119 of the Treaty apply directly to such a situation.*

Case 12/81
EILEEN GARLAND v BRITISH RAIL ENGINEERING LIMITED
Date of judgment:
9 February 1982
Reference:
[1982] ECR 359
Content:
Equal pay for men and women (EEC Treaty, Article 119, Article 1 of Council Directive 75/117/EEC of 10 February 1975, and Article 1 of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

During the period of their employment, all employees of British Rail Engineering enjoyed certain valuable travel facilities which were also extended to their spouses and dependent children. On retirement, former employees, men and women, continued to enjoy travel facilities but they were reduced in comparison with those which they previously enjoyed. However, although male employees continued to be granted facilities for themselves and for their wives and dependent children as well, female employees no longer had such facilities granted in respect of their families.

On 25 November 1976, Mrs Garland complained to an industrial tribunal that her employer was discriminating against her contrary to the provisions of the Sex Discrimination Act 1975. The tribunal rejected Mrs Garland's application and she then appealed to the Employment Appeal Tribunal which reversed the first decision. Following a new appeal, the Court of Appeal annulled the second decision. The issues of Community law were not raised until the case reached the House of Lords.

2. Questions referred to the ECJ

By order dated 19 January 1981, the House of Lords referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after retirement which discriminate against former female employees in the manner described above, is this contrary to:

   a) Article 119 of the EEC Treaty?

   b) Article 1 of Council Directive 75/117/EEC?

   c) Article 1 of Council Directive 76/207/EEC?

2) If the answer to question (1) (a), (1) (b) or (1) (c) is in the affirmative, is Article 119 or either of the said Directives directly applicable in Member States so as to confer enforceable Community rights upon individuals in the above circumstances?)

3. The judgment of the ECJ

Before replying to question (1), the Court found it necessary to investigate the legal nature of the special travel facilities at issue, which the employer granted to its employees although it was not contractually bound to do so. The Court then called attention to paragraph 6 of Case 80/70 — *Defrenne I*, where it had stated that the concept of pay contained in the second paragraph of Article 119 comprised any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker received it, albeit indirectly, in respect of his employment from his employer. When male employees of the respondent undertaking retired from their employment on reaching retirement age they continued to be granted special travel facilities for themselves, their wives and their dependent children. It followed from this that rail travel facilities such as those under consideration fulfilled the criteria enabling them to be treated as pay within the meaning of Article 119 of the EEC Treaty. Moreover, the Court stressed that the argument that the

facilities were not related to a contractual obligation was immaterial; their legal nature was not important for the purposes of the application of Article 119 provided that they were granted in respect of employment. In view of the interpretation given to Article 119, there was no need to consider points (b) and (c) of question (1).

As to the second question, which concerned the direct effect of Article 119, the Court mentioned its ruling in Case 96/80 — *Jenkins:* Article 119 of the Treaty applied directly to all forms of discrimination which might be identified solely with the aid of the criteria of equal work and equal pay referred by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application.

On these grounds, the Court ruled that:

1) *Where an employer (although not bound to do so by contract) provides special travel facilities for former male employees to enjoy after their retirement this constitutes discrimination within the meaning of Article 119 against former female employees who do not receive the same facilities.*

2) *Where a national court is able, using the criteria of equal work and equal pay, without the operation of Community, or national measures, to establish that the grant of special travel facilities solely to retired male employees represents discrimination based on difference of sex, the provisions of Article 119 of the Treaty apply directly to such a situation.*

Case 19/81
ARTHUR BURTON v BRITISH RAILWAYS BOARD
Date of judgment:
16 February 1982
Reference:
[1982] ECR 555
Content:
Equal pay and working conditions for men and women (social policy) (EEC Treaty, Article 119; Article 1 of Council Directive 75/117/EEC of 10 February 1975; Articles 1(1), 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976; Article 7 of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

As a result of an internal reorganisation, the British Railways Board ('the Board') made an offer of voluntary redundancy to some of its employees. A memorandum was drawn up embodying the terms of a collective agreement between management and the recognised trade unions on the terms on which certain aspects of the reorganisation were to be carried out. Paragraph 6 of the memorandum provided as follows: 'Staff aged 60/55 (male/female) may leave the service under the redundancy and resettlement arrangements when the function in which (they are) employed has been dealt with under organisation planning'.

In August 1979, Mr Burton had his application for voluntary redundancy rejected on the ground that he was under the minimum age of 60 specified for male employees by said memorandum. He therefore claimed that he was treated less favourably than female employees inasmuch as the benefit would have been granted to a woman of his age (58). Mr Burton then complained to an industrial tribunal under the provisions of the Equal Pay Act 1970, as last amended by the Sex Discrimination Act 1975. His claim was rejected and he appealed to the Employment Appeal Tribunal.

2. Questions referred to the ECJ

By an order of 16 January 1981, the Employment Appeal Tribunal referred three questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is a voluntary redundancy benefit, which is paid by an employer to a worker wishing to leave his employment, within the scope of the principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of the Council Directive 75/11/EEC of 10 February 1975?

2) If the answer to question (1) is in the affirmative, does the principle of equal pay have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?

3) If the answer to question (1) is in the negative:

   a) is such a voluntary redundancy benefit within the scope of the principle of equal treatment for men and women as regards 'working conditions' contained in Article 1(1), Article 2(1) and Article 5(1) of Council Directive 76/ 207/EEC of 9 February 1976?

   b) if so, does the said principle have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?

3. The judgment of the ECJ

The question of interpretation which was referred to the Court concerned not the benefit itself, but whether the conditions of access to the voluntary redundancy scheme were discriminatory. The Court pointed out that that was a matter covered by the provisions of Directive 76/207 and not by those of Article 119 of the Treaty or Directive

75/117. According to Article 5(1) of Directive 76/207, application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, meant that men and women were to be guaranteed the same conditions without discrimination on grounds of sex. In the context of the Directive, the word 'dismissal' should be widely construed so as to include termination of the employment relationship between a worker and his employer, even as part of a voluntary redundancy scheme. The Court was of the opinion that, in deciding whether the difference in treatment of which Mr Burton complained was discriminatory within the meaning of that Directive, account should be taken of the relationship between measures such as that at issue and national provisions on normal retirement age. Under United Kingdom legislation the minimum qualifying age for a State retirement pension was 60 for women and 65 for men. Moreover, according to the United Kingdom Government, a worker who was permitted by the Board to take voluntary early retirement should do so within the five years preceding the normal minimum age of retirement. In turn, Article 7 of Directive 79/7 envisaged that the Directive should be without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. Taking these provisions into account, the Court concluded that the determination of a minimum pensionable age for social security purposes which was not the same for men as for women did not amount to discrimination prohibited by Community law; the option given to workers in the present instance was tied to the retirement scheme governed by United Kingdom social security provisions.

In answer to the questions referred to it, the Court held that:

1. *The principle of equal treatment contained in Article 5 of Council Directive 76/207 of 9 February 1976 (OJ L 39, 14.2.1976 p. 40) applies to the conditions of access to voluntary redundancy benefit paid by an employer to a worker wishing to leave his employment.*

2. *The fact that access to voluntary redundancy is available only during the five years preceding the minimum pensionable age fixed by national social security legislation and that that age is not the same for men as for women cannot in itself be regarded as discrimination on grounds of sex within the meaning of Article 5 of Directive 76/207.*

Case 58/81
COMMISSION OF THE EUROPEAN COMMUNITIES v GRAND DUCHY OF LUXEMBOURG
Date of judgment:
9 June 1982
Reference:
[1982] ECR 2175
Content:
Failure of a State to fulfil its obligation — Equal pay (Article 8 (1) of Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

Article 3 of Directive 75/117 on Equal Pay provides that Member States are to abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay. Article 4 of the same Directive envisages that Member States are to take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay must be, or may be declared, null and void or may be amended. Article 8 of the Directive places Member States under an obligation to put into force the laws, regulations and administrative provisions necessary in order to comply with it within one year of its notification and to inform the Commission thereof immediately.

In the Grand Duchy of Luxembourg, the head of household allowance was granted to State civil servants pursuant to the Law of 22 June 1963, as amended, laying down the scheme for remuneration of civil servants. Article 9(2) of that law listed several possibilities in which a civil servant (male or female) would be classified as head of household. Article 9(2)(a), however, discriminated against married women. Whereas a male married civil servant would be regarded as head of household, only a female married civil servant whose husband was subject to an infirmity or serious illness rendering him incapable of providing for the household expenses or whose husband received an income lower than the minimum social wage would be granted the same status.

The same household allowances applied to municipal officials and employees by virtue of the provisions of the Law of 28 July 1954. There were also similar provisions in some collective employment agreements, which had the force of law by the Grand Ducal regulations.

Being of the opinion that the Grand Duchy of Luxembourg had failed to fulfil its obligation under Article 119 of the Treaty and Directive 75/117/EEC, the Commission decided to initiate, against this Member State, the procedure provided for in Article 169 of the Treaty.

2. The judgment of the ECJ

The Grand Duchy of Luxembourg did not dispute the failure to fulfil its obligations with which it was charged but confined itself to stating that the delay in adopting the measures necessary to comply with the Directive in question resulted, on the one hand, from the need to enact legislation and, on the other hand, from the fact that implementation of the Directive necessitated an assessment of the budgetary consequences. Moreover, it added that it was necessary to make changes to the conditions applicable to part-time work, which involved discussions with the civil service representatives. After considering these arguments, the Court maintained that according to its well-established case law, a Member State could not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations resulting from Community directives.

The Court decided as follows:

1) *Declares that by not adopting within the period prescribed in Article 8(1) of Directive 75/117/EEC of 10 February 1975, the measures necessary to eliminate discrimination in the conditions for*

the grant of head of household allowances to civil servants, the Grand Duchy of Luxembourg has failed to fulfil one of its obligations under the EEC Treaty.

2) *Orders the Grand Duchy of Luxembourg to pay the costs.*

Case 61/81
COMMISSION OF THE EUROPEAN COMMUNITIES v UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
Date of judgment:
6 July 1982
Reference:
[1982] ECR 2601.
Content:
Equal pay for men and women (EEC Treaty, Article 119; and Article 1 of Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

Article 1 of Directive 75/117 provides that 'the principle of equal pay for men and women' outlined in Article 119 of the Treaty means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and be drawn up so as to exclude any discrimination on grounds of sex.

The reference to 'work to which equal value is attributed' was used in the United Kingdom in the Equal Pay Act 1970, as amended by the Sex Discrimination Act 1975. Section 1(5) of that Act provided that a woman was to be regarded as employed on work rated as equivalent with that of any man if, but only if, her job and his job had been given an equal value, in terms of the demand made on the worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading. Comparison of those provisions revealed that the job classification system was, under the Directive, merely one of several methods for determining pay for work to which equal value was attributed, whereas under the abovementioned provision of the Equal Pay Act the introduction of such a system was the sole method of achieving such a result.

The Commission therefore concluded that the United Kingdom had failed to fulfil its obligation under the Treaty by failing to adopt the laws, regulations or administrative provisions needed to comply with Council Directive 75/117/EEC and decided to bring the matter before the Court of Justice as provided for in Article 169 of the Treaty.

2. The judgment of the ECJ

Based on the premise that British legislation did not permit the introduction of a job classification system without the employer's consent and that Article 1 of the Directive said nothing about the right of an employee to insist on having pay determined by a job classification system, the United Kingdom concluded that the worker could not insist on a comparative evaluation of different work by the job classification method, the introduction of which was at the employer's discretion.

According to the Court, the United Kingdom's interpretation amounted to a denial of the very existence of a right to equal pay for work of equal value where no classification had been made. This position, said the Court, was not consonant with Directive 75/117 whose essential purpose was to implement the principle that men and women should receive equal pay contained in Article 119 of the Treaty and that it was primarily the responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions in such a way that all employees in the Community could be protected in these matters. With this in mind, the Court concluded that where there was

disagreement as to the application of the concept of 'work to which equalvalue was attributed', a worker should be entitled to claim, before an appropriate authority, that his work had the same value as other work and, if that was found to be the case, to have his rights under the Treaty and the Directive acknowledged by a binding decision. Consequently, any method which excluded that option prevented the aims of the Directive from being achieved. Moreover, the Court refused to endorse the United Kingdom's view that the criterion of work of equal value was too abstract to be applied by the courts. In the Court's opinion, the Member State should endow an authority with the requisite jurisdiction to decide whether work had the same value as other work.

On those grounds, the Court:

1) *Declares that by failing to introduce into its national legal system in implementation of the provisions of Council Directive 75/117/EEC of 10 February 1975 such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists to obtain recognition of such equivalence, the United Kingdom has failed to fulfil its obligation under the Treaty.*

2) *Orders the United Kingdom to pay the costs.*

Case 163/82
COMMISSION OF THE EUROPEAN COMMUNITIES v ITALIAN REPUBLIC
Date of judgment:
26 October 1983
Reference:
[1983] ECR 3273
Content:
Failure of a State to fulfil its obligations — Equal treatment for men and women (Articles 5 and 6 of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

The purpose of Council Directive 76/207 is to give effect, in the Member States, to the principle of equal treatment for men and women as regards access to employment, including promotion and vocational training, and working conditions, referred to as 'the principle of equal treatment' (Article 1(1)).

The Italian Republic adopted Law No 903 of 9 December 1977, concerning equal treatment for men and women in relation to employment. This law stated that discrimination based on sex was prohibited in relation to: access to employment, vocational guidance, vocational training, advanced vocational training and retraining (Article 1), remuneration and job classification systems for determining remuneration (Article 2), assignment of grading, duties and career development (Article 3), and retirement age (Article 4). Article 6 regulated, in relation to adoptive working women, the right to claim compulsory leave and the corresponding financial allowance during the first three months following the date on which the child was united with its adoptive family or the family which had been given custody thereof. Article 7 granted a working father the right to take leave of absence from work and to the allowances, even if he was a father by adoption or a guardian, in lieu of the working mother or where the care and custody of the children were given to him. Article 15 provided legal remedies in case of breach of the provisions of Articles 1 and 5 of the law. Moreover, Article 15 of Law No 300 of 20 May 1970 was amended by Article 13 of the abovementioned law so as to render void any agreement or measure based on sex aimed at dismissing a worker or adversely affecting him.

The Commission, being of the opinion that Italian Law No 903 transposed the provisions of Articles 5 and 6 of Directive 76/207 into Italian law to an extent and in a manner not in conformity with the spirit and the letter of the Community instrument, decided to initiate proceedings under Article 169 of the Treaty.

2. The judgment of the ECJ

Firstly, the Commission argued that although the Italian Law covered certain working conditions such as remuneration, retirement age and the right to take leave from work in case of adoption, it did not cover all working conditions in spite of the wider nature of the provisions of Article 5 of the Directive. After examining the Italian Law, the Court observed that, according to Article 189 of the Treaty, a directive was binding as to the result to be achieved upon each Member State to which it was addressed, but left to the national authorities the choice of form and methods. Therefore, concluded the Court, the Italian legislature could not be criticised for having adopted a number of specific provisions in relation to the most important working conditions whilst confining itself in relation to other working conditions to a general provision covering all other working conditions not specifically mentioned, unless it was shown that the result sought by the Directive had not in fact been attained. The Commission, however, did not show that those specific provisions combined with a general supplementing provision had left some areas of the scope of the Directive unprovided.

In the second place, in relation to Articles 6 and 7 of the Italian Law, the Commission alleged that the adoptive father did not have the right given

to the adoptive mother of maternity leave for the first three months following the actual entry of the child into the adoptive family. It was said that such different treatment amounted to discrimination in working conditions within the meaning of the Directive. The Court agreed with the Italian Government's view that that distinction was justified by the legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new-born child in the family during the very delicate initial period. As regards leave from work after the initial period of three months, the adoptive father had the same rights as the adoptive mother. The Court held that in those circumstances the difference in treatment criticised by the Commission could not be regarded as discrimination within the meaning of the Directive.

The Commission's last complaint related to the alleged failure by the Italian Republic to comply with Article 6 of the Directive. The Commission stated that Article 15 of Law No 903 of 9 December 1977 restricted the legal remedies it provided for to cases of breach of the provisions of Articles 1 and 5 of that Law, but failed to give a legal remedy to a worker who considered himself adversely affected by failure to comply with the other provisions of the Directive. The Italian Government contended that the procedure referred to in the aforesaid Article 15 was an emergency one but emphasised that there was nothing in the Directive which required such a procedure for all cases of discrimination. The Italian Government then mentioned Article 700 of the Italian Code of Civil Procedure which allowed the measures required to avoid irremediable damage to be obtained urgently and Article 24 of the Italian Constitution which provided that any person could bring proceedings to protect his rights and lawful interests. As the Commission did not contest the aforementioned explanations, the complaint could not be upheld.

On these grounds, the Court:

1) *Dismisses the application.*

2) *Orders the Commisson to pay the costs.*

Case 165/82
COMMISSION OF THE EUROPEAN COMMUNITIES v UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
Date of judgment:
8 November 1983
Reference:
[1983] ECR 343.1
Content:
Failure of a State to fulfil its obligations — Equal treatment for men and women (Articles 2(2), 4(b) and 9(2) of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

The purpose of Council Directive 76/207 is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

In the United Kingdom this Directive was implemented, with regard to Great Britain, by the Sex Discrimination Act ('the Act') and, with regard to Northern Ireland, by the Sex Discrimination (Northern Ireland) Order 1976. The contents of both legislative measures were identical. The Act entered into force on 12 November 1975.

The Commission maintained that the Act was not in accordance with the provisions of the Directive. On 3 June 1982, the Commission brought an action before the Court under Article 169 of the Treaty for a declaration that the United Kingdom had failed to fulfil its obligation under the Treaty.

2. The judgment of the ECJ

First of all, the Commission complained that neither the 1975 Act nor any other provision of the legislation in force in the United Kingdom provided that provisions contrary to the principle of equal treatment contained in collective agreements, rules of undertakings and rules governing independent occupations and professions were to be, or could be declared, void or could be amended. The Government of the United Kingdom considered that the complaint which concerned collective agreements was unfounded, as in fact, collective agreements were not normally legally binding. The UK Government added that even if collective agreements containing provisions contrary to the principle of equality of treatment did exist (it was not aware of there being any legally binding collective agreements at that time in force in the UK), those provisions, in so far as they were not capable of amendment under section 3 of the Equal Pay Act 1970, would be rendered void by section 77 of the 1975 Act. Any provision in the internal rules of an undertaking or in the rules governing an independent occupation or profession which was contrary to the prohibition of discrimination would similarly be either rendered void by the same provision or, depending on its contents, be caught by sections 6, 13(1) or 15 of the 1975 Act. The Court took the view that these arguments were not sufficient to nullify the complaints made by the Commission. Whilst it could be admitted that the UK legislation satisfied the obligations imposed by the Directive as regards any collective agreement which had legally binding effects, in so far as they were covered by section 77 of the 1975 Act, it had to be noted, however, that the UK legislation contained no corresponding provision regarding either non-binding collective agreements — which the UK Government declared to be the only kind in existence — or the internal rules of undertakings or the rules governing independent occupations or professions. After quoting Article 4(b) of the Directive, the Court declared that the Directive thus covered all collective agreements without distinction as to the nature of the legal effects which they did or did not produce. Collective agreements had de facto consequences for the employment relationships to which they referred. The need to ensure that the Directive was completely effective therefore required that any clauses in such agreements which were incompatible with the obligations imposed by the Di-

rective upon the Member States could be rendered inoperative, eliminated or amended by appropriate means.

Secondly, the Commission argued that contrary to the provisions of the Directive, section 6(3) of the Act provided that the prohibition of discrimination did not apply to employment in a private household or where the number of persons employed by an employer did not exceed five (disregarding persons employed in a private household). According to the UK, the exclusions from the prohibition of discrimination provided for in the abovementioned section were justified by the exception provided for in Article 2(2) of the Directive itself, i.e., that Member States had the right to exclude from the Directive's field of application those occupational activities in which the sex of the worker constituted a determining factor.

Although it was recognised that the provision in question was intended, in so far as it referred to employment in a private household, to reconcile the principle of equality of treatment with the principle of respect for private life, which is also fundamental, the Court indicated that this was not the case for all the kinds of employment in question. As regards small undertakings, the UK did not put forward any argument to show that in any undertaking of that size the sex of the worker would be a determining factor by reason of the nature of his activities or the context in which they were carried out. The Court declared that by reason of its generality, the exclusion provided for in the contested provision of the 1975 Act went beyond the objective which could be lawfully pursued within the framework of Article 2(2) of the Directive.

The Commission's third complaint related to the fact that by virtue of section 20 of the 1975 Act the prohibition of discrimination based on sex did not apply to the employment, promotion and training of midwives. The UK acknowledged the facts and explained that this situation was due to the fact that in the UK the occupation in question was not traditionally engaged in by men. In a sphere in which respect for the patient's sensitivities was of particular importance, it considered that at the time that limitation was in conformity with Article 2(2) of the Directive. However, it added that it intended to proceed by stages and keep the position under review, in accordance with the obligations imposed by Article 9(2) of the Directive. The Court agreed with the arguments put forward by the UK Government and stated that by failing fully to apply the principle laid down in the Directive, the UK had not exceeded the limits of the power granted to the Member States by Articles 9(2) and 2(2) of the Directive. Consequently, the Commission's complaint in that regard could not be upheld.

On those grounds, the Court:

1) *Declares that by failing to adopt in accordance with Directive 76/207/EEC of 9 February 1976 the measures needed to ensure that any provisions contrary to the principle of equality of treatment contained in collective agreements or in the rules of undertakings or in the rules governing the independent professions and occupations are to be, or may be declared, void or may be amended, and by excluding from the application of that principle employment for the purposes of a private household and any case where the number of persons employed does not exceed five, the United Kingdom has failed to fulfil its obligations under the Treaty.*

2) *Dismisses the application in all other respects.*

3) *Orders each of the parties to bear its own costs.*

Case 14/83
SABINE VON COLSON AND ELISABETH KAMANN v LAND NORDRHEIN-WESTFALEN
Date of judgment:
10 April 1984
Reference:
[1984] ECR 1891
Content:
Equal treatment for men and women — Access to employment (EEC Council Directive 76/207 of 9 February 1976).

1. Facts and procedure

In 1982, two vacancies for social workers arose at Werl prison. Ms von Colson and Ms Kamann applied for those posts. Two male candidates were eventually appointed.

Ms von Colson and Ms Kamann brought an action before the Arbeitsgericht Hamm against the *Land* Nordrhein-Westfalen, which administered Werl prison. The action sought a declaration that it was solely because of their sex that the plaintiffs had not been appointed. Consequently, they claimed that the defendant should be ordered to offer them a contract of employment in the abovementioned prison or, in the alternative, to pay them damages amounting to six months' salary. In a second claim, in the alternative, Ms von Colson claimed the reimbursement of travelling expenses amounting to DEM 7.20 incurred by her in pursuing her application for the post.

The Arbeitsgericht held that the plaintiffs were rejected for the posts in question because of their sex.

Nevertheless, it considered that under German law it was not able to allow their claims with the exception of the alternative claim submitted by the plaintiff von Colson for her travelling expenses (DEM 7.20).

2. Questions referred to the ECJ

By order of 6 December 1982, the Arbeitsgericht (labour court) Hamm referred the following questions to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

1) Does Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards employment, vocational training and promotion, and working conditions imply that discrimination on grounds of sex in relation to access to employment (failure to conclude a contract of employment on account of the candidate's sex; preference given to another candidate on account of his sex) must be sanctioned by requiring the employer in question to conclude a contract of employment with the candidate who was discriminated against?

2) If question (1) is answered in the affirmative, in principle:

   a) Is the employer required to conclude a contract of employment only if, in addition to the finding that he made a subjective decision on the basis of criteria relating to sex, it can be established that the candidate discriminated against is objectively — according to acceptable selection criteria — better qualified for the post than the candidate with whom a contract of employment was concluded?

   b) Or, is the employer also required to engage the candidate discriminated against if, although it can be established that the employer made a subjective decision on the basis of criteria relating to sex, the candidate discriminated against and the successful candidate are objectively equally well qualified?

   c) Finally, does the candidate discriminated against have the right to be engaged even

if objectively he is less well qualified than the successful candidate, but it is established that from the outset the employer, on account of the sex of the candidate discriminated against, disregarded that candidate in making his decision on the basis of acceptable criteria?

3) If the essential issue is the objective assessment of the candidate's qualifications within the meaning of question (2) (a), (b) and (c): Is that issue to be decided wholly by the court and what criteria and procedural rules relating to evidence and burden of proof are applicable in that regard?

4) If question (1) is answered in the affirmative, in principle:

   Where there are more than two candidates for a post and from the outset more than one person is on the ground of sex disregarded for the purposes of the decision made on the basis of acceptable criteria, is each of those persons entitled to be offered a contract of employment?

   Is the court in such a case obliged to make its own choice between the candidates discriminated against?

   If the question contained in the first paragraph is answered in the negative, what other sanction of substantive law is available?

5) If question (1) is answered in the negative, in principle: Under the provisions of Directive 76/207/EEC what sanction applies where there is an established case of discrimination in relation to access to employment?

   In that regard must a distinction be drawn between the situations described in questions (2) (a), (b) and (c)?

6) Does Directive 76/207/EEC as interpreted by the Court of Justice in its answers to the questions set out above constitute directly applicable law in the Federal Republic of Germany?

3. *The judgment of the ECJ*

In reply to question (1), after mentioning Article 189 of the Treaty, the Court said that it was necessary to examine Directive 76/207 in order to determine whether it required Member States to provide for specific legal consequences or sanctions in respect of a breach of the principle of equal treatment regarding access to employment. Article 6 of this Directive required Member States to introduce into their national legal systems measures as were necessary to enable all persons who considered themselves wronged by discrimination 'to pursue their claims by judicial process'. It followed from the provision that Member States were required to adopt measures which were sufficiently effective to achieve the objective of the Directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures could include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However, stressed the Court, the Directive did not prescribe a specific sanction; it left Member States free to choose between the different solutions suitable for achieving its objective.

The Court did not answer the second, third and fourth questions since they were put only on the supposition that an employer was required to offer a post to the candidate discriminated against.

In its fifth question the Arbeitsgericht essentially asked whether it was possible to infer from the Directive any sanction in the event of discrimination other than the right to the conclusion of a contract of employment. The sixth question asked whether the Directive, as properly interpreted, could be relied on before national courts by persons who had suffered injury. In the Court's opinion it was impossible to establish real equality of

opportunity without an appropriate system of sanctions. Although full implementation of the Directive did not require any specific form of sanction for unlawful discrimination (reply to question (1)), it did entail that that sanction be such as to guarantee real and effective judicial protection. Moreover, it must also have a real deterrent effect on the employer. It followed that, where a Member State chose to penalise the breach of the prohibition of discrimination by the award of compensation, that compensation should in any event be adequate in relation to the damage sustained.

National provisions limiting the right to compensation to a purely nominal amount (for instance, reimbursement of travel expenses) did not satisfy the requirements of an effective transposition of the Directive. The Court went on to add that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive 76/207, national courts were required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 189.

In answer to the questions referred to it, the Court held that:

1) *Directive 76/207/EEC does not require discrimination on grounds of sex regarding access to employment to be made the subject of a sanction by way of an obligation imposed on the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against.*

2) *As regards sanctions for any discrimination which may occur, the Directive does not include any unconditional and sufficiently precise obligation which, in the absence of implementing measures adopted within the prescribed time limits, may be relied on by an individual in order to obtain specific compensation under the Directive, where that is not provided for or permitted under national law.*

3) *Although Directive 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalise breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.*

Case 79/83
DORIT HARZ v DEUTSCHE TRADAX GMBH
Date of judgment:
10 April 1984
Reference:
[1984] ECR 1921
Content:
Equal treatment for men and women — Access to employment (Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

On 24 January 1981, Deutsche Tradax GmbH ('Tradax') placed an advertisement in the newspaper *Die Welt* for a vacant post in which it offered economics graduates willing to work hard 'a spring-board for a career in management'.

Ms Harz applied for that post by letter dated 28 January 1981. By letter dated 3 February 1981, the manager of Tradax returned her application papers and informed her that only male applicants would be considered for the position. It appeared from Tradax's letter that Ms Harz's qualifications, which were generally good, were not in doubt.

At the instigation of Ms Harz, the Leitstelle *Gleichstellung der Frau* (regional department promoting equality for women) in Hamburg requested an explanation from Tradax. The letter replied that it had rejected Ms Harz for the position advertised solely because she was a woman.

In her application brought before the Arbeitsgericht Hamburg on 26 February 1981, Ms Harz sought, primarily, an order requiring Tradax either to appoint her, or in the alternative, to pay damages to the sum of DEM 12 000, or, in the last alternative, to pay damages to the sum of DEM 2.31.

Meanwhile, Ms Harz was invited by Tradax for two interviews which took place respectively on 12 and 25 May 1981. By a letter of 3 June 1981, Tradax informed Ms Harz that it had decided not to recruit her for its trainee programme. Before the Arbeitsgericht Ms Harz claimed that Tradax had infringed Articles 2 and 3 of Directive 76/207 as well as the German Civil Code. As far as compensation was concerned the facts of this case are very similar to those of the preceding case (Case 14/83 — *von Colson*).

2. Questions referred to the ECJ

By order of 5 July 1982, the Arbeitsgericht (labour court) Hamburg referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

1) In an established case of discrimination, does the principle of equal treatment for men and women as regards access to employment contained in Articles 1(2), 2(1) and 2(3) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, confer on a female applicant a right to a contract of employment against an employer who has refused to engage her on account of sex?

2) In the case of an affirmative reply to question (1) does that answer apply only:

   a) where the female applicant discriminated against is the best qualified of all the applicants, whether male or female; or

   b) also where, although there was discrimination in the selection procedure, in the result a better qualified male applicant was appointed?

3) If questions (1), (2)(a) and 2(b) are answered in the negative, does it follow, as a legal consequence, from the principle of equal treatment for men and women as laid down by the provisions of Directive 76/207/EEC

a) that a financially appreciable sanction is necessary, for example a right in favour of the female worker discriminated against to damages to be assessed, according to the position in the particular case, in a sum not exceeding the earnings which she could properly have expected to receive for the period of six months, the period in which under the law of the Federal Republic of Germany workers may not plead socially unjustified dismissal; and/or

b) that the State must impose penalties or administrative fines?

4) If question (3) is answered in the affirmative, does that answer apply only:

a) where the female applicant discriminated against is the best qualified of all the candidates, whether male or female; or

b) also where, even though there was discrimination in the selection procedure, in the result a better qualified male candidate was appointed?

5) If questions (1), (2), (3), or (4) are answered in the affirmative, are Articles 1, 2 and 3 of Directive 76/207/EEC directly applicable in the Member States?

3. The judgment of the ECJ

Although the questions referred to the Court in the present case are worded in a slightly different manner than those of the previous case (Case 14/83 — *von Colson*), they are essentially the same.

The reasoning and answers given by the Court in the present case are identical to those set out in the previous case mentioned above.

Case 184/83
ULRICH HOFMANN v BARMER ERSATZKASSE
Date of judgment:
12 July 1984
Reference:
[1984] ECR 3047
Content:
Equal treatment for men and women — Maternity leave (Articles 1, 2(3), (4) and 5(1) of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

On 21 May 1979, Mr Hofmann became the father of an illegitimate child, of which he acknowledged paternity. In the period between the expiry of the mother's statutory period of convalescence (8 weeks) and the day on which the child reached the age of six months, he obtained from his employer unpaid leave of absence. During that period he looked after the child, while the mother resumed employment as a teacher.

On 1 August 1979, Mr Hofmann submitted to the Barmer Ersatzkasse, a claim for payment, during the period of maternity leave provided for by paragraph 8a of the Mutterschutzgesetz, of an allowance pursuant to the combined provisions of paragraph 13 thereof and paragraph 200(4) of the Reichsversicherungsordnung (German Insurance Regulation). Barmer Ersatzkasse refused Mr Hofmann's request, and his appeal against that refusal was also unsuccessful. An action brought before the Sozialgericht (social court) Hamburg was dismissed by a judgment of 19 October 1982, on the ground that the wording of paragraph 8(a) of the Mutterschutzgesetz and the intention of the legislature indicated that only mothers could claim maternity leave. According to the Sozialgericht, it was the deliberate intent of the legislature not to create 'parental leave'. Mr Hofmann appealed against that decision to the Landessozialgericht (higher social court) Hamburg, arguing that the maternity leave introduced by the Mutterschutzgesetz was not in fact designed to protect the mother's health but was concerned exclusively with the mother's care of the child. In the course of the proceedings before that court, he requested primarily that the proceedings be stayed and that certain questions on the interpretation of Directive 76/207 should be referred to the Court of Justice.

2. Questions referred to the ECJ

By an order of 9 August 1983, the Landessozialgericht (higher social court) Hamburg referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Are Articles 1, 2 and 5(1) of Council Directive 76/ 207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions infringed if, on the expiry of the eight-week protective period for working mothers following child-birth, a period of leave which the State encourages by payment of the net remuneration of the person concerned, subject to a maximum of DEM 25 per calendar day, and which lasts until the day on which the child reaches the age of six months can be claimed solely by working mothers and not, by way of alternative, if the parents so decide, by working fathers?

2) If the answer to question (1) is in the affirmative, are Articles 1, 2 and 5(1) of Council Directive 76/ 207/EEC directly applicable in the Member States?

3. The judgment of the ECJ

The Court started its reasoning by analysing Articles 1, 2 and 5 of Directive 76/207, and subsequently concluded that it was designed to implement the principle of equal treatment for men and women as regards, *inter alia,* 'working conditions', with a view to attaining the social policy aims of the EEC Treaty and not to settle

questions concerned with the organisation of the family, or to alter the division of responsibility between parents. The Court further added, with particular reference to Article 2(3), that by reserving to Member States the right to retain, or introduce provisions which were intended to protect women in connection with 'pregnancy and maternity', the Directive recognised the legitimacy, in terms of the principle of equal treatment, of protecting a woman's need in two respects: the protection of (a) her biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth and (b) the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.

Furthermore, the Court pointed out that the Directive left Member States with a discretion as to the social measures which they adopted in order to guarantee, within the framework laid down by the Directive, the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the maintenance of their jobs.

In view of this, the Court ruled that:

Articles 1, 2 and 5(1) of Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment vocational training and promotion and working conditions must be interpreted as meaning that a Member State may after the protective period has expired, grant to mothers a period of maternity leave which the State encourages them to take by the payment of an allowance. The Directive does not impose on Member States a requirement that they shall, as an alternative, allow such leave to be granted to fathers, even where the parents so decide.

Case 23/83
W.G.M. LIEFTING AND OTHERS v DIRECTIE VAN HET ACADEMISCH ZIEKENHUIS BIJ DE UNIVERSITEIT VAN AMSTERDAM
Date of judgment:
18 September 1984
Reference:
[1984] ECR 3225
Content:
Equal pay for men and women (EEC Treaty, Article 119).

1. Facts and procedure

The plaintiffs in the main proceedings were all women employed as civil servants. They were married and their husbands were also employed in the civil service. Civil servants were covered by two sets of pension rules: the Algemene Ouderdomswet (General Law on Old-Age Insurance Law — 'The Old-Age Law') and the Algemene Weduwen en Wezenwet (Widows and Orphans General Insurance Law — 'the Widows and Orphans Law'), establishing a general pension scheme for persons residing in the Netherlands, and secondly the Algemene Burgerlijke Pensioenwet (General Civil Pensions Law), laying down pension arrangements for civil servants.

In order to avoid any overlapping of pensions, the General Civil Pensions Law provided that a proportion of the general old-age pension was to be regarded as forming part of the pension of civil servants. Consequently, a retired civil servant received, in general, only a proportion of the pension payable under the Old-Age Law or the Widows and Orphans Law but, by way of compensation, he was not obliged, while in employment, to pay contributions under those two laws. By virtue of Article 9 of the General Civil Pensions Law, the contribution was paid by the authority by which a civil servant was employed; that article made the payment of contributions, which in principle was the responsibility of the civil servant, incumbent upon the public authority.

Under the Old-Age Law and the Widows and Orphans Law, a married couple was treated as one person for the purposes both of benefits and of contributions. Only one contribution was payable on the total of both salaries. The contribution was collected by the collector of direct taxes at the same time as income tax. There was a maximum limit for contributions. Before 1972, if the amounts paid by the public authority exceeded that maximum limit, the surplus (called 'over-compensation') was paid back by the collector of taxes, not to the public authority which paid it, but to the civil servants concerned. Obviously, that payment was financially advantageous for them. The recipients of 'over-compensation' were mostly civil servants who worked at the same time for different public authorities, each of which paid separate contributions under the Old-Age Law and the Widows and Orphans Law, and the wives of civil servants employed by an authority other than the one for which their husbands worked.

In 1972 and 1973, legislation was introduced to terminate the so-called 'over-compensation'. It consisted of the Wet Gemeenschappelijke Bepalingen Overheidspensioenwetten (Law laying down common provisions with regard to laws governing the pensions of civil servants), the Uitvoeringsbesluit Beperking Meervoudige Overneming AOW/AWW — Premie (Order restricting the payment of contributions due under the Old-Age Insurance Law and the Widows and Orphans Insurance Law by more than one institution) and various implementing provisions. Those provisions together had created an administrative system under which the various public authorities kept one another informed about the separate payment of contributions for the same civil servant or married couple. Once the maximum amount of contributions had been paid in respect of employment in one place, no further contributions were paid in respect of employment elsewhere.

The plaintiffs in the main proceedings made applications to the Ambtenarengerecht (civil serv-

ants' tribunal), in Amsterdam, Arnhem, 's-Hertogenbosch, and Utrecht, contending that the 'compensation' and 'overcompensation' were considered as 'pay' within the meaning of Article 119 of the EEC Treaty and that, consequently, the abolition of the payment of 'overcompensation' was contrary to that article as it largely affected contributions payable in respect of married female civil servants. Their applications were dismissed at first instance and they appealed to the Centrale Raad van Beroep (Court of last instance in social security matters) Utrecht.

2. Questions referred to the ECJ

By order of 20 January 1983, the Centrale Raad van Beroep, Utrecht, submitted two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Must the term 'pay' appearing in Article 119 of the EEC Treaty be construed as including the 'compensation' or, in certain cases, the amount referred to as 'the over-compensation' which the employing public authority used to pay to the tax authorities in excess of the maximum contributions due under the Algemene Ouderdomswet and the Algemene Weduwen en Wezenwet but which now no longer need be transferred by such authority?

2) If the answer to the first question is in the affirmative, must Article 119 of the Treaty be construed as meaning that the system applying in the Netherlands based on the Wet Gemeenschappelijke Bepalingen Overheidspensioenwetten must be regarded as being contrary to the principle that men and women should receive equal pay for equal work laid down in Article 119 because, under that system, in those cases in which the joint contributions due under the Algemene Ouderdomswet and the Algemene Weduwen en Wezenwet for a married couple employed in the public service exceed the maximum amounts of contributions due, the contributions are primarily paid by the husband's employer while the wife's employer continues to transfer contributions only in so far as the maximum amount of contributions due is not exceeded?

3. The judgment of the ECJ

Under the system described above a civil servant whose husband was also a civil servant had the same net disposable salary as a male civil servant doing the same work but the latter's gross salary was higher than hers.

In analysing the present case, the Court said that it followed from its previous decisions, and in particular, from Case 69/80 — *Worringham,* that, although the portion which employers were liable to contribute to the financing of statutory social security schemes to which both employees and employers contributed did not constitute pay within the meaning of Article 119 of the Treaty, the same was not true of sums which were included in the calculation of the gross salary payable to the employee and which directly determined the calculation of other advantages linked to the salary. That was also the case if the amounts in question were immediately deducted by the employer and paid to a pension fund on behalf of the employee. The Court concluded by saying that the principle that men and women should receive equal pay for equal work, as laid down in Article 119, had not therefore been complied with in so far as those other advantages linked to the salary and determined by the gross salary were not the same for male civil servants and for female civil servants whose husbands were also civil servants.

Based on these arguments, the Court held that:

A social security scheme under which:

1) *the contributions are calculated on the basis of the employee's salary but may not exceed a certain limit;*

2) a husband and wife are treated as one person, the contributions being calculated on the basis of their combined salaries, subject once again to the upper limit;

3) the State is bound to pay on behalf of its employee the contributions owed by him; and

4) where husband and wife are both civil servants, the authority employing the husband is primarily responsible for paying the contributions and the authority employing the wife is required to pay the contributions only in so far as the upper limit is not reached by the contributions paid on behalf of the husband;

is incompatible with the principle laid down in Article 119 of the EEC Treaty that men and women should receive equal pay for equal work, in so far as the resultant differences between the gross salary of a female civil servant whose husband is also a civil servant and the gross salary of a male civil servant directly affect the calculation ofbther benefits dependent on salary, such as severance pay, unemployment benefit, family allowances and loan facilities.

Case 143/83
COMMISSION OF THE EUROPEAN COMMUNITIES v KINGDOM OF DENMARK
Date of judgment:
30 January 1985
Reference:
[1985] ECR 427
Content:
Equal pay for men and women (Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

Council Directive 75/117 of 10 February 1975, lays down detailed rules regarding aspects of the scope of Article 119 and enacts various provisions whose essential purpose is to improve the legal protection of workers who may be wronged by failure to apply the principle of equal pay. On 4 February 1976, the Kingdom of Denmark adopted Law No 32 on equal pay for men and women, which provided in its Article 1 that every person who employed men and women to work at the same place of work should pay them the same salary for the same work ('samme arbejde'), if he was not already required to do so pursuant to a collective agreement.

The Commission considered that the Danish legislation did not fulfil all the obligations resulting from Directive 75/117 inasmuch as, on the one hand, it required employers to pay men and women the same salary exclusively for the same work but not for work to which equal value was attributed, and, on the other hand, it did not provide for any means of redress enabling workers wronged by the failure to apply the principle of equal pay for work of equal value to pursue their claims.

On 18 July 1983, the Commission brought an action before the Court pursuant to Article 169 of the EEC Treaty for a declaration that the Kingdom of Denmark had failed to fulfil its obligations under the EEC Treaty.

2. The judgment of the ECJ

In its defence, the Danish Government alleged that Danish law was entirely in conformity with the Directive as it in fact guaranteed equal pay not only for the same work but also for work of equal value. The Law of 4 February 1976, was only a subsidiary guarantee of the principle of equal pay, in cases where observance of that principle was not already ensured under collective agreements. Collective agreements, which governed most employment relationships in Denmark, clearly upheld the idea that the principle of equal pay also applied to work of equal value. The Danish Government based this interpretation in particular on the 1971 agreement concluded by the main organisations on the labour market, which provided expressly that 'equal pay' meant that the same salary was to be paid for work of the same value regardless of sex.

Whilst accepting that Member States could leave the implementation of the principle of equal pay in the first instance to representatives of management and labour, the Court maintained that that possibility did not, however, discharge them from the obligations of ensuring, by appropriate legislative and administrative provisions, that all workers in the Community were afforded the full protection provided for in the Directive. The Court further stated that, even if the arguments of the Danish Government were accepted, i.e. that the principle of equal pay for men and women, in the broad sense required by the Directive, was implemented in collective agreements, it had not been shown that the same implementation of that principle was guaranteed for workers whose rights were not defined in such agreements. The principle of legal certainty and the protection of individuals thus required an unequivocal wording which would give the persons concerned a clear and precise understanding of their rights and obligations and would enable the courts to ensure that those rights and obligations were observed. According to the Court, it appeared that the wording of the Danish law did not fulfil those conditions inas-

much as it set out the principle of equal pay without speaking of work of equal value, thus restricting the scope of the principle. Therefore, the fact that during the preparatory work which led to the adoption of Directive 75/117 the Danish Government entered a declaration in the Council minutes to the effect that 'Denmark was of the view that the expression 'same work' could continue to be used in the context of Danish labour law' was considered to be irrelevant. In view of this, the Court recalled that it had consistently held that such unilateral declarations could not be relied upon for the interpretation of Community measures, since the objective scope of rules laid down by the common institutions could not be modified by reservations or objections which Member States had made at the time the rules were being formulated.

On those grounds, the Court:

1) *Declares that by failing to adopt within the prescribed period the measures necessary to implement Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, the Kingdom of Denmark has failed to fulfil its obligation under the EEC Treaty.*

2) *Orders the Kingdom of Denmark to pay the costs.*

Case 248/83
COMMISSION OF THE EUROPEAN COMMUNITIES v FEDERAL REPUBLIC OF GERMANY
Date of judgment:
21 May 1985
Reference:
[1985] ECR 1459
Content:
Equal treatment of men and women (EEC Treaty, Article 119; Council Directive 76/207/EEC of 9 February 1976; Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

On 13 August 1980, the Federal Republic of Germany adopted a law on the equal treatment of men and women in the work place, the Arbeitsrechtliches EG-Anpassungsgesetz (Law aligning labour legislation with Community law). The purpose of that law was, in particular, to insert a series of new paragraphs in Book 2, Title 6, of the German Civil Code which dealt with contracts of service.

On the basis of Article 169 of the EEC Treaty, on 9 November 1983, the Federal Republic of Germany was alleged to have failed to fulfil its obligation under the EEC Treaty. The Commission formulated five complaints which could be summarised as follows:

1) failure to transpose Directive 76/207/EEC into national law, as required, with regard to employment relationships in the public service;

2) failure to transpose Directive 76/207/EEC into national law, as required, with regard to the rules governing the independent professions;

3) failure to define, as required, the scope of the exceptions referred to in Article 2(2) of Directive 76/ 207/EEC;

4) failure to comply fully with Directive 76/207/EEC when adopting the provisions concerning offers of employment laid down in paragraph 611b of the Civil Code;

5) failure to transpose Directive 75/117/EEC into national law as required, with regard to remuneration in the public service.

2. The judgment of the ECJ

As for the first complaint, in the Commission's view, Directive 76/207 was applicable to the public service as well. Article 3(1), which referred to 'all jobs or posts, whatever the sector or branch of activity', made this clear. As far as the substance of the problem was concerned, the Federal Republic contended that both the basic law and the legislation concerning the public service expressly guaranteed equal access and equal treatment for men and women as regards the public service. It maintained that all those provisions defined rights which were directly conferred on individuals and which gave rise, where they were infringed, to a right of action before the administrative courts and, if necessary, before the Constitutional Court. Accordingly, to bring into force legislative provisions pursuant to Directive 76/207 seemed to be devoid of purpose. The Court took the position that the Commission had not established, or even attempted to establish, that discrimination on grounds of sex existed, either in law or in fact, in the public service in Germany. Moreover, said the Court, the basic law affirmed the equality of men and women before the law, and the express exclusion of all discrimination on grounds of sex and the guarantee of equal access to employment in the public service for all German nationals, in provisions that were intended to be directly applicable, constituted, in conjunction with the existing system of judicial remedies, including the possibility of instituting proceedings before the Constitutional Court, an adequate guarantee of the implementation, in the field of the public administration, of the principle of equal treatment laid down in Directive 76/207. The same guarantees were reiterated in the legislation concerning the public service, which expressly laid down that appointment to

posts in the public service should be based on objective criteria, without distinction on grounds of sex. Therefore, concluded the Court, the object of that Directive had already been achieved in the Federal Republic of Germany as regards employment in the public service at the time when the Directive entered into force, with the result that no further legislative provisions were required for its implementation. In assessing the allegation made by the Commission that access to employment in the public service was subject to the 'aptitude' of the applicants, which made it possible to re-introduce discrimination on grounds of sex, the Court pointed out that such criterion of aptitude, as used in the basic law and in German legislation, covered a wide variety of criteria of assessment which, having regard to the broad range of duties performed by the public administration, were entirely unconnected with the question of a person's sex. The question, therefore, to be resolved was exclusively concerned with whether the criterion of aptitude, which was in itself an objective criterion, had been applied in practice in such a way as to lead to appointments to the public service based on sex discrimination. The onus was on the Commission to show that such a practice was followed in the German administration. However, it had not established that this was the case.

The second charge, which referred to the failure to apply the principle of equal treatment to the independent professions, was denied by the Federal Republic of Germany on the grounds that the relevant provisions of the basic law constituted an adequate safeguard against sex discrimination in this case as well. According to the Federal Republic, the relevant constitutional provisions were directly applicable in this area in view of the fact that, in so far as the right to take up an independent profession was subject to an admission procedure, admission was in the nature of an administrative measure adopted by a body governed by public law. Consequently, the principle laid down in Article 3(1) of the basic law applied without exception to the rules governing the various independent professions, in accordance with the requirements of the Directive. The Court remarked that the Commission had again produced no evidence from which it could be inferred that these rules actually gave rise to discrimination. For the reasons already given in connection with the first complaint, this head of the application also appeared to be unfounded, since, as far as the rules governing the independent professions were concerned, the object of Directive 76/207 had already been achieved in the Federal Republic of Germany at the time when the Directive came into force.

In its third complaint, the Commission considered that paragraph 611a of the Civil Code, which made it possible to derogate from the principle of equal treatment where a person's sex constituted a condition for carrying on a given occupational activity, was inadequate since that provision did not contain a catalogue setting out precisely the exceptions permitted. Moreover, the Federal Republic was charged with failing to create an adequate basis for enabling the Commission to exercise its right of supervision which was conferred upon it by Article 9(2) of Directive 76/207. For the Federal Republic, Article 2(2) of Directive 76/207 did not contain any indication which suggested that Member States were obliged to determine exhaustively by way of legislation the exceptions permitted by that provision. It considered that the relevant provision embodied in paragraph 611a of the Civil Code fully satisfied the requirements of the Directive. The existence of a list established by law was not essential for the exercise by the Commission of its right of supervision. Moreover, the requirement laid down by the Commission was impractical since the occupational activities excluded from the scope of the principle of equal treatment by Article 2(2) of the Directive were largely the result of specific prohibitions of access to certain posts, which were laid down for the purpose of providing protection related to the nature of the activity carried on, in accordance with the provisions of Article 2(3). The Court pointed out that the purpose of paragraph 2 of Article 2 was not to oblige but to permit Member States

to exclude certain occupational activities from the field of application of the Directive. That provision did not intend, or have the effect, of obliging the Member States to exercise that power of derogation in a particular manner, especially since, as it was clear from a comparative study, the exceptions in question served widely differing purposes and several of them were closely linked to the rules governing certain occupations or activities. However, Article 9(2) of the Directive provided for supervision in two stages, namely a periodic assessment by the Member States themselves of the justification for maintaining exceptions to the principle of equal treatment, and supervision by the Commission based on the notification of the results of that assessment. That twofold supervision served to eliminate progressively existing exceptions which no longer appeared justified, having regard to the criteria laid down in Article 2(2)(3). It followed from those provisions that it was primarily for the Member States to compile a complete and verifiable list of the occupations and activities excluded from the application of the principle of equal treatment and to notify the results to the Commission. For its part, said the Court, the Commission had the right and the duty, by virtue of the powers conferred on it by Article 155 of the EEC Treaty, to adopt the measures necessary to verify the application of that provision of the Directive. At no time, concluded the Court, since the entry into force of the Directive, had the Federal Republic of Germany adopted the necessary measures to create even a minimum of transparency with regard to the application of Article 2(2) and (3) and Article 9 of Directive 76/207.

The fourth complaint concerned paragraph 611a of the Civil Code, according to which an employer could not advertise offers of employment which were not 'impartial' as regards the sex of the employees. The Commission considered that, since offers of employment preceded access to employment, they came within the scope of Directive 76/207. It charged the Federal Republic of Germany with failing to make paragraph 611a a binding provision and that it did not satisfy the requirement laid down in Article 6 of the Directive to the effect that persons who considered themselves wronged by failure to apply the principle of equal treatment to them should be able to pursue their claims by judicial process. The Federal Republic refuted the charge on the ground that, since offers of employment merely preceded access to employment, they did not come within the scope of the Directive. It pointed out that none of the provisions of the Directive referred to offers of employment. In response to this, the Court stated that it should be observed, first of all, that all offers of employment could not be excluded a priori from the scope of Directive 76/207, inasmuch as they were closely connected with access to employment and could have a restrictive effect thereon. However, recognised the Court, the Directive imposed no obligation on the Member States to enact general legislation concerning offers of employment and consequently, paragraph 611a of the German Civil Code could not be regarded as implementing an obligation imposed by Directive 76/207 but should be treated as an independent legislative measure.

Finally, the Commission considered that the legislation of the Federal Republic of Germany, which implemented Directive 75/117 concerning equal pay for male and female civil servants, also lacked the legal clarity which was essential for effective implementation of the Directive. The German Government contended that the remuneration of public servants and judges was determined according to post and grade, without reference to the sex of the officials concerned. The Court was of the opinion that that argument should be upheld as the Commission failed to produce the slightest evidence of sex discrimination with regard to remuneration of public servants in the Federal Republic of Germany.

On those grounds, the Court:

1) *Declares that, by failing to adopt the measures necessary to apply Article 9(2) of Council Direc-*

tive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion and working conditions, in relation to the occupational activities excluded from the scope of that principle by virtue of Article 2(2) of the same Directive, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2) *For the rest, dismisses the application.*

3) *Orders the Commission to pay the costs.*

Case 151/84
JOAN ROBERTS v TATE & LYLE INDUSTRIES LTD
Date of judgment:
26 February 1986
Reference:
[1986] ECR 703
Content:
Equal treatment for men and women — Conditions governing dismissal (Articles 1(2) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 and Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

Ms Roberts was employed by Tate & Lyle Industries Limited ('Tate & Lyle') at their Liverpool depot for 28 years and, at the age of 53, was made redundant on 22 April 1981, following the closure of the depot, together with other employees, under a mass redundancy.

Ms Roberts was member of an occupational pension scheme, which had been created in 1978 by Tate & Lyle for their employees and which was contracted out of the State retirement pension scheme. That scheme was funded partly by the employer itself and partly by voluntary contributions by employees. It provided for compulsory retirement with a pension at the age of 65 for men and 60 for women. Nevertheless, men and women over the age of 50 could, with the employer's consent, retire before attaining the aforementioned normal retirement age, in which case they were entitled to a reduced pension immediately. An employee who had been a member of the scheme for 10 years could choose to retire at any time up to five years before the normal retirement age and received the pension earned up to that date.

On the closure of the Liverpool depot, the employer agreed severance terms with the trade union of which Ms Roberts was a member. Under those terms, all employees made redundant were to be offered either a cash payment or an early pension out of the pension scheme up to five years before the date of their entitlement under the scheme. The pension was therefore payable immediately to women over the age of 55 and men over the age of 60. Nevertheless, as a result of representations made by male employees against the allegedly discriminatory nature of those arrangements with regard to men aged between 55 and 60, Tate & Lyle amended them by agreeing to grant an immediate pension to both men and women over the age of 55, with the amount of their cash payment reduced.

Ms Roberts brought proceedings against Tate & Lyle before an industrial tribunal, claiming that her dismissal constituted unlawful discrimination contrary to the Sex Discrimination Act 1975 and to Community law, since under the new arrangements, a male employee was entitled to receive an immediate pension 10 years before the normal retirement age for men whereas a female employee was not so entitled until five years before the normal retirement age for women.

As her case was dismissed by the Industrial Tribunal on 7 December 1981, and by the Employment Appeal Tribunal on 30 March 1983, Ms Roberts brought a new appeal before the Court of Appeal.

2. Questions referred to the ECJ

By an order of 12 March 1984, the Court of Appeal of England and Wales referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Whether or not Tate & Lyle discriminated against Ms Roberts contrary to Directive 76/207 by arranging for male employees who were made redundant to receive a pension from the occupational pension fund 10 years prior to their normal retirement age of 65 but arranging for female employees (such as Ms Roberts) who were made redundant to re-

ceive a pension only five years prior to their normal retirement age of 60, thereby arranging for both men and women to receive an immediate pension at the age of 55.

2) If the answer to question (1) is in the affirmative, whether or not Directive 76/207 can be relied upon by Ms Roberts in the circumstances of the present case in national courts and tribunals notwithstanding the inconsistency (if any) between the Directive and section 6(4) of the Sex Discrimination Act 1975.

3. The judgment of the ECJ

In analysing the first question, the Court observed that the question of interpretation which was referred to it did not concern the conditions for the grant of the normal old-age or retirement pension but the termination of employment in connection with a mass redundancy caused by the closure of part of an undertaking's plant. The question therefore concerned the conditions governing dismissal and fell to be considered under Directive 76/207. In its judgment in the *Burton* case (Case 19/81) the Court stated that the term 'dismissal' contained in Article 5(1) of Directive 76/207 should be given a wide meaning. Consequently, said the Court, an age limit for the compulsory redundancy of workers as part of a mass redundancy fell within the term 'dismissal' construed in that manner, even if the redundancy involved the grant of an early retirement pension. The Court found it necessary to consider whether the fixing of the same age for the grant of an early pension constituted discrimination on grounds of sex in view of the fact that under the UK statutory social security scheme the pensionable age for men and women was different (65 and 60 respectively). As the Court emphasised in its judgment in the *Burton* case, Article 7 of Directive 79/7 expressly provided that the Directive did not prejudice the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits falling within the statutory social security scheme. The Court thus acknowledged that benefits linked to a national scheme which laid down a different minimum pensionable age for men and women could lie outside the ambit of the aforementioned obligation. However, in view of the fundamental importance of the principle of equality of treatment, Article 1(2) of Directive 76/207, which excludes social security matters from the scope of that Directive, should be interpreted strictly. Consequently, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of Directive 79/7 applied only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and to the consequences thereof for other social security benefits. The Court then emphasised that whereas the exception contained in Article 7 of Directive 79/7 concerned the consequences which pensionable age had for social security benefits, this case was concerned with dismissal within the meaning of Article 5 of Directive 76/207. In those circumstances the grant of a pension to persons of the same age who were made redundant amounted merely to a collective measure adopted irrespective of the sex of those persons in order to guarantee them all the same rights.

Since the second question was contingent upon the reply to the first question being in the affirmative, the Court did not give a reply to it.

In answer to questions referred to it, the Court ruled that:

Articles 5(1) of Directive 76/207 must be interpreted as meaning that a contractual provision which lays down a single age for the dismissal of men and women under a mass redundancy involving the grant of an early retirement pension, whereas the normal retirement age is different for men and women, does not constitute discrimination on grounds of sex, contrary to Community law.

Case 152/84
H. MARSHALL v SOUTHAMPTON AND SOUTH-WEST HAMPSHIRE AREA HEALTH AUTHORITY (Teaching)
Date of judgment:
26 February 1986
Reference:
[1986] ECR 723
Content:
Equality of treatment for men and women — Conditions governing dismissal (Articles 1(2) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 and Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

Ms Marshall, who was born on 4 February 1918, was employed by Southampton and South-West Hampshire Area Health Authority ('the Authority') from June 1966 to 31 March 1980. From 23 May 1974, she worked under a contract of employment as senior dietician. On 31 March 1980, approximately four weeks after she had attained the age of 62, Ms Marshall was dismissed, notwithstanding that she had expressed her willingness to continue in employment until she reached the age of 65. The sole reason for the dismissal was the fact that Ms Marshall was a woman who had passed 'the retirement age' (the age at which social security pensions became payable) applied by the Authority to women.

Ms Marshall instituted proceedings against the Authority before an industrial tribunal claiming that her dismissal for the reason indicated by the Authority constituted discriminatory treatment on the grounds of sex and, accordingly, unlawful discrimination contrary to the Sex Discrimination Act 1975 and Community law. The industrial tribunal dismissed Ms Marshall's claim in so far it was based on infringement of the Sex Discrimination Act 1975 but upheld the claim that the principle of equality of treatment laid down by Directive 76/207 had been infringed. On appeal to the Employment Appeal Tribunal that decision was confirmed as regards the first point but was set aside as regards the second point on the grounds that an individual could not rely upon violation of the principle of equality of treatment (Directive 76/207) in proceedings before a United Kingdom court or tribunal. Ms Marshall appealed against that decision to the Court of Appeal.

2. Questions referred to the ECJ

By an order of 12 March 1984, the Court of Appeal of England and Wales referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Whether the Authority's dismissal of Ms Marshall after she had passed her 60th birthday pursuant to the Authority's retirement age policy and on the grounds only that she was a woman who had passed the normal retiring age applicable to women, was an act of discrimination prohibited by Directive 76/207.

2) If the answer to question (1) is in the affirmative, whether or not Directive 76/207 can be relied upon by Ms Marshall in the circumstances of the present case in national courts or tribunals notwithstanding the inconsistency (if any) between the Directive and section 6(4) of the Sex Discrimination Act 1975.

3. The judgment of the ECJ

The Court observed, in the first place, that the question of interpretation which was referred to it did not concern access to a statutory or occupational retirement scheme, i.e. the conditions for payment of an old-age or retirement pension, but the fixing of an age limit with regard to the termination of employment pursuant to a general policy concerning dismissal. The question therefore related to the conditions governing dismissal and fell to be considered under Directive 76/207.

As the Court had already stated in *Burton* (Case 19/81), the term 'dismissal' contained in Article

5(1) of Directive 76/207 should be given a wide meaning. Consequently, an age limit for the compulsory dismissal of workers pursuant to an employer's general policy concerning retirement fell within the term 'dismissal' construed in that manner, even if dismissal involved the grant of a retirement pension. The Court then made it clear that whereas the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of Directive 79/7 applied only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits, this case was concerned with dismissal within the meaning of Article 5 of Directive 76/207. The Court therefore concluded that the fixing of an age limit which was different for men and women with regard to the termination of employment pursuant to a general policy concerning dismissal constituted discrimination on grounds of sex contrary to Directive 76/207.

Since the first question had been answered in the affirmative, it was necessary to consider whether Article 5(1) of Directive 76/207 could be relied upon by an individual before national courts or tribunals. The Court started by recalling that wherever the provisions of a directive appeared, as far as their subject matter was concerned, to be unconditional and sufficiently precise, those provisions could be relied upon by an individual against the State where that State had failed to implement the directive into national law by the end of the period described or where it had failed to implement it correctly. The Court further added that a directive could not of itself impose obligations on an individual and that a provision of a directive could not be relied upon as such against such a person. Therefore, it should be examined whether, in this case, the Authority could be regarded as having acted as an individual. The Court pointed out that, where a person involved in legal proceedings was able to rely on a directive as against the State he could do so regardless of the capacity in which the latter was acting, whether employer or public authority. In either case, the Court stressed, it was necessary to prevent the State from taking advantage of its own failure to comply with Community law. Finally, the Court sustained that Article 5 of Directive 76/207 did not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of application or to subject it to conditions and that that provision was sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which did not conform to that article.

In answer to the questions referred to it, the Court held that:

1) *Article 5(1) of Directive 76/207 must be interpreted as meaning that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained or passed the qualifying age for a State pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to that Directive.*

2) *Article 5(1) of Council Directive 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1).*

Case 262/84
VERA MIA BEETS-PROPER v F. VAN LANSCHOT BANKIERS NV
Date of judgment:
26 February 1986
Reference:
[1986] ECR 773
Content:
Equality of treatment for men and women — conditions governing dismissal (Articles 1(2) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 and Article 7(1)(a) of Council Directive 79/7/ EEC of 19 December 1978).

1. Facts and procedure

Mrs Beets-Proper worked as a secretary with Vermeer & Co. Bankers, of Amsterdam, from 1969 until that company's amalgamation in 1972 with F. Van Lanschot Bankiers NV ('Van Lanschot'), and from then until the end of August 1982 with the latter. The employment relationship between the parties was governed by the collective agreement for the banking sector for the years 1980 and 1981 and the pension scheme of the 'F. Van Lanschot Pension Fund'. Article 3 of that scheme provided that the persons affiliated to it were entitled to an old-age pension 'from the date of retirement'. That date was defined in Article 1 as 'the first day of the month following the month in which a person affiliated to the scheme attained the age of 65 in the case of a man and 60 in the case of a woman'.

Since Mrs Beets-Proper reached the age of 60 in August 1982, Van Lanschot took the view that the employment relationship automatically ended on 1 September 1982, by virtue of an implied condition to that effect in the contract of employment, without the need for any notice of dismissal. By a letter dated 2 August 1982, Van Lanschot informed Mrs Beets-Proper that she was entitled to an old-age pension together with a supplementary pension payable until she attained the age of 65. She had not been admitted to work since 1 September 1982, in spite of her desire to continue her employment, possibly on a part-time basis.

By a writ of 16 September 1982, Mrs Beets-Proper applied to the president of the Arrondissementsrecht-bank (District Court), Amsterdam, for an interlocutory injunction requiring Van Lanschot to allow her to resume work and to pay her salary from 1 September 1982, until such time as the contract of employment should be terminated in a legally valid manner. Mrs Beets-Proper also submitted a complaint to the Commissie Gelijke Behandeling van Mannen en Vrouwen bij de Arbeid (Commission on Equal Treatment of Men and Women in Employment at Work). In its opinion, the Commission concluded that 'a direct distinction was made, to the disadvantage of the applicant, between men and women with regard to the termination of the contract of employment by the application of different age limits'.

After the dismissal of Mrs Beets-Proper's application by the Arrondissementsrechtbank, she appealed to the Gerechshof (Regional Court of Appeal), Amsterdam, which, by judgment of 19 May 1983, confirmed the judgment of the lower court. Mrs Beets-Proper brought an appeal on a point of law against the latter judgment before the Hoge Raad der Nederlanden.

2. Questions referred to the ECJ

By an order of 2 November 1984, the Hoge Raad der Nederlanden referred a question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

Does Council Directive 76/207/EEC of 9 February 1976 allow the Member States the freedom not to include among the conditions of employment in respect of which equal treatment for men and women must be laid down pursuant to that Directive an express or implied condition concerning the termination of the contract of employment on the ground of the age attained by the employee, where that condition relates to the age at which the employee becomes entitled to a pension?

3. The judgment of the ECJ

The Court's reasoning in the present case is exactly the same as for question (1) of the previous case (Case 152/ 84 — *Marshall).* However, in view of the wording of the question referred to it, the Court gave a different ruling:

Article 5(1) of Directive 76/207/EEC of 9 February 1976 must be interpreted as meaning that it does not allow the Member States the freedom to exempt from the application of the principle of equality of treatment an express or implied condition in a contract of employment concluded on the basis of a collective wage agreement if that condition has the effect of terminating the contract of employment on the ground of the age attained by the employee and the relevant age is determined by the age — which is different for men and women — at which the employee becomes entitled to a retirement pension.

Case 170/84
BILKA-KAUFHAUS GMBH v KARIN WEBER VON HARTZ
Date of judgment:
13 May 1986
Reference:
[1986] ECR 1607
Content:
Equal treatment for men and women — Part-time workers — Exclusion from an occupational pension scheme (EEC Treaty, Article 119).

1. Facts and procedure

For several years, Bilka-Kaufhaus GmbH ('Bilka'), which belonged to a group of department stores in the Federal Republic of Germany employing several thousand persons, had a supplementary (occupational) pension scheme for its employees. This scheme, which had been modified on several occasions, was regarded as an integral part of the contracts of employment between Bilka and its employees. According to the version in force since 26 October 1973, part-time employees could obtain pensions under the scheme only if they had worked full-time for at least 15 years over a total period of 20 years.

Mrs Weber was employed by Bilka as a sales assistant from 1961 to 1976. After initially working full-time, she chose to work part-time from 1 October 1972, until her employment came to an end. Since she had not worked full-time for the minimum period of 15 years, Bilka refused to pay her an occupational pension under its scheme. Mrs Weber brought proceedings before the German labour courts challenging the legality of Bilka's refusal to pay her a pension. She argued, *inter alia,* that the occupational pension scheme was contrary to the principle of equal pay for men and women laid down in Article 119 of the EEC Treaty. The case came before Bundesarbeitsgericht on appeal on a point of law.

2 Questions referred to the ECJ

By an order of 5 June 1984, the Bundesarbeitsgericht (Federal Labour Court) referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) May there be an infringement of Article 119 of the EEC Treaty in the form of 'indirect discrimination' where a department store which employs predominantly women excludes part-time employees from benefits under its occupational pension scheme although such exclusion affects disproportionately more women than men?

2) If so:

   a) Can the undertaking justify that disadvantage on the ground that its objective is to employ as few part-time workers as possible even though in the department store sector there are no reasons of commercial expediency which necessitate such a staff policy?

   b) Is the undertaking under a duty to structure its pension scheme in such a way that appropriate account is taken of the special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension?

3 The judgment of the ECJ

Before answering the questions referred to it, the Court made clear that, contrary to its judgment in Case 80/70 — *Defrenne I,* which concerned statutory social security schemes directly governed by legislation and therefore not considered as pay within the meaning of Article 119, the occupational pension scheme at issue, although adopted in accordance with German legislation, was of a contractual nature. Because of this, the Court concluded, benefits paid to employees under such scheme constituted consideration received by

the worker from the employer in respect of his employment, as referred to in the second paragraph of Article 119.

In order to reply to question (1), the Court made a comparison between the present case and Case 96/80 — *Jenkins*. Although Bilka did not pay different hourly rates to part-time and full-time workers (as in *Jenkins),* it granted only full-time workers an occupational pension. Since such a pension fell within the concept of pay for the purposes of the second paragraph of Article 119, it followed that, hour for hour, the total remuneration paid by Bilka to full-time workers was higher than that paid to part-time workers. The conclusion reached by the Court in its judgment in *Jenkins* was therefore equally valid in the context of this case. That is to say, if it should be found that a much lower proportion of women than of men worked full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which excluded any discrimination on grounds of sex. Only if the undertaking was able to show that its pay practice could be explained by objectively justified factors unrelated to any discrimination on grounds of sex there would be no breach of Article 119.

In examining question (2)(a), the Court said that it was for the national court, which had sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a given pay practice could be regarded as objectively justified economic grounds. If the national court would find that the measures chosen by Bilka corresponded to a real need on the part of the undertaking, were appropriate with a view to achieving the objectives pursued, and were necessary to that end, the fact that the measures affected a far greater number of women than men was not sufficient to show that they constituted an infringement of Article 119.

Finally, in answer to question (2)(b), the Court pointed out that, as stated in the judgment of Case 149/77 — *Defrenne III,* the scope of Article 119 was restricted to the question of pay discrimination between men and women workers. Consequently, the imposition of an obligation such as that envisaged by the national court in its question went beyond the scope of Article 119 and had no other basis in Community law as it stood.

In answer to the questions submitted to it, the Court held that:

1) *Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.*

2) *Under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.*

3) *Article 119 does not have the effect of requiring an employer to organise its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension.*

Case 222/84
MARGUERITE JOHNSTON v CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY
Date of judgment:
15 May 1986
Reference:
[1986] ECR 1651
Content:
Equal treatment for men and women — Armed member of a police reserve force (Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

In the United Kingdom, police officers did not as a general rule carry firearms in the performance of their duties. Because of the high number of police officers assassinated in Northern Ireland over a number of years, the Chief Constable of the Royal Ulster Constabulary ('RUC') considered that he could not maintain that practice. He decided that, in the RUC and the RUC Reserve, men should carry firearms in the regular course of their duties but that women would not be equipped with them and would not receive training in the handling and use of firearms. In those circumstances, the Chief Constable decided in 1980 that the number of women in the RUC was sufficient for the particular tasks generally assigned to women officers. He took the view that general police duties, frequently involving operations requiring the carrying of firearms, should no longer be assigned to women and decided not to offer or renew any more contracts for women in the RUC full-time Reserve, except where they had to perform duties assigned only to women officers.

Mrs Johnston was a member of the RUC full-time from 1974 to 1980. She had performed efficiently the general duties of a uniformed police officer, and was not armed when carrying out those duties. In 1980, the Chief Constable refused to renew her contract because of the new policy mentioned above.

Mrs Johnston lodged an application with the industrial tribunal challenging the decision to refuse to renew her contract and to give her training in the handling of firearms. She contended that she had suffered unlawful discrimination prohibited by the Sex Discrimination Order and Directive 76/207. In the proceedings before the industrial tribunal, the Chief Constable produced a certificate issued by the Secretary of State in accordance with Article 53 of the Sex Discrimination Order. That article provided that an act contravening the prohibition of discrimination should not be unlawful if it was done for the purpose of safeguarding national security or of protecting public safety or public order and that a certificate signed by the Secretary of State certifying that an act was done for such purposes should be conclusive evidence that it was done for such purposes.

2. Questions referred to the ECJ

By a decision dated 8 August 1984, the Industrial Tribunal of Northern Ireland, Belfast, referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) On the proper construction of Council Directive 76/207 and in the circumstances of this case, can a Member State exclude from the Directive's field of application acts of sex discrimination as regards access to employment done for the purpose of safeguarding national security or of protecting public safety or public order?

2) On the proper construction of the Directive and in the circumstances of this case, is full-time employment as an armed member of a police reserve force, or training in the handling and use of firearms for such employment, capable of constituting one of those occupational activities and, where appropriate, the training leading thereto for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor, within the meaning of Article 2(2)?

3) What are the principles and criteria by which Member States should determine whether 'the sex of a worker constitutes a determining factor' within the meaning of Article 2(2) in relation to (a) 'the occupational activities' of an armed member of such a force and (b) 'the training leading thereto', whether by reason of their nature or by reason of the context in which they are carried out?

4) Is a policy applied by a chief constable of police, charged with a statutory responsibility for the direction and control of a police force, that women members of that force should not carry firearms capable, in the circumstances of this case, of constituting a 'provision concerning the protection of women', within the meaning of Article 2(3), or an 'administrative provision' inspired by 'concern for protection' within the meaning of Article 3(2)(c) of the Directive?

5) If the answer to question (4) is affirmative, what are the principles and criteria by which Member States should determine whether the 'concern for protection' is 'well founded', within the meaning of Article 3(2)(c)?

6) Is the applicant entitled to rely upon the principle of equal treatment contained in the relevant provisions of the Directive before the national courts and tribunals of Member States in the circumstances of the present case?

7) If the answer to question (6) is affirmative:

   a) Does Article 224 of the EEC Treaty, on its proper construction, permit Member States when confronted with serious internal disturbances affecting the maintenance of law and order to derogate from any obligations which would otherwise be imposed on them or on employers within their jurisdiction by the Directive?

b) If so, is it open to an individual to rely upon the fact that a Member State did not consult with other Member States for the purpose of preventing the first Member State from relying on Article 224 of the EEC Treaty?

3. *The judgment of the ECJ*

The Court started its reasoning by examining whether Article 53(2) of the Sex Discrimination Order was compatible with Article 6 of Directive 76/207 (part of question (6)). The Court recalled that Article 6 of the Directive required Member States to introduce into their internal legal systems such measures as were needed to enable all victims of discrimination to pursue their claims by judicial process. This article reflected a general principal of law which underlined the constitutional traditions common to the Member States and which was also present in Articles 6 and 13 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. By virtue of Article 6 of the Directive, interpreted in the light of the general principle stated above, all persons had the right to obtain an effective remedy in a competent court against measures which they considered to be contrary to the principle of equal treatment for men and women laid down in the Directive. Moreover, said the Court, it was for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provided. The Court concluded that a provision such as Article 53(2), which deprived an individual of the possibility of asserting by judicial process the rights conferred by the Directive, was contrary to the principle of effective judicial control laid down in Article 6 of the Directive.

In replying to question (1), the Court observed that the only articles in which the Treaty provided for derogations applicable in situations which could involve public safety were Articles 36, 48, 56, 223, and 224 which dealt with exceptional and clearly defined cases. Because of their limited character those articles did not lend themselves to a wide interpretation and it was not possible to

infer from them that there was inherent in the Treaty a general proviso covering all measures taken for reasons of public safety. The fact which induced the competent authority to invoke the need to protect public safety should, therefore, if necessary be taken into consideration, in the first place, in the context of the application of the specific provisions of the Directive.

The second and third questions concerned the interpretation of the derogation, provided for in Article 2(2) of the Directive, from the principle of equal treatment. Article 2(2) of the Directive, said the Court, being a derogation from an individual right, should be interpreted strictly. However, the context in which the occupational activity of a member of an armed police force was carried out was determined by the environment in which that activity was carried out. In this regard, the possibility could not be excluded that in a situation characterised by serious internal disturbances the carrying of firearms by policewomen could create additional risks of their being assassinated and could therefore be contrary to the requirements of public safety. In such circumstances, the context of certain policing activities could be such that the sex of police officers constituted a determining factor for carrying them out. If that was so, a Member State could therefore restrict such tasks, and the training leading thereto, to men. In such a case, as was clear from Article 9(2) of the Directive, the Member States had a duty to assess periodically the activities concerned in order to decide whether, in light of social developments, the derogation from the general scheme of the Directive could still be maintained. Moreover, the Court recalled, the principle of proportionality should not be forgotten when determining the scope of any derogation from an individual right. In view of this, it was for the national court to say whether the reasons on which the Chief Constable based his decision were in fact well founded and justified the specific measure taken in Mrs Johnston's case. It was also for the national court to ensure that the principle of proportionality was observed and to determine whether the refusal to renew Mrs Johnston's contract could not be avoided by allocating to women duties which, without jeopardising the aims pursued, could be performed without firearms.

In its fourth and fifth questions, the industrial tribunal asked the Court for an interpretation of the expressions 'protection of women' in Article 2(3) of the Directive and 'concern for protection' in Article 3(2)(c). The Court observed that like Article 2(2) of the Directive, Article 2(3), which also determined the scope of Article 3(2)(c), should be interpreted strictly. It was clear from the express reference to pregnancy and maternity that the Directive was intended to protect a woman's biological condition and the special relationship which existed between a woman and her child. That provision did not therefore allow women to be excluded from a certain type of employment on the grounds that public opinion demanded that women be given greater protection than men against risks which affected men and women in the same way and which were distinct from women's specific needs of protection, such as those expressly mentioned. The Court considered that a total exclusion of women from the occupational activity in question, which, owing to a general risk not specific to women, was imposed for reasons of public safety, was not one of the differences in treatment that Article 2(3) of the Directive allowed out of a concern to protect women.

In relation to question (6), the Court observed that the derogation from the principle of equal treatment which was allowed by Article 2(2) constituted only an option for the Member States. The question whether an individual could rely upon a provision of the Directive in order to have a derogation laid down by national legislation set aside would only arise if that derogation had gone beyond the limits of the exceptions permitted by Article 2(2) of the Directive. The Court then mentioned its judgment in Case 14/83 — *von Colson* and Case 79/83 — *Harz*. There it was stated that the Member States' obligation under a Directive to achieve the result envisaged by that Directive and their duty under Article 5 of the Treaty to take all appropriate measures,

whether general or particular, to ensure the fulfilment of that obligation, was binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It was therefore for the industrial tribunal to interpret the provisions of the Sex Discrimination Order, and in particular Article 53 thereof, in the light of the provisions of the Directive in order to give it its full effect. The Court went on to say that, in the event that a question should still arise whether an individual could rely on the Directive as against a derogation laid down by national legislation, reference should be made to the established case-law of the Court, more particularly, Case 152/84 — *Marshall*.

In that case the Court held that certain provisions of Directive 76/207 were, as far as their subject-matter was concerned, unconditional and sufficiently precise and that they could be relied upon by individuals as against a Member State where it failed to implement it correctly. *Mutatis mutandis,* the same would apply as regards the application of the principle of equal treatment laid down in Article 2(1) to the conditions governing access to jobs and access to vocational training and advanced vocational training referred in Articles 3(1) and 4. Furthermore, the Court also held in the aforesaid judgment that individuals could rely on the Directive as against an organ of the State whether it acted *qua* employer or *qua* public authority. The Court observed that the Chief Constable was an official responsible for the direction of the police service and did not act as a private individual. As regards Article 6 of the Directive, the Court replied that in so far as it followed from that article, construed in the light of a general principle which it expressed, that all persons who considered themselves wronged by sex discrimination should have an effective judicial remedy, that provision was sufficiently precise and unconditional to be capable of being relied upon as against a Member State which had not ensured that it was fully implemented in its internal legal order. In the opinion of the Court, the seventh question had no purpose, in view of the answers to the other questions.

In reply to the questions submitted to it, the Court ruled that:

1) *The principle of effective judicial control laid down in Article 6 of Council Directive 76/207/EEC of 9 February 1976 does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purposes of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts. The provision contained in Article 6 to the effect that all persons who consider themselves wronged by discrimination between men and women must have an effective judicial remedy may be relied upon by individuals as against a Member State which has not ensured that it is fully implemented in its internal legal order.*

2) *Acts of sex discrimination done for reasons related to the protection of public safety must be examined in the light of the derogations from the principle of equal treatment for men and women which are laid down in Directive 76/207/EEC.*

3) *Article 2(2) of Directive 76/207/EEC must be interpreted as meaning that in deciding whether, by reason of the context in which the activities of a police officer are carried out, the sex of the officer constitutes a determining factor for that occupational activity a Member State may take into consideration requirements of public safety in order to restrict general policing duties, in an internal situation characterised by frequent assassinations, to men equipped with firearms.*

4) *The differences in treatment of men and women that Article 2(3) of Directive 76/207/EEC allows out of a concern to protect women do not include risks and danger, such as those to which any armed police officer is exposed in the performance of his duties in a given situation, that do not specifically affect women as such.*

5) Individuals may claim the application, as against a State authority charged with the maintenance of public order and safety acting in its capacity as employer, of the principle of equal treatment for men and women laid down in Article 2(1) of Directive 76/207/EEC to the matters referred to in Articles 3(1) and 4 concerning the conditions for access to posts and to vocational training and advanced vocational training in order to have a derogation from that principle contained in national legislation set aside in so far as it exceeds the limits of the exceptions permitted by Article 2(2).

Case 150/85
JACQUELINE DRAKE v CHIEF ADJUDICATION OFFICER
Date of judgment:
24 June 1986
Reference:
[1986] ECR 1995
Content:
Invalid care allowance (Articles 3(1)(a) and 4(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

Mrs Drake was married and lived with her husband. Prior to the middle of 1984, she held a variety of full-time and part-time jobs. In June 1984, her mother, a severely disabled person who received an attendance allowance under section 35 of the Social Security Act 1975, came to live with her, and Mrs Drake had to give up her job in order to look after her.

On 5 February 1985, Mrs Drake applied for an invalid care allowance under section 37 of the Social Security Act 1975. The adjudication officer pointed out that under section 37(3)(a)(i) married women who lived with their husbands were not entitled to the allowance, but in order to expedite the procedure, he referred the matter to the Social Security Appeal Tribunal. On 1 March 1985, the Tribunal held that that provision constituted discrimination on grounds of sex, contrary to Directive 79/7.

The Chief Adjudication Officer appealed against that decision to the Chief Social Security Commissioner.

2. Questions referred to the ECJ

By an order of 15 May 1985, the Chief Social Security Commissioner referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) If a Member State provides a benefit payable, (provided certain residence and other conditions are met), to a person who is not gainfully employed and is regularly and substantially engaged in caring for a person in respect of whom a benefit is payable as a severely disabled person by reason of that person requiring attention or supervision as prescribed (and provided that that person meets certain residence and other conditions), does the benefit payable to the first-mentioned person constitute the whole or part of a statutory scheme which provides protection against invalidity to which Article 3(1)(a) of Directive 79/7/EEC applies?

2) If the answer to the first question is yes, does a condition that a married woman is not entitled to that benefit if she is residing with her husband or he is contributing to her maintenance above a certain level constitute discrimination contrary to Article 4(1) of that Directive in circumstances where married men do not have to meet a corresponding condition?

3. The judgment of the ECJ

In answering question (1), the Court pointed out that, according to Article 3(1), Directive 79/7 applied to statutory schemes which provided protection against, *inter alia,* the risk of invalidity (subparagraph (a)) and social assistance, in so far as it was intended to supplement or replace the invalidity scheme (subparagraph (b)). In order to fall within the scope of the Directive, therefore, a benefit should constitute the whole or part of a statutory scheme providing protection against one of the specified risks or a form of social assistance. Under Article 2, said the Court, the term 'working population', which determined the scope of the Directive, was defined broadly. That provision was based on the idea that a person whose work had been interrupted by one of the risks referred to in Article 3 belonged to the working population. The Court found that this was the case for Mrs Drake, who

had given up work solely because of one of the risks listed in Article 3, namely the invalidity of her mother. She should therefore be regarded as a member of the working population for the purposes of the Directive. Furthermore, as it was possible for the Member States to provide protection against the consequences of the risk of invalidity in various ways, Article 3(1) should be interpreted as including any benefit which in a broad sense formed part of one of the statutory schemes referred to or a social assistance provision intended to supplement or replace such a scheme, otherwise it would be possible, by making formal changes to existing benefits covered by the Directive, to remove them from its scope.

Moreover, the Court added that the payment of the benefit to a person who provided care still depended on the existence of a situation of invalidity inasmuch as such a situation was a condition *sine qua non* for its payment. It also emphasised that there was a clear economic link between the benefit and the disabled person, since the disabled person derived an advantage from the fact that an allowance was paid to the person caring for him. It followed that the fact that a benefit which formed part of a statutory invalidity scheme but which was paid to a third party and not directly to the disabled person did not place it outside the scope of Directive 79/7.

In considering question (2), the Court stated that Article 4(1) of Directive 79/7 embodied its aim, set out in Article 1, i.e. the implementation, in the field of social security and of men and women, of the principle of equal treatment, a principle which it had frequently described as fundamental.

It followed from the foregoing that a national provision such as that at issue was contrary to the aim of the Directive, which under Article 189 of the Treaty was binding on the Member States as to the result to be achieved.

In answer to the questions referred to it, the Court held that:

1) *A benefit provided by a Member State and paid to a person caring for a disabled person forms part of a statutory scheme providing protection against invalidity which is covered by Directive 79/7/EEC pursuant to Article 3(1)(a) of that Directive.*

2) *Discrimination on grounds of sex contrary to Article 4(1) of the Directive 79/7/EEC arises where legislation provides that a benefit which forms part of one of the statutory schemes referred to in Article 3(1) of that Directive is not payable to a married woman who lives with or is maintained by her husband, although it is paid in corresponding circumstances to a married man.*

Case 237/85
GISELA RUMMLER v DATO-DRUCK GMBH
Date of judgment:
1 July 1986
Reference:
[1986] ECR 2101
Content:
Equal pay for men and women — Classification systems (Article 1(2) of council Directive 75/117/EEC of February 1975).

1. Facts and procedure

Conditions of remuneration in the printing industry were governed by the Lohnrahmentarifvertrag fur die gewerblichen Arbeitnehmer der Druckindustrie im Gebiet der Bundesrepublik Deutschland, einschliesslich Berlin-West (framework wage-rate agreement for industrial employees of the printing industry in the territory of the Federal Republic of Germany including West Berlin) of 6 July 1984, which provided for seven wage groups corresponding to the work carried out, which were determined according to the degree of knowledge, concentration, muscular demand or effort and responsibility.

Ms Rummler, who was classified in Wage Group III, considered that she should be classified in Wage Group IV, since she carried out work falling under that wage group. In particular, she was required to pack parcels weighing more than 20 kilogrammes, which for her represented heavy physical work. Dato-Druck GmbH denied that Ms Rummler's duties were of the nature described by her; it considered that they did not even fulfil the conditions for classification in Wage Group III, in which she was now classified and that having regard to the nature of her duties, which made only slight muscular demands, she should be classified in Wage Group II.

The Arbeitsgericht Oldenburg considered that in order to arrive at a decision on the classification of Ms Rummler in one of the wage groups in questions it needed to know first whether the classification criteria were compatible with Directive 75/117.

2. Questions referred to the ECJ

By an order of 25 June 1985, the Arbeitsgericht Oldenburg referred three questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Does it follow from the provisions of Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women that in job classification systems no distinction may be made on the basis of:

   a) the extent to which a job demands on or requires an effort of the muscles;

   b) whether the work is heavy or not?

2) If question (1) is answered essentially in the negative:
   As regards the decision as to:

   a) the extent to which a job makes demands on or requires an effort of the muscles;

   b) whether the work is heavy or not; is reference to be made to the extent to which it makes demands on or requires an effort from women or whether it is heavy for women?

3) If question (2) is answered in the affirmative: Does a job classification system which uses the criterion of demand on or effort of the muscles or the criterion of heaviness of work but does not make clear that it is significant to what extent the work makes demands on or requires an effort of the muscles as regards women or whether the work is heavy for women satisfy the requirements of the Directive?

3. The judgment of the ECJ

In replying to question (1), the Court first made reference to the general rule laid down in Article 1(1) of Directive 75/117, which provided for the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration for the same work or for work to which equal value was attributed. That general rule was applied in the second paragraph of Article 1, which provided that a job classification system should be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex. The Court subsequently observed that, where a job classification system was used in determining remuneration, that system should be based on criteria which did not differ according to whether the work was carried out by a man or by a woman and should not be organised, as a whole, in such a manner that it had the practical effect of discriminating generally against workers of one sex. Consequently, criteria corresponding to the duties performed met the requirements of Article 1 of the Directive where those duties by their nature required particular effort or were physically heavy. In differentiating rates of pay, it was consistent with the principle of non-discrimination to use a criterion based on the objectively measurable expenditure of effort necessary in carrying out the work or the degree to which, reviewed objectively, the work was physically heavy. The Court then added that a system was not necessarily discriminatory simply because one of its criteria made reference to attributes more characteristic of men. In order for a job classification system as a whole to be non-discriminatory, it should, however, be established in such a manner that it included, if the nature of the tasks in question so permitted, jobs to which equal value was attributed and for which regard was had to other criteria in relation to which women workers could have a particular aptitude.

The answer to questions (2) and (3), said the Court, followed from what had already been said in answer to question (1), i.e. nothing in the Directive prevented the use in determining wage rates of a criterion based on the degree of muscular effort objectively required by a specific job or the objective degree of heaviness of the job. The Court then remarked that the failure to take into account values corresponding to the average performance of female workers in establishing a progressive pay scale based on the degree of muscle demand and muscular effort could indeed have the effect of placing women workers, who could not take jobs which were beyond their physical strength, at a disadvantage. That difference in treatment could, however, be objectively justified by the nature of the job when such a difference was necessary in order to ensure a level of pay appropriate to the effort required by the work and corresponded to a real need on the part of the undertaking (see Case 170/84 — *Bilka*). The Court then recalled that a job classification system should, in so far as the nature of the tasks in question permitted, include other criteria which served to ensure that the system as a whole was not discriminatory.

In reply to the questions referred to it, the Court ruled that:

1) *Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ L 48, 19.2.1975, p. 19) does not prohibit the use, in a job classification system for the purpose of determining rates of pay, of the criterion of muscle demand or muscular effort or that of the heaviness of the work if, in view of the nature of the tasks involved, the work to be performed does not require the use of a certain degree of physical strength, so long as the system as a whole, by taking into account other criteria, precludes any discrimination on grounds of sex.*

2) *It follows from Directive 75/117 that:*

   - *the criteria governing pay rate classification must ensure that the work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman;*

- *the use of values reflecting the average performance of workers of one sex as a basis for determining the extent to which work makes demands or requires effort or whether it is heavy constitutes a form of discrimination on grounds of sex, contrary to the Directive;*
- *in order for a job classification system not to be discriminatory as a whole, it must, in so far as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show particular aptitude.*

Case 71/85
STATE OF THE NETHERLANDS v FEDERATIE NEDERLANDSE VAKBEWEGING
Date of judgment:
4 December 1986
Reference:
[1986] ECR 3855
Content:
Equal treatment for men and women with regard to social security (Article 4(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

The Netherlands Government initially intended, as part of a wide-ranging reform of the system of social security, to transpose Directive 79/7 into national law at the same time as it merged the Werkloosheidswet (Law on unemployment) and the Wet Werkloosheidsvoorziening (Law on unemployment benefit). That reform was to include the repeal of the breadwinner requirement laid down in Article 13(1) of the Wet Werkloosheidsvoorziening, which provided that 'the following shall be excluded from the right to benefit: workers ... (1) who, having the status of married women, may not be described as breadwinners under the rules adopted by the competent minister after consulting the central commission, and who do not live permanently separated from their husbands ...'. When it appeared that that merger could not be effected by 23 December 1984, a provisional bill amending the abovementioned article and designed to extend the breadwinner requirement to unemployed males was tabled by the Government but rejected by the Second Chamber of the States-General on 13 December 1984. By letter dated 18 December 1984, the State Secretary for Social Affairs and Employment informed the President of the Second Chamber of the States-General that a new Bill would be submitted and its provisions would take effect retroactively from 23 December 1984, in order to implement the Directive within the period prescribed. The States-General were asked to approve the Bill by 1 March 1985. The State Secretary notified the competent authorities, by circular dated 21 December 1984, that the contested provisions of the Wet Werkloosheidsvoorziening had to continue to be applied pending the retroactive amending law.

The Federatie Nederlandse Vakbeweging ('FNV'), whose statutory objects included safeguarding workers and their families, summoned the State in interlocutory proceedings before the President of the Arrondisse-mentsrechtbank (District Court), The Hague. It sought an order requiring the State to suspend, or at least not to give effect to Article 13(1), point 1, of the Wet Werkloosheidsvoorziening, as far as the breadwinner rule was concerned, until new published legislation entered into force. By order of 17 January 1985, the President ordered the State to amend the relevant Article 13 before 1 March 1985. The State and the FNV appealed against that decision.

2. Questions referred to the ECJ

By order of 13 March 1985, the Gerechshof (Regional Court of Appeal), The Hague, referred three questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Has Article 4 of Directive 79/7/EEC had direct effect since 23 December 1984 and does this mean that from that date Article 13(1) point 1, of the Wet Werkloosheidsvoorziening is inapplicable and that the women excluded by that provision acquired entitlement to benefit as from the same date?

2) In that respect, does it matter whether, apart from having the possibility of simply repealing the provision referred to in question (1), the State had alternative possibilities for complying with the Directive? For example, in repealing the aforesaid provision and in order to finance the extra costs involved, it could have made more rigorous the conditions for the acquisition of entitlement to benefit and limited it to unemployed persons under 35 years of age.

3) Does it matter, in that respect, that a transitional provision is necessary owing to the repeal of that provision and that a choice must be made between alternative measures?

3. The judgment of the ECJ

Before examining the core of question (1), the Court mentioned Case 8/81 — *Becker v Finanzamt Munster-Innenstadt* ([1]), where it held that wherever the provisions of a directive appeared, as far as their subject matter was concerned, to be unconditional and sufficiently precise, individuals could rely on those provisions in the absence of implementing measures adopted within the prescribed period as against any national provision which was incompatible with the directive or in so far as the provisions defined rights which individuals were able to assert against the State. The Court then made mention of Case 150/85 — *Drake,* where it had stated that the objective set out in Article 1 of Directive 79/7 was given practical expression by Article 4(1), which provided that in matters of social security there should be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status, in particular, as concerned the scope of social security schemes and the conditions of access thereto. The Court pointed out that, standing by itself, and in the light of the objective and contents of Directive 79/7, Article 4(1) precluded, generally and unequivocally, all discrimination on grounds of sex. The provision was therefore sufficiently precise to be relied upon in legal proceedings by an individual and applied by the courts. However, said the Court, it remained to be considered whether the prohibition of discrimination which it contained could be regarded as unconditional, having regard to the exceptions provided for in Article 7, and to the fact that, according to the wording of Article 5, Member States were to take certain measures in order to ensure that the principle of equal treatment was applied in national legislation. In analysing Article 7, the Court took the view that it was not relevant in this case because it laid down no condition with regard to the application of the principle of equal treatment as regards Article 4 of the Directive. As for Article 5, the Court observed that it could not be inferred from its wording that it laid down conditions to which the prohibition of discrimination was subject. Consequently, Article 4(1) of the Directive did not confer on Member States the power to make conditional or to limit the application of the principle of equal treatment within its field of application and it was sufficiently precise and unconditional to allow individuals, in the absence of implementing measures adopted within the prescribed period, to rely upon it before the national courts as from 23 December 1984, in order to preclude the application of any national provision inconsistent with that article.

As regards the second and third questions, the Court found that it was sufficient to observe, as it had already held in *Becker,* cited above, that the fact that a directive left the choice of form and methods for achieving the desired result to the Member States could not be relied upon in order to deny all effect to those provisions of the directive which could be invoked in legal proceedings even though that directive had not been implemented in its entirety.

In answer to the questions submitted to it, the Court ruled that:

1) *Where no measures have been adopted to implement Council Directive 79/7/EEC of 19 December 1978, Article 4(1) thereof, which prohibits all discrimination on grounds of sex in matters of social security, could be relied on as from 23 December 1984 in order to preclude the application of any national provision inconsistent with that article. In the absence of measures implementing that article, women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the Directive has not been implemented, those rules remain the only valid point of reference.*

([1]) ([1982] ECR 53).

2) A Member State may not invoke its discretion with regard to the choice of methods for implementing the principle of equal treatment in the field of social security laid down in Directive 79/7/EEC in order to deny all effect to Article 4(1) thereof, which may be invoked in legal proceedings even though the said Directive has not been implemented in its entirety.

Case 286/85
NORAH MCDERMOTT AND ANN COTTER v MINISTER FOR SOCIAL WELFARE AND ATTORNEY-GENERAL (McDermott and Cotter I)
Date of judgment:
24 March 1987
Reference:
[1987] ECR 1453
Content:
Equal treatment in matters of social security (Article 4(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

Mrs McDermott was a married woman who was in insurable employment from approximately September 1982 until 4 November 1983. Upon becoming unemployed, she applied for unemployment benefit. The basic unemployment benefit was paid to her from about 3 January 1984, and ceased on 5 January 1985. She was informed by an officer in her local employment exchange that her entitlement to unemployment benefit had ceased as of that date on the grounds that a married woman was only entitled to receive unemployment benefit for a period of 312 days.

Mrs Cotter was a married woman who was in insurable employment for a period of approximately nine years. On being made redundant, in January 1984, she claimed unemployment benefit, which was first paid on or about 17 January 1984. It took the form of basic benefit together with an element of pay-related benefit. In accordance with a decision under the Social Welfare (Consolidation) Act 1981, both benefits ceased to be paid on 17 January 1985, on the grounds that 'a married woman was only entitled to receive unemployment benefit for a period of 312 days from the date of the initial payment but the payment of pay-related benefit automatically ceased on the cessation of the payment of unemployment benefit'.

Mrs McDermott and Mrs Cotter applied to the High Court on 4 February 1985, for conditional orders of *certiorari* to have the decisions made by or on behalf of the Minister for Social Welfare to cease to pay unemployment benefit after the period of 312 days quashed, on the grounds that these decisions were contrary to, and in infringement of, their rights under Article 4 of Council Directive 79/7/EEC, and in the case of Mrs Cotter, on the grounds that to pay her unemployment benefit at a lower rate than a married or single man was contrary to the Directive. The Minister for Social Welfare and the Attorney-General filed an affidavit in each case in which they stated that Article 4 of the Directive at issue did not impose a clear and precise obligation concerning the manner of securing compliance, as to which there was a wide degree of discretion. It could not therefore be directly effective so as to be capable of being invoked by Mrs McDermott and Mrs Cotter before the Irish courts.

2. Questions referred to the ECJ

By an order of 13 May 1985, the High Court, Dublin referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Do the provisions of Directive 79/7/EEC, and in particular Article 4 thereof, have direct effect in the Republic of Ireland as and from the 23rd day of December 1984 so as to confer enforceable Community rights upon married women such as the prosecutrices in the circumstances of the present cases?

2) If the answer to question (1) is in the affirmative, does this mean that national provisions such as those contained in Chapters 4 and 6 of Part 2 of the Social Welfare (Consolidation) Act 1981, as amended, are inactable and that the prosecutrices, as married women living in a Member State which had failed to repeal or adapt such provisions, are entitled to equal treatment in relation to the relevant social welfare benefits as and from the 23rd day of

December 1984 and have rights of action in that regard which are enforceable by them against such Member State?

3. The judgment of the ECJ

The reasoning given by the Court, when answering the above questions, was very much similar to that given in the first question of the previous case (Case 71/85 — *FNV),* the difference being the former's wording and concise form.

In reply to the questions submitted to it, the Court ruled that:

1) *Where Council Directive 79/7/EEC of 19 December 1978 has not been implemented, Article 4(1) of that Directive, which prohibits all discrimination on grounds of sex in matters of social security, could be relied on as from 23 December 1984 in order to preclude the application of any national provision inconsistent with it.*

2) *In the absence of measures implementing Article 4(1) of the Directive, women are entitled to have the same rules applied to them as are applied to men who are in the same situation, since, where the Directive has not been implemented, those rules remain the only valid point of reference.*

Case 30/85
J.W. TEULING v BEDRIJFSVERENIGING VOOR DE CHEMISCHE INDUSTRIE
Date of judgment:
11 June 1987
Reference:
[1987] ECR 2497
Content:
Equal treatment in matters of social security (Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 and Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

Mrs Teuling worked without interruption for various employers from 1955 until September 1972, when she became incapable of working. From that date, she received benefits under the Wet op de Arbeidsson-geschiktheidsverzekering (Insurance Law). Since the entry into force in 1975 of the provisions concerning the daily minimum wage, she had been entitled to a minimum benefit equal to the net amount of the statutory minimum wage.

By a letter of 18 June 1984, the Bedrijfsvereniging voor de Chemische Industrie informed Mrs Teuling that as a result of the Law of 29 December 1982, her benefit under the Insurance Law would from 1 January 1984, be calculated not on the basis of the minimum daily wage under that law but on the basis of the wage which she earned before becoming incapacitated for work (which was lower). Under the transitional measures, the reduction leading to the new level of benefit would take place in stages with reductions on 1 January and 1 July 1984. However, another provision came into effect on 1 January 1984, (namely a new version of Article 97 of the Algemene Arbeidsongeschiktheidswet (General Law) which gave a right to benefits under the General Law to women receiving benefits under the Insurance Law in respect of an incapacity for work which had arisen before 1 October 1976 (the date on which the General Law came into force). Women had previously been disqualified for benefit under the General Law simply by virtue of being married. Consequently, with effect from 1 January 1984, Mrs Teuling became entitled to a minimum benefit under the General Law equal to 70 % of the legal minimum wage, as her benefit under the Insurance Law, calculated on the basis of the last salary which she earned before becoming incapacitated for work, was less than the benefit under the General Law.

Mrs Teuling claimed that during the period from 1 January to 1 April 1984 (when her husband died), she was not able to obtain 'family support' supplements because account was taken of her husband's income. That constituted discrimination against her and was incompatible with Article 4(1) of Directive 79/7.

2. Questions referred to the ECJ

By an order of 4 February 1985, the Raad van Beroep, Amsterdam, referred four questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is a system of entitlement to benefits in respect of incapacity for work under which the amount of the benefit is determined in part by marital status and by the income earned from or in connection with work of the spouse, or by the existence of a dependent child, consistent with Article 4(1) of Council Directive 79/7/EEC of 19 December 1978?

2) a) Is the law of 29 December 1982 (Staatblad 737) abolishing the guarantee for all persons covered by the Wet op de Arbeidsongeschiktheidsverzekering that the (net) benefits are to be at least equal to the (net) statutory minimum wage, with the result that the guarantee now applies only to persons who satisfy the conditions of Article 10(4) of the Algemene Arbeidsongeschiktheidswet, consistent with Article 4(1) of the Directive referred to in question (1)?

b) Having regard to the period referred to in Article 8 of the Directive and to the provisions of Article 5 thereof and Article 5 of the Treaty establishing the European Economic Community, is it relevant to the answer to be given to question (2)(a) that the said law was adopted on 29 December 1982 and entered into force partially on 1 January 1983, whilst provision is made for its material consequences to take effect in stages both before and after the expiry of the period referred to in Article 8 of the Directive?

3) Are the provisions of Council Directive 76/207/EEC of 9 February 1976 also relevant as regards the answers to the foregoing questions?

4) If question (1) or question (2)(a), or both, are answered in the negative, does that mean that the relevant provision of Community law — which is thus deemed to have been infringed — may be relied upon directly by the persons concerned as against the national authorities?

3. *The judgment of the ECJ*

As far as question (1) was concerned, the Court started its reasoning by stating that Article 4(1) of Directive 79/7 prohibited, with regard to social security, all discrimination whatsoever on grounds of sex either directly or indirectly, by reference, in particular, to marital or family status, in particular concerning the calculation of benefits including increases due in respect of a spouse or for dependents and the conditions governing the duration and retention of entitlement benefits. The Court then pointed out that a system of benefits in which, as in this case, the supplements provided were not directly based on the sex of the beneficiaries but on account of their marital status or family situation, and in respect of which it emerged that a considerably smaller proportion of women than men were entitled to such supplements, was contrary to Article 4(1) of the Directive, if that system of benefits could not be justified by reasons which excluded discrimination on grounds of sex. However, concluded the Court, if supplements to a minimum social security benefit were intended, where beneficiaries had no income from work, to prevent the benefit from falling below the minimum subsistence level for persons who, by virtue of the fact that they had a dependent spouse or children, bore heavier burdens than single persons, such supplements could be justified under the Directive.

In answering question (2)(a), the Court observed that, after the entry into force of the Law of 29 December 1992, the position of married persons entitled to benefits under the Insurance Law at the minimum rate, who could not produce evidence that they had a dependent spouse, became less favourable, since their benefits were reduced to 70 % of the statutory minimum wage with effect from 1 January 1984. It was clear that within the group of persons entitled to benefits under the Insurance Law, a much greater number of (married) men than (married) women came within the scope of Article 10(4) of the General Law. The Court then mentioned the arguments of the Netherlands Government, that the Law of 29 December 1982, embodied a policy which sought to ensure, having regard to available resources, a minimum subsistence income for all workers suffering from an incapacity for work. In that regard, it recognised that Community law did not prevent a Member State, in controlling its social expenditure, from taking account of the fact that the need of beneficiaries who had a dependent child or spouse or whose spouse had a very small income was greater than that of single persons.

In view of the replies given to questions (1) and (2)(a), the Court said that it was no longer necessary to consider questions (2)(b), (3) or (4).

In answer to the questions referred to it, the Court held that:

1) Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 is to be interpreted as meaning

that a system of benefits in respect of incapacity for work under which the amount of the benefit is determined in part by marital status and by the income earned from or in connection with work of a spouse is consistent with that provision if the system seeks to ensure adequate minimum subsistence income for beneficiaries who have a dependent spouse or children, by means of a supplement to the social security benefit which compensates for the greater burdens they bear in comparison with single persons.

2) *Article 4(1) of Directive 79/7/EEC is to be interpreted as meaning that legislation under which the guarantee previously applicable to all workers suffering from an incapacity for work whose income was approximately equal to the statutory minimum wage that their (net) benefit would be at least equal to the (net) statutory minimum wage is restricted to persons having a dependent spouse or child or whose spouse has a very small income is compatible with that provision.*

Case 384/85
JEAN BORRIE CLARKE v CHIEF ADJUDICATION OFFICER
Date of judgment:
24 June 1987
Reference:
[1987] ECR 2865
Content:
Equal treatment in matters of social security (Article 4(1) of Council Directive 79/7/EEC of 19 December 1979).

1. Facts and procedure

Mrs Clarke, a married woman residing with her husband, had not been gainfully employed since January 1983, as a result of an illness which incapacitated her for work. On 17 April 1983, she made a claim for a non-contributory invalidity pension ('NCIP'). The insurance officer and, on appeal, the local tribunal, rejected the claim for NCIP on the grounds that Mrs Clarke had not proved that she was incapable of normal household duties. Both the decision of the insurance officer and that of the tribunal were given before the passing of the Health and Social Security Act 1984, and, therefore, they did not have to consider the question of severe disablement allowance. However, the Social Security Commissioner on appeal held that since the claim covered the period to August 1985 it was necessary for him to consider severe disablement allowance.

In an interim decision of 25 November 1985, the Social Security Commissioner decided that Mrs Clarke satisfied the condition of incapacity for work well before 10 September 1984, but that she did not satisfy the condition of incapacity for normal household duties before 19 November 1984.

Mrs Clarke then contended that after 22 December 1984, she could claim severe disablement allowance by relying on Article 4(1) of Directive 79/7/EEC, without proof of the additional condition applicable only to married women of her age who were living with their husbands.

2. Question referred to the ECJ

By order of 25 November 1985, the Social Security Commissioner, London, referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

Does Article 4(1) of the Council Directive 79/7/EEC have a direct effect such that a woman can from 22 December 1984 qualify for an invalidity benefit by reason of her having before that date satisfied conditions sufficient to enable a man to qualify for that benefit notwithstanding that she did not also before that date satisfy a further condition applicable under domestic law only to a class of women of whom she was one?

3. The judgment of the ECJ

First of all, the Court mentioned its decision in Case 286/85 — *McDermott and Cotter I,* where it had held that standing by itself, and in the light of the objective and contents of the Directive, Article 4(1) was sufficiently precise to be relied upon in legal proceedings and applied by a court. Moreover, whilst Article 5 of the Directive left to Member States a discretion with regard to methods, it prescribed the result those methods should achieve, namely the abolition of any provisions contrary to the principle of equal treatment. The Court then emphasised that the Directive did not provide for any derogation from the principle of equal treatment laid down in Article 4(1), in order to authorise the extension of the discriminatory effects of earlier provisions of national law. Consequently, Article 4(1) of the Directive in no way conferred on Member States the power to make conditional or to limit the application of the principle of equal treatment within its field of application and it was sufficiently precise and unconditional to allow individuals, in the absence of appropriate implementing measures, to rely upon it before the national courts as from 23 December 1984, in order to preclude the application of any provision of national law inconsistent with that article. The Court again recalled its decision in *McDermott and Cotter I* where it clearly followed from

Article 4(1) of the Directive that, as from 23 December 1984, women were entitled to be treated in the same manner, and to have the same rules applied to them, as men who were also in the same situation, since, where the Directive had not been implemented correctly, those rules remained the only valid point of reference. In the present case, said the Court, that meant that if, as from 23 December 1984, a man in the same position as a woman would automatically be entitled to the new severe disablement allowance under national law without having to re-establish his rights, a woman would also be entitled to that allowance without having to satisfy an additional condition applicable before that date exclusively to married women.

On those grounds, the Court ruled that:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security could be relied upon as from 23 December 1984 in order to prevent the extension beyond that date of the effects of an earlier national provision inconsistent with Article 4(1). In the absence of appropriate measures for the implementation of that article, women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the Directive has not been implemented, those rules remain the only valid point of reference.

Case 192/85
GEORGE NOEL NEWSTEAD v DEPARTMENT OF TRANSPORT AND HER MAJESTY'S TREASURY
Date of judgment:
3 December 1987
Reference:
[1987] ECR 4753
Content:
Equal treatment for men and women — Pension for surviving spouse — Requirement to contribute (EEC Treaty, Article 119, Council Directive 75/117/EEC of 10 February 1975, Council Directive 76/207/EEC of 9 February 1976, and Council Directive 86/378/EEC of 24 July 1986).

1. Facts and procedure

Mr Newstead was a civil servant employed by the Department of Transport and the Treasury. The occupational scheme to which Mr Newstead belonged made provision for a widow's pension fund. That fund was financed in part by the contributions of civil servants. However, although male civil servants, whatever their marital status, were obliged to contribute to the fund, a deduction of 1.5 % being made from their gross salary, female civil servants were never obliged to contribute to the fund but could be permitted to do so in certain circumstances.

Mr Newstead, who at the age of 58, was a convinced bachelor, argued that the obligation to contribute to the widows' pension fund had the effect of discriminating against him in comparison with a female civil servant in an equivalent post, since she was not obliged to give up temporarily 1.5 % of her salary as a contribution to the fund (the fund would be returned to him or paid to his estate). The industrial tribunal dismissed his application. Mr Newstead appealed against that decision to the Employment Appeal Tribunal.

2. Questions referred to the ECJ

By order of 11 June 1985, the Employment Appeal Tribunal referred four questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is it a breach of Article 119 (read on its own or together with the Equal Pay Directive 75/117) for the employer to pay men and women the same gross salary but to require an unmarried male pensionable civil servant (such as the appellant) to pay (by way of deduction from his salary) 1.5 % of his gross salary as a contribution to provision of a widow's pension of the sort in the present case, and which contributions cannot be repaid until his death or he leaves the Civil Service, when a similar requirement is not imposed upon an unmarried female pensionable civil servant for the purposes of a widower's pension?

2) If the answer to question (1) is in the affirmative, does Article 119 (read on its own or together with the Equal Pay Directive) have direct effect in Member States so as to confer enforceable rights on individuals in the circumstances of the present case?

3) Is it a breach of the Equal Treatment Directive 76/ 207/EEC for the employer to pay men and women the same gross salary but to require an unmarried male pensionable civil servant (such as the appellant) to pay (by way of deduction from his salary) 1.5 % of his gross salary as a contribution to provision of a widow's pension of the sort in the present case and which contributions cannot be repaid until his death or he leaves the Civil Service, when a similar requirement is not imposed upon unmarried female pensionable civil servant for the purposes of a widower's pension?

4) If the answer to question (3) is in the affirmative, does the Equal Treatment Directive have direct effect in Member States so as to confer enforceable rights on individuals in the circumstances of the present case?

3. The judgment of the ECJ

In order to reply to the first question, the Court decided to determine first of all whether the present case fell within the scope of Article 119. It pointed out that the factor which gave rise to the disparity at issue was neither a benefit paid to workers nor a contribution paid by the employer to a pension scheme on behalf of the employee, which could be regarded as 'consideration ... which the worker received, directly or indirectly' as referred to in Article 119. The disparity at issue was in fact the result of the deduction of a contribution to an occupational pension scheme which like a contribution to a statutory social security scheme, should be considered to fall within the scope of Article 118 of the Treaty, not of Article 119. Unlike the circumstances in Cases 69/80 — *Worringham* and 23/ 83 —*Liefting,* the deduction in question resulted in a reduction in net pay because of a contribution paid to a social security scheme and in no way affected gross pay (as it did in the aforementioned cases), on the basis of which the other salary-related benefits were normally calculated. The Court concluded therefore that the present case did not fall within the scope of Article 119 of the Treaty and that Directive 75/117 did not affect this conclusion.

In view of its answer to question (1), the Court did not reply to question (2).

As far as the third question was concerned, the Court first emphasised that Directive 76/207 was not intended to apply in social security matters. In fact, none of the directives adopted by the Council pursuant to Article 1(2) of that Directive applied to survivors' pensions, whether provided for under a statutory social security scheme or under an occupational scheme. Moreover, Article 3(3) of Directive 79/7 envisaged that application of the principle of equal treatment to occupational social security schemes was subject to the adoption of further provisions by the Council, acting on a proposal from the Commission. While these proceedings were in progress, the Council, acting pursuant to the aforesaid article, adopted Directive 86/378 of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes. However, its Article 9 provided that Member States could defer compulsory application of the principle of equal treatment with regard to (b) survivors' pensions until a directive would require the principle of equal treatment in statutory social security schemes in that regard. In view of the absence of more specific directives extending the application of the principle of equal treatment to benefits for surviving spouses, whether these were provided under a statutory social security scheme or under an occupational scheme, and having regard to the fact that the difference in treatment affecting Mr Newstead as regards the immediate enjoyment of all his net pay was the direct consequence of a difference in treatment in the occupational scheme in question with regard to this type of benefit, the Court concluded that the case under examination fell within the exception to the application of the principle of equal treatment provided for in Article 1(2) of Directive 76/207.

Considering its answer to question (3), the Court did not reply question (4).

Based on this reasoning, the Court held that:

1) *Article 119 of the EEC Treaty, read together with Council Directive 75/117 of 10 February 1975, does not prevent an employer from paying men and women the same gross salary but making a deduction of 1.5 % of the gross salary of men only, even those who are unmarried, as a contribution to a widow's pension fund provided for under an occupational scheme which is a substitute for a statutory social security scheme.*

2) *Council Directive 76/207 of 9 February 1976 does not prevent an employer from paying men and women the same gross salary but making a deduction of 1.5 % of the gross salary of men only, even those who are unmarried, as a contribution to a widow's pension fund provided for under an occupational scheme which is a substitute for a statutory social security scheme.*

Case 157/86
MARY MURPHY AND OTHERS v BORD TELECOM EIREANN
Date of judgment:
4 February 1988
Reference:
[1988] ECR 673
Content:
Equal pay for men and women (EEC Treaty, Article 119 and Article 1 of Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

Mrs Murphy and 28 other women were employed by Bord Telecom Eireann as factory workers and were engaged in such tasks as dismantling, cleaning, oiling and reassembling telephones and other equipment. They claimed the right to be paid at the same rate as a specified male worker employed in the same factory as a stores labourer and engaged in cleaning, collecting and delivering equipment and components and in lending general assistance as required.

The Equality Officer to whom the claim was referred in the first instance, under the procedure prescribed by the Anti-Discrimination (Pay) Act 1974, considered the claimants' work to be of higher value taken as a whole than that of the male worker and, consequently, did not constitute 'like work' within the meaning of the above Act. The Equality Officer, therefore, found herself unable on that ground alone to make a recommendation that the claimants should be paid at the same rate as the male worker. That being so, the Equality Officer decided that it was necessary to consider whether the difference in pay amounted to discrimination on grounds of sex. Those conclusions were upheld on appeal by the Labour Court and Mrs Murphy and her colleagues then appealed on a point of law to the High Court.

2. Questions referred to the ECJ

By an order of 4 March 1986, the High Court of Ireland referred three questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1) Does the Community law principle of equal pay for equal work extend to a claim for equal pay on the basis of work of equal value in circumstances where the work of the claimant has been assessed to be of higher value than that of the person with whom the claimant sought comparison?

2) If the answer to question (1) is in the affirmative is that answer dependent on the provisions of Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women?

3) If so, is Article 1 of the said Directive directly applicable in Member States?

3. The judgment of the ECJ

In replying to the first question, the Court admitted that Article 119 expressly required the application of the principle of equal pay for men and women solely in the case of equal work or, according to various of its decisions, in the case of work of equal value, and not in the case of work of unequal value. Nevertheless, said the Court, if that principle forbade workers of one sex engaged in work of equal value to that of workers of the opposite sex to be paid a lower wage than the latter on grounds of sex, it a fortiori prohibited such a difference in pay where the lower-paid category of workers was engaged in work of higher value. Consequently, to adopt a contrary interpretation would be tantamount to rendering the principle of equal pay ineffective and nugatory. The Court then agreed with the Irish Government as to the fact that in that case an employer would easily be able to circumvent the principle by assigning additional or more oner-

ous duties to workers of a particular sex, who could then be paid a lower wage. Subsequently, the Court concluded that in so far as it was established that the difference in wage levels in question was based on discrimination on grounds of sex, Article 119 of the EEC Treaty was directly applicable in the sense that the workers concerned could rely on it in legal proceedings in order to obtain equal pay within the meaning of the provision and in the sense that national courts or tribunals should take it into account as a constituent part of Community law.

In the opinion of the Court, the proceedings before the national court were capable of being resolved by means of an interpretation of Article 119 alone. Because of this, it was unnecessary to reply to the second, and third questions concerning the interpretation of Directive 75/117.

In reply to the questions submitted to it, the Court ruled that:

Article 119 of the EEC Treaty must be interpreted as covering the case where a worker who relies on that provision to obtain equal pay within the meaning thereof is engaged in work of higher value than that of the person with whom a comparison is to be made.

Case 80/87
A. DIK, A. MENKUTOS-DEMIRCI AND H.G LAAR-VREEMANN v COLLEGE VAN BURGERMEESTER EN WETHOUDERS ARNHEM AND WINTERSWIJK
Date of judgment:
8 March 1988
Reference:
[1988] ECR 1601
Content:
Social Security — Equal treatment of men and women (Articles 4(1) and 8 of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

The discriminatory rules, namely Article 13(1), point 1, of the Wet Werkloosheidsvoorziening (Law on Unemployment Benefit) ('WWV'), which excluded from the 'right to benefit workers who, having the status of married women, could not be described as 'wage-earners' (kostwinster) under the rules adopted by the competent Minister, after consulting the Central Commission, or who did not live permanently separated from their husbands', was repealed with retroactive effect as from 23 December 1984, by the Law of 24 April 1985. Article II of the Law of 24 April 1985, nevertheless provided a transitional period to the effect that the repeal of Article 13(1), point 1, of the WWV would not apply to workers whose unemployment commenced before 23 December 1984 unless they were in receipt at that date of the benefit under the Werkloosheidswet (Law on Unemployment) ('WW').

Before 23 December 1984, all the three claimants lost their employment and their entitlement to the benefit under the WW because the maximum period for receiving that benefit had expired. After that date they were refused unemployment benefit under the WWV pursuant to Article 13(1), point 1 thereof. Mrs Dik and Mrs Menkutos-Demirci thereupon challenged before the Raad van Beroep the decisions by which the College van Burgemeester en Wethouders, Arnhem, had rejected their claims. So did Mrs Laar-Vreeman as regards the decision taken by the same governmental body in Winterswijk. In their view, the effect of the aforementioned transitional provision was to prolong the discriminatory basis of entitlement to unemployment benefit in the case of married women who had lost their employment and their entitlement to the benefit under the WW before 23 December 1984, and who would have been entitled to benefit under the WWV if Article 13(1), point 1, had never existed.

2. Questions referred to the ECJ

By decision of 19 February 1987, the Raad van Beroep, Arnhem, referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Does Directive 79/7/EEC confer on the Member States a discretion to include in the law implementing the Directive a transitional provision on the basis of which a 'wage-earner' requirement continues to apply even after 23 December 1984 to a married woman who became unemployed before 23 December 1984?

2) Is it compatible with the Directive for a transitional provision such as that referred to in the first question to be given retroactive effect as from the date at which the period prescribed in Article 8(1) of the Directive expired?

3. The judgment of the ECJ

As a basis for its reply to question (1), the Court first mentioned its decision in Case 286/85 — *McDermott and Cotter I*. In that case the Court had held that, taken by itself and in the light of the objective and content of Directive 79/7, Article 4(1) was sufficiently precise to be relied upon by an individual and applied by the courts. Moreover, whilst Article 5 left the Member States a discretion with regard to methods, it prescribed the re-

sult which those methods should achieve, i.e. the abolition of any provisions contrary to the principle of equal treatment. Secondly, the Court made reference to its decision in Case 384/85 — *Borrie Clarke,* where it emphasised that the Directive did not provide for any derogation from the principle of equal treatment laid down in Article 4(1) in order to authorise the extension of the discriminatory effects of earlier provisions of national law. It followed that a Member State could not maintain beyond 23 December 1984, any inequalities of treatment attributable to the fact that the conditions for entitlement to benefit were those which applied before that date. That was so notwithstanding the fact that those inequalities were the result of transitional provisions. Finally the Court added that it also followed from its decision in *McDermott and Cotter I* that by virtue of Article 4(1) of the Directive women were entitled as from 23 December 1984, to be treated in the same manner and to have applied to them the scheme which applied to men in the same situation, since, where the Directive had not been implemented correctly, that scheme remained the only valid point of reference. In the present case, said the Court, that meant that, if a man who lost his employment and his right to benefit under the WW before 23 December 1984 and who did not obtain benefit under the WWV before that date was entitled to benefit under the WWV after 23 December 1984, a woman in the same position would also be entitled to such benefit without having to satisfy any additional condition applicable before that date exclusively to married women.

As for the second question, which concerned the retroactive effect of a transitional provision, the Court, after agreeing with the Commission, said that if national implementing measures were adopted belatedly, namely after the expiry of the period in question, the simultaneous entry into force of Directive 79/7 in all Member States was ensured by giving such measures effect retroactively as from 23 December 1984. Nevertheless, the Court made clear that such belatedly-adopted implementing measures should fully respect the rights which Article 4(1) had conferred on individuals in a Member State as from the expiry of the period allowed to the Member States for complying with it.

In reply to the questions submitted to it, the Court ruled as follows:

1) *Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that it does not confer on the Member States a discretion to include in the national law implementing the Directive a transitional provision on the basis of which a married woman who became unemployed before 23 December 1984 remains subject even after that date to the requirement that she be a 'wage-earner'.*

2) *Article 8 of Directive 79/7/EEC must be interpreted as meaning that a Member State which adopts implementing measures after the expiry of the period prescribed by the Directive may fix the date of their entry into force retroactively to the date of expiry of that period, provided that the rights which Article 4(1) of the Directive confers on individuals in the Member States as from the expiry of the said period are respected.*

Case 318/86
COMMISSION OF THE EUROPEAN COMMUNITIES v FRENCH REPUBLIC
Date of judgment:
30 June 1988
Reference:
[1988] ECR 3559
Content:
Equal treatment for men and women — Access to posts in the public service (Article 2(2) of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

Under French legislation, the only criterion for civil service recruitment was a candidate's grading after a single-entry competition open to both men and women. However, in 1982, French Law No 82-380 of 7 May 1982, inserted a new Article 18 *bis* into the Order of 4 February 1959, on the *Statut General des Fonctionnaires* (General Staff Regulations) enabling separate recruitment to be organised for certain corps in the French civil service where sex constituted a determining factor for the duties involved. That provision was re-enacted by Article 21 of Law No 84-16 of 11 January 1984, which was in the following terms: 'For certain corps a list of which will be drawn up by decree of the Conseil d'Etat ... separate recruitment may be organised for men and women if belonging to one or other sex constitutes a determining factor for the performance of the duties carried out by persons in such corps'. The list of corps for which separate recruitment could thus be organised was laid down by Decree No 82-886 of 15 October 1982, and maintained in force by Decree No 84-957 of 25 October 1984. The list specified: police superintendents, captains and officers, inspectors, investigators and police constables and policemen in the national police force; assistants at the *maisons d'education* of the Legion d'honneur; certain corps in the external departments of the prison service, namely management, technical and vocational training and custodial staff; customs inspectors, investigators and officers; teachers; physical education and sports teachers; and assistant teachers.

During the pre-litigation procedure, the Commission arrived at the conclusion that in the case of certain corps the derogation from the principle of equal treatment for men and women provided for in French legislation did not exceed the limits laid down in Article 2(2) of Directive 76/207; the French Government also withdrew certain other corps from the above mentioned list.

On 8 December 1986, the Commission brought an action before the Court under Article 169 of the EEC Treaty for a declaration that by failing within the prescribed period to take all the measures necessary for the full and proper implementation of Directive 76/207 and, in particular, by maintaining a system of separate recruitment according to sex for appointment to certain civil service corps, contrary to the requirements of that Directive, the French Republic had failed to fulfil its obligation under the Treaty.

2. The judgment of the ECJ

After the hearing, the Commission withdrew its action in regard to teachers and assistant teachers of physical education and sports, since those corps had been removed in the meantime from the contested list by a decree of 29 April 1988. With regard to management, technical and vocational training staff in the external departments of the prison service, the French Government admitted that the derogation provided for in its legislation was not in conformity with the Directive and announced its intention to remove that corps from the contested list.

The issue between the parties was, therefore, limited to the requirements of the Directive in relation to head warders of prisons and to the five corps in the national police force. The category of head warders responsible for the direction of prisons did not appear as such in the contested list, since the head warders in question did not

constitute a 'corps' within the meaning of the French legislation. On the other hand, the list referred to the *corps du personnel de surveillance* (corps of custodial staff) as part of the corps in the external departments of the prison service for which separate recruitment of men and women could be provided for.

As far as custodial staff in general was concerned, the Commission admitted that the specific nature of the post of warder and the conditions under which warders carried out their activities justified reserving such posts primarily for men in male prisons and primarily for women in female prisons and to that extent such a policy did not go beyond the limits laid down in Article 2(2) of the Directive. However, the Commission considered that an exception should have been made in the case of *surveillants chefs* (head warders) in charge of prisons as they carried out management functions which involved no regular contact with the prisoners. Their duties were thus comparable to those of a *directeur d'établissement* (governor of a penal institution), whose sex was not a determining factor. The French Government contended that governors belonged to the management staff corps *(personnel de direction)* whereas head warders always belonged to the custodial staff corps, even if they were required to take charge of a prison. The Court observed that the custodial staff corps was composed of different grades, and that the question to be considered accordingly concerned a corps in respect of which separate recruitment of male and female candidates was regarded as justified under Article 2(2) of the Directive, in which promotion was carried out without discrimination but in which promotion to the highest grade could, in certain cases, lead to a situation in which the person concerned carried out activities of such a nature that sex did not constitute a determining factor. Although the Court agreed with the Commission's view that the French authorities could have avoided the problem by organising their departments differently, it admitted that there could be reasons for appointing to the post of head warder only persons having actually performed the duties of a warder. The French Government gave the Court to understand that such reasons existed in this case, having regard to the need to provide for opportunities for promotion within the corps of warders and to the fact that the professional experience acquired in that corps was desirable for the performance of the duties of a prison governor. As the Commission did not show that those arguments were not valid, its complaint was rejected by the Court.

The second complaint referred to the following corps in the national police force which were included in the contested list: *commissaires* (inspectors and superintendents), *commandants* and *officers de paix* (peace officials), *inspecteurs* (detectives), *enquêteurs* (investigators), *gradés* (sergeants) and *gardiens de la paix* (constables). The arguments conducted before the Court showed that the two parties agreed that certain activities connected with the duties performed by the corps of the national police force could be performed by men only or, depending on the case, by women only, whereas certain other duties could be performed by any member of the police force, whether male or female. The dispute concerned the consequences arising from such a situation in relation to the application of Article 2(2) of the Directive. The Court sustained that the exceptions provided for in Article 2(2) could relate only to specific activities, that they should be sufficiently transparent so as to permit effective supervision by the Commission and that, in principle, they should be capable of being adapted to social developments. Although, according to the Court, the last requirement gave rise to no difficulties in this case, French law was not in accordance with the other two requirements. As regards the requirement of transparency, the Court concluded that it was not fulfilled. Under the system of separate recruitment, the percentages of posts to be allotted to men and women respectively were fixed in the decision ordering the holding of a competition; the fixing of those percentages was not governed by any objective criterion defined in a legislative provision. According to the Court, this lack of transparency also had conse-

quences for compliance with the second requirement laid down by the Directive, which related to the activities involved. The contested system of recruitment made it impossible to exercise any form of supervision, not only by the Commission and the courts, but also by persons adversely affected by discriminatory measures, as to the verification of whether the percentages fixed for the recruitment of each sex actually corresponded to specific activities for which the sex of the persons to be employed constituted a determining factor within the meaning of Article 2(2) of the Directive. Finally the Court stated that the principle of proportionality made it necessary to reconcile, as far as possible, equal treatment of men and women with the requirements which were decisive for the carrying out of the specific activity in question. Consequently, the Court upheld this aspect of the Commission's complaint.

On those grounds, the Court:

1) *Declares that by retaining in force a system of separate recruitment according to sex, contrary to the requirements of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, for appointment to the management staff corps and the corps of technical staff and vocational training staff in the external departments of the prison service as well as to all of the five corps in the national police force, the French Republic has failed to fulfil its obligations under the Treaty.*

2) *Dismisses the remainder of the application.*

3) *Orders each of the parties to bear its own costs.*

Case 312/86
COMMISSION OF THE EUROPEAN COMMUNITIES v FRENCH REPUBLIC
Date of judgment:
25 October 1988
Reference:
[1988] ECR 6315
Content:
Equal treatment for men and women — Transposition of Directive 76/207 (Articles 2(3)(4), 5(2)(b) and 9(1) of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

With a view to ensuring the application of Directive 76/207 in France, Law No 83-635 of 13 July 1983, amending the Labour Code and the Criminal Code as regards equality at work for women and men was brought into force. Article 1 of that law redrafted Article L 123-2 of the Labour Code to provide that any term reserving the benefit of any measures to employees on grounds of sex included in any collective labour agreement should be void, except where such a clause was intended to implement the provisions relating to pregnancy, nursing or pre-natal and post-natal rest. The first paragraph of Article 19 of that law provided, however, that the abovementioned provision in the Labour Code did not prohibit the application of usages, terms of contracts of employment or collective agreements in force on the date which the law was promulgated granting special rights to women. The second paragraph of that article provided that employers, groups of employers and groups of employed persons should proceed, by collective negotiation, to bring such terms into conformity with the provisions of the Labour Code mentioned in the law.

The Commission took the view that Article 19 was not in accordance with the Directive. By an application lodged at the Court on 12 December 1986, the Commission brought proceedings pursuant to Article 169 of the EEC Treaty for a declaration that by failing to adopt, within the period prescribed in the first subparagraph of Article 9(1) of Directive 76/207, all measures necessary to secure the full and precise implementation of that Directive and by adopting Article 19 of the Law of 13 July 1983 which conflicted with the requirements of the said Directive, the French Republic had failed to fulfil its obligations under the Treaty.

2. The judgment of the ECJ

In the first place, the Commission considered that some of the special rights for women included in collective agreements could be covered by the exceptions to the application of the Directive provided for in Article 2(3) and (4) thereof which involved, respectively, provisions concerning the protection of women, particularly as regards pregnancy and maternity, and measures to promote equal opportunities for men and women. It was of the opinion, however, that the French legislation, by its generality, made it possible to preserve for an indefinite period measures discriminating as between men and women contrary to the Directive. The French Government alleged that, under French constitutional law, the law should ensure that women had rights equal to those of men in every field. The existence of special rights favouring women was nevertheless considered compatible with the principle of equality when those special rights derived from a concern for protection. In its opinion, the Directive should be interpreted in the same manner. Moreover, it claimed that those special rights were designed to take account of the situation existing in the majority of French households. The Court stated that the exception provided for in Article 2(3) referred in particular to the situation of pregnancy and maternity. In Case 184/83 — *Hofmann,* it held that the protection of woman in relation to maternity was designed to protect the special relationship between a woman and her child over the period which followed pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. The Court then observed that some of the special rights preserved in the French

legislation related to the protection of women in their capacity as older workers or parents — categories to which both men and women could equally belong. The Court maintained that the exception provided for in Article 2(4) was specifically and exclusively designed to allow measures which, although discriminatory in appearance, were in fact intended to eliminate or reduce actual instances of inequality which could exist in the reality of social life. Nothing in the papers of the case, however, made it possible to conclude that a generalised preservation of special rights for women in collective agreements could correspond to the situation envisaged in that provision. Therefore, the Commission's complaint was upheld.

In the second place, the Commission alleged that the second paragraph of Article 19 of French Law No 83-635, authorised the maintenance of discriminatory conditions for an indeterminate period and left their removal to the discretion of the two sides of industry. The law did not provide for any machinery capable of remedying any inadequacy of the results achieved by collective negotiation. The French Government maintained, first of all, that it would be difficult in the circumstances of French society to provide for the immediate removal by legislative act of rights acquired during past negotiations between the two sides of industry. Collective negotiation, in its opinion, was more likely than a legislative measure to influence the behaviour in practice of those involved and thus bring any discrimination to an end. Secondly, the French Government pointed out that, under French labour law, national collective agreements for particular occupations were subject to an approval procedure which enabled the agreement to be extended to the whole of the field of activity concerned. That procedure could be used to ensure that discriminatory measures did not survive. The Court took the view that the French Government's argument that collective negotiation was the only appropriate method of abolishing the special rights in question should be considered in the light of the fact that, according to the information supplied, the requirement that collective agreements should be approved and the possibility that they could be extended by the public authorities had not led to a rapid process of renegotiation. In that regard, the Court observed that, even if that argument were to be accepted, it could not be used to justify national legislation which, several years after the expiry of the period prescribed for the implementation of the Directive, made the two sides of industry responsible for removing certain instances of inequality without laying down any time-limit for compliance with that obligation. Therefore, said the Court, the French Government's argument could not be accepted.

On those grounds, the Court:

1) *Declares that, by failing to adopt within the prescribed period all the measures necessary to secure the full implementation of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, the French Republic has failed to fulfil its obligations under the Treaty.*

2) *Orders the French Republic to pay the costs.*

Joined Cases 48, 106, and 107/88
J.E.G. ACHTERBERG-TE RIELE AND OTHERS v SOCIALE VERZEKERINGSBANK AMSTERDAM
Date of judgment:
27 June 1989
Reference:
[1989] ECR 1963
Content:
Equal treatment for men and women — Social security — Scope ratione personae of Directive 79/7 (Articles 2 and 4 of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

The Netherlands Algemene Ouderdomswet (General Law on Old-Age Insurance) established for the benefit of Netherlands residents and non-residents subject to income tax on the basis of an occupation in the Netherlands, at the age of 65, a general old-age pension scheme, in which pension rights were acquired on the basis of completed periods of insurance. Under this scheme, prior to a legislative amendment which took effect on 1 April 1985, a married woman resident in the Netherlands, whose husband, also a Netherlands resident, was not insured because he was exercising an occupation abroad and was insured there, was herself not insured for the corresponding period. On the other hand, a married man resident in the Netherlands whose wife was excluded from insurance remained affiliated to the pension scheme.

Mrs Achterberg-te Riele and Mrs Bernsen-Gustin had been in paid employment and had given it up voluntarily. Mrs Egberts-Reuversthe had never been in gainful employment. Nonetheless, the Sociale Verzekeringsbank refused to grant a full pension to these women, at the age of 65, on the basis that their husbands, resident in the Netherlands, had for certain periods exercised an occupation abroad and had been insured there. The claimants appealed against that decision to the Raad van Beroep, Utrecht, and the Raad van Beroep, Groningen.

2. Questions referred to the ECJ

By three orders of 12 February and 29 March 1988, the Raad van Beroep, Utrecht and the Raad van Beroep, Groningen, referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

In Case 48/88:

1) Does the expression 'working population' within the meaning of Article 2 of Directive 79/7 also cover a person who has worked as an employed person in a Member State but is no longer available for employment when one of the risks referred to in Article 3 of that Directive materialises?

2) In the case of a system under which the amount of benefit is dependent upon the duration of the insurance cover, must Article 5 of Directive 79/7 be interpreted as placing the Member States under a duty, as regards old-age benefits payable after 22 December 1984 in the pensioner's own right, to eliminate the adverse effect on the level of benefit caused by a difference in treatment with regard to the acquisition of rights to benefit which is contrary to that Directive?

In Case 106/88:

1) Does a person who has not been employed or worked as a self-employed person in a Member State and has not been available for employment because of her choice to devote herself to the care of her family fall within the class of persons described in Article 2 of Directive 79/7?

2) Can an individual who does not fall within the class of persons described in Article 2 of Directive 79/7 rely on Article 4(1) of Directive 79/7 in opposition to a provision of the Algemene Ouderdomswet (Old-Age Insurance Law) which may not be in conformity with the principle of equal treatment contained in

the said Article 4(1) where the Dutch legislature has chosen to implement that principle of Directive 79/7 in the Algemene Ouderdomswet without distinction as to the persons concerned?

3) Is there discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7 where a statutory provision has the effect that because of uninsured periods prior to 23 December 1984 a reduction is made to the old-age pension of a woman who becomes entitled thereto after 22 December 1984, where no such reduction could be made to the pension of a man in comparable circumstances, because the fact she was uninsured during periods prior to 22 December 1984 resulted from her status as a married woman?

In Case 107/88:

1) a) Does a person who has been employed in a Member State but immediately before and upon reaching pensionable age ('old age' as referred to in Article 3(1) of Directive 79/7) was not working because she became involuntarily unemployed and subsequently was no longer available for employment because of her choice to devote herself to the care of her family fall within the class of persons described in Article 2 of that Directive?

b) Does it make any difference if the person concerned ceased to be employed and subsequently was unavailable for employment before Directive 79/7 came into force?

c) If the answer to question (1)(a) is in the negative, what is the answer to the following question: Can an individual who does not fall within the class of persons described in Article 2 of Directive 79/7 rely on Article 4(1) of Directive 79/7 in opposition to a provision of the Algemene Ouderdomswet which may not be in conformity with the principle of equal treatment contained in Article 4(1) where the Dutch legislature has chosen to implement that principle of Directive 79/7 in the Algemene Ouderdomswet without distinction as to the persons concerned?

2) Is there discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7 where a statutory provision has the effect that because of uninsured periods prior to 23 December 1984 a reduction is made to the old-age pension of a woman who becomes entitled thereto after 22 December 1984, where no such reduction could be made to the pension of a man in comparable circumstances, because the fact she was uninsured during periods prior to 23 December 1984 resulted from her status as a married woman?

3. *The judgment of the ECJ*

In reply to the first questions in Cases 48/88 and 106/88 and question (1)(a) in Case 107/88, the Court stated that the scope *ratione personae* of the Directive was determined by Article 2, according to which the Directive applied to the working population, to persons seeking employment and to workers and self-employed persons whose activity was interrupted by one of the risks set out in Article 3(1)(a), i.e., illness, invalidity, old age, an accident at work or an occupational disease, or unemployment. The Court further added that although according to Article 3(1)(a) the Directive applied to statutory schemes which provided protection against old age, including the scheme at issue here, it could be inferred from Article 2 in conjunction with Article 3 of the Directive that the Directive only covered persons who were working at the time when they became entitled to claim an old-age pension or whose occupational activity was previously interrupted by one of the risks set out in Article 3(1)(a). Consequently, the Directive did not apply to persons who had never been available for employment or who had ceased to be available for a reason other than the materialisation of one of the risks referred to by the Direc-

tive. This interpretation, said the Court, was in conformity with the objectives of Community law and the wording of the other provisions in the same field as Directive 79/7 Article 119 of the EEC Treaty, Directive 75/117, and Directive 76/207 implemented equal treatment between men and women not generally but in their capacity as workers.

The answer to question (1)(b) in Case 107/88 should be that the answer to question (1)(a) in that case was not affected if the person concerned stopped working and was no longer available for employment before the last date for transposing the Directive.

In answer to the second question in Case 106/88 and question (1)(c) in Case 107/88, the Court said that it could be inferred from the internal logic of the Directive that Article 4, which defined the extent of the principle of equal treatment, only applied within the scope *ratione personae* and *ratione materiae* of the Directive. Therefore, a person who is not referred to in Article 2 of Directive 79/7 could not rely on Article 4 of the Directive.

In the light of the replies given to these questions, the Court concluded that there was no need to reply to the second question in Case 48/88, the third question in Case 106/88 or the second question in Case 107/88.

In answer to the questions submitted to it, the Court held that:

1) *Article 2 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that the Directive does not apply to persons who have not had an occupation and are not seeking work or to persons who have had an occupation which was not interrupted by one of the risks referred to in Article 3(1)(a) of the Directive and are not seeking work.*

2) *The reply given above is not affected if the person concerned stopped working and was no longer available for employment before the last date for transposing the Directive.*

3) *A person who is not referred to by Article 2 of Directive 7917/EEC may not rely on Article 4 of the Directive.*

Case 171/88
INGRID RINNER-KÜHN v FWW SPEZIAL-GEBÄUDEREINIGUNG GMBH & CO.KG
Date of judgment:
13 July 1989
Reference:
[1989] ECR 2743
Content:
Continued payment of wages in the event of illness — Exclusion of part-time workers (EEC Treaty, Article 119, and Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

The German Law on the continued payment of wages (Lohnfortzahlungsgesetz) of 27 July 1969, provided that an employer should continue to pay wages for a period of up to six weeks to any employee who, after the commencement of his employment and because of no fault of his own, was incapable of working. However, employees whose contract of employment provided for a normal period of work of not more than 10 hours a week or 45 hours a month were excluded from the benefit of that provision.

Mrs Rinner-Kühn had been employed since 1985 as an office-cleaner by FWW which operated an office-cleaning business. On the basis of the abovementioned law and with reference to the fact that Mrs Rinner-Kühn normally worked 10 hours a week, her employer refused to pay her for a period of eight hours in which she was absent owing to illness.

In her application to the Arbeitsgericht (Labour Court) Oldenburg she sought the continued payment of her wages during the absence caused by her illness.

2. Question referred to the ECJ

By an order dated 5 May 1988, the Arbeitsgericht (Labour Court) Oldenburg referred a question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

Are legislative provisions which derogate from the principle that an employer must continue to pay an employee during illness in the case of employed workers whose regular period of work does not exceed 10 hours a week or 45 hours a month compatible with Article 119 of the EEC Treaty and with Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, even though the proportion of women adversely affected by that derogation is considerably greater than that of men?

3. The judgment of the ECJ

In answering the question submitted to it, the Court, first of all, observed that since the payment of wages to an employee in the event of illness fell within the concept of 'pay' within the meaning of the second paragraph of Article 119, the German legislative provision in question accordingly allowed employers to maintain a distinction relating to total pay between two categories of employees: those who worked the minimum number of weekly or monthly hours and those who, although performing the same type of work, did not work the minimum number of hours. The Court also observed that it was clear from the order requesting a preliminary ruling that in percentage terms considerably fewer women than men worked the minimum number of weekly or monthly hours required to entitle an employee to the continued payment of wages in the event of inability to work due to illness. In such a situation, the Court concluded that a provision such as that in question resulted in discrimination against female workers in relation to male workers and should, in principle, be regarded as contrary to the aim of Article 119 of the Treaty. The position would be different only if the distinction between the two categories of employees were justified by objective factors unrelated to any discrimination on grounds of sex (see the judgment in Case 170/84 —

Bilka). The German Government stated, in response to a question put by the Court in the course of the proceedings, that workers whose period of work amounted to less than 10 hours a week or 45 hours a month were not as integrated in, or as dependent on, the undertaking employing them as other workers. In view of those considerations, the Court stated that, in so far as they were only generalisations about certain categories of workers, they did not enable criteria which were both objective and unrelated to any discrimination on grounds of sex to be identified. However, if the Member State could show that the means chosen met a necessary aim of its social policy and that they were suitable and requisite for attaining that aim, the mere fact that the provision affected a much greater number of female workers than male workers could not be regarded as constituting an infringement of Article 119. But this was an issue to be decided by the national court.

In answer to the question referred to it, the Court ruled that:

Article 119 of the EEC Treaty must be interpreted as precluding national legislation which permits employers to exclude employees whose normal working hours do not exceed 10 hours a week or 45 hours a month from the continued payment of wages in the event of illness, if that measure affects a far greater number of women than men, unless the Member State shows that the legislation concerned is justified by objective factors unrelated to any discrimination on grounds of sex.

Case 109/88
HANDELS- OG KONTORFUNKTIONAERERNES FORBUND I DANMARK v DANSK ARBEJDSGIVERFORENING (Danfoss A/S)
Date of judgment:
17 October 1989
Reference:
[1989] ECR 3199
Content:
Equal pay for men and women (EEC Treaty, Article 119, and Articles 1 and 6 of Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

Danfoss A/S paid the same basic wage to employees in the same wage group. Making use of the possibility open to it under Article 9 of the collective agreement made on 9 March 1983, between Dansk Arbejdsgiverforening (Danish Employers' Association) and Handelsog Kontorfunktionaeremes Forbund i Danmark (Union of Commercial and Clerical Employees, Denmark) ('the Employees' Union') it awarded, however, individual pay supplements calculated, *inter alia,* on the basis of mobility, training and seniority.

The Employees' Union first brought Danfoss A/S before the Industrial Arbitration Board, basing its case on the principle of equal pay for the benefit of two female employees, one of whom worked in the laboratory and the other in the reception and dispatch department. In support of its action it showed that in these two wage groups a man's average wage was higher than that of a woman's. In its decision of 16 April 1985, the Industrial Tribunal Arbitration Board considered that, in view of the small number of employees on whose pay the calculations had been based, the Employees' Union did not prove discrimination. The Employees' Union thereupon brought fresh proceedings in which it produced more detailed statistics relating to the wages paid to 157 workers between 1982 and 1986 and showing that the average wage paid to men was 6.85 % higher than that paid to women. The Danish Employers' Association acted on behalf of Danfoss A/S.

2. Questions referred to the ECJ

By order of 12 October 1987, the Faglige Voldgiftsret (a Danish industrial arbitration board) referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) a) Where it is established that a male and female employee do the same work of equal value, who, in the view of the Court of Justice, is the person (employer or employee) on whom the burden lies of proving that a differentiation in pay between the two employees is attributable/not attributable to considerations determined by sex?

   b) Is it incompatible with the Directive on equal pay to give higher pay to male employees, who do the same work as female employees or work of equal value, solely by reference to subjective criteria — for example, staff mobility?

2) a) Is it contrary to the Directive to give to employees of a different sex who do the same work or work of equal value, over and above the basic pay for the job, special supplements for length of service, training, etc?

   b) If so, how can an undertaking, without infringing the Directive, make a differentiation in pay between individual members of staff?

   c) Is it it contrary to the Directive for employees of different sex who do the same work or work of equal value to be paid differently by reference to different training?

3) a) Can an employee or an employees' organisation, by proving that an undertaking with a large number of employees (e.g. at least 100) engaged in work of the same

nature or value pays on average the women less than the men, establish that the Directive is thereby infringed?

b) If so, does it follow that the two groups of employees (men and women) must on average receive the same pay?

4) a) In so far as it may be found that a difference in pay for the same work is attributable to the fact that the two employees are covered by different collective agreements, will it follow from that finding that the Directive does not apply?

b) Is it of importance in considering that question whether the two agreements in each case cover, exclusively or to an overwhelming degree, male and female employees respectively?

3. The judgment of the ECJ

First of all the Court examined the questions concerning the burden of proof (questions (1)(a) and (3)(a)). It pointed out that in a situation where a system of individual pay supplements which was completely lacking in transparency was at issue, female employees could only establish differences in so far as average pay was concerned. They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages was not in fact discriminatory. The Court subsequently added that it followed from Article 6 of the Equal Pay Directive that the concern for effectiveness which underlaid the Directive meant that it should be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments were necessary for the effective implementation of the principle of equality.

Questions (1)(b) and (2)(a) and (c), asked in essence whether the Directive should be interpreted as meaning that where it appeared that the application of the criteria relating to supplements such as mobility, training or length of service, systematically worked to the disadvantage of female employees, the employer could, none the less, and if so on what conditions, justify its use. The Court considered each of the criteria separately. As regards the criteria of mobility, the Court said that a distinction should be made according to whether the criterion of mobility was employed to reward the quality of work done by the employee or was used to reward the employee's adaptability to variable hours and varying places of work. In the first case, the criterion of mobility was undoubtedly wholly neutral from the point of view of sex. Where it systematically worked to the disadvantage of women that could only be because the employer had misapplied it and, therefore, it could not be justified. In the second case, the criterion of mobility could also work to the disadvantage of female employees, who, because of household and family duties for which they were frequently responsible, were not as able as men to organise their working time flexibly. However, after mentioning its decision in Case 170/84 — *Bilka,* the Court maintained that if the employer's practice was based on objectively justified factors unrelated to any discrimination on grounds of sex, the employer could justify the remuneration of such adaptability by showing that it was of importance for the performance of specific tasks entrusted to the employee. The same conclusion applied to the criterion of training, the Court said. As to the criterion of length of service, the Court stated that since the length of service went hand-in-hand with experience and since experience generally enabled the employee to perform his duties better, the employer was free to reward it without having to establish the importance it had in the performance of specific tasks entrusted to the employee.

In view of the above, the Court was of the opinion that question (2)(b) did not call for an answer.

As the collective agreement of 9 March 1983 was the only one at issue in the present case, the Court

concluded that it was not necessary to answer question (4).

The Court answered the questions referred to it, as follows:

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women must be interpreted as meaning that:

1) *Where an undertaking applies a system of pay which is totally lacking in transparency it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker established, in relation to a relatively large number of employees, that the average pay for women is less than that for men.*

2) *Where it appears that the application of criteria for additional payments such as mobility, training or the length or service of the employee systematically works to the disadvantage of female employees:*

- *the employer may justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee, but not if that criterion is understood as covering the quality of the work done by the employee;*

- *the employer may justify recourse to the criterion of training by showing that such training is of importance for the performance of the specific tasks which are entrusted to the employee;*

- *the employer does not have to provide special justification for recourse to the criterion of length of service.*

Case C-102/88
M.L. RUZIUS-WILBRINK v BESTUUR VAN DE BEDRIJSVERENIGING VOOR OVERHEIDS-DIENSTEN
Date of judgment:
13 December 1989
Reference:
[1989] ECR 4311
Content:
Equal treatment for men and women — Social security — Part-time work (Article 4(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

Article 6 of the Algemene Arbeidsongeschiktheidswet (Law on incapacity for work) of 11 December 1975 ('the 1975 Law'), granted entitlement to a disability allowance to insured persons aged 17 or over who became incapable of working, where, in the year immediately preceding the day on which they had become incapable of working, they received income exceeding 15 % of the minimum wage. The condition relating to income did not apply to insured persons who were already suffering from incapacity for work on reaching the age of 17 years; self-employed persons working on a full-time basis whose income was lower than the minimum wage; students without income; or unmarried persons who kept houses for their parents or for unmarried brothers or sisters. Articles 10 and 12 of the 1975 Law provided that the disability allowance was to be determined by applying a percentage, determined according to the degree of disability, to a basic amount corresponding to a minimum daily wage, which varied according to the civil status of the person concerned, the existence of any dependent children and the amount of income actually received. The amount thus arrived at, known as the 'minimum subsistence income', was intended to guarantee a minimum income depending on the needs of the person concerned. However, pursuant to Article 10(5), that basic amount was not applied if, in the year immediately prior to the onset of the disability of the person concerned, he did not work for a period to be considered normal in his occupation and as a result thereof earned less than an amount 260 times the basic amount normally applicable. In such cases, the average daily income was taken as the basic amount.

By decision of 15 October 1985, the Bestuur van de Bedrijfsvereniging voor Overheidsdiensten granted Mrs Ruzius-Wilbrink a disability allowance calculated, pursuant to Article 10(5) of the 1975 Law, on the basis of her average daily earnings in the year immediately prior to the onset of her disability (18 hours a week). She challenged that decision before the Raad van Beroep on the ground that Article 10(5) gave rise to indirect discrimination against women prohibited by Directive 79/7.

2. Questions referred to the ECJ

By order of 10 March 1988, the Raad van Beroep te Groningen referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is a system of allowances for (not unemployed) workers in the event of incapacity for work which provides for allowances at the level of the minimum subsistence income except in cases where the wage previously earned by the person entitled to the allowance was, in part because he or she was working on a part-time basis, below that level in accordance with Article 4(1) of Directive 79/7/EEC?

2) If the answer to question (1) is in the negative: does the Community rule (which in that case has been infringed) mean that the persons concerned (of both sexes) are entitled to an allowance in the amount of the minimum subsistence income even in the (exceptional) cases referred to in that question?

3. The judgment of the ECJ

In replying to question (1), and after observing that in the Netherlands there were considerably

fewer male than female part-time workers, the Court stated that a provision such as the one at issue led, in principle, to discrimination against female workers in relation to male workers and should be regarded as contrary to the objective pursued by Article 4(1) of Directive 79/7, unless the difference of treatment as between full-time and part-time workers was justified by objective factors unrelated to any discrimination on grounds of sex (see Case 171/88 — *Rinner-Kühn).*

The answer to the second question was based on two previous judgments of the Court: Case 384/85 — *Borne Clarke* and Case 71/85 — *FNV.* In the former the Court ruled that Article 4(1), standing by itself and seen in the light of the objective and content of the Directive, was sufficiently precise to be relied upon by an individual before a national court in order to have any national provision, not in conformity with that article, declared inapplicable. By analogy with the latter, which concerned direct discrimination, the Court stated that in a case of indirect discrimination such as this, the members of the group placed at a disadvantage, be they men or women, were entitled to have the same rules applied to them as were applied to the other recipients of the allowance.

In answer to these two questions, the Court held that:

1) *Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as precluding a provision from creating, within the framework of national legislation which guarantees a minimum subsistence income to insured persons suffering from incapacity for work, an exception to that principle in respect of insured persons who had previously worked on a part-time basis and from limiting the amount of the allowance to the wage previously received, where that measure affects a much larger number of women than of men, unless that legislation is justified by objective factors unrelated to any discrimination on grounds of sex.*

2) *If no appropriate measures exist for implementing Article 4(1) of Directive 7917/EEC and there is indirect discrimination by the State, the class of persons placed at a disadvantage by reasons of that discrimination must be treated in the same way and according to the same rules as other recipients of the allowance, such rules remaining the only valid point of reference so long as the Directive has not been implemented correctly.*

Case C-322/88
SALVATORE GRIMALDI/FOUNDATION OF INDUSTRIAL DISEASES
Date of judgment:
13 December 1989
Reference:
Compilation 1989, p. 4407
Content:
Industrial diseases — Effects of a recommendation (Article 189(5) of the EEC Treaty and recommendation of the Commission dated 23 July 1962, addressed to the Member States concerning the adoption of a list of European industrial diseases)

1. Facts and procedure

Mr Grimaldi, a migrant worker of Italian nationality, worked in Belgium between 1953 and 1980. On 17 May 1983, he requested that the Foundation of Industrial Diseases (hereafter 'the Foundation') recognise the ailment from which he was suffering as an industrial disease. The condition, known as Dupuytren, is an osteo-articular or angioneurotic complaint of the hands, caused by mechanical vibration due to the use of a pneumatic drill. The Foundation rejected his request on the grounds that the complaint in question did not appear on the Belgian list of industrial diseases. Mr Grimaldi brought a claim before the employment tribunal in Brussels.

The tribunal ordered an expert's report, which concluded in favour of the existence of the complaint previously mentioned and not included on the Belgian list of industrial diseases, but capable of being categorised as a 'complaint linked to overwork [...] of the peri-sinuous tissue' This complaint appeared at item F6 b) of the European list of industrial diseases, which the recommendation of 23 July 1962 advocated be introduced into national law. In other regards, the question was asked as to whether Mr Grimaldi could prove the industrial origin of a complaint not included on the national list, with a view to benefitting from compensation by virtue of the 'joint' system of compensation envisaged by the Commission's recommendation 66/462, dated 20 July 1966, relating to the terms for compensation of victims of industrial diseases.

2. Question referred to the ECJ

By its order dated 28 October 1988, the Belgian tribunal asked the Court, in application of Article 177 of the EEC Treaty, to give an interlocutory determination on the question of whether:

by interpretation of Article 189(5), as elucidated by the spirit of the first paragraph and the teleological intent of the Court's jurisprudence, a text such as 'the European list' of industrial diseases must not take direct effect in the Member States, insofar as it appears clear, unconditional, sufficiently detailed and unequivocal, not conferring any discretional power as regards the result to be achieved and is annexed to a recommendation of the Commission not yet formally transposed into the law in force in the national internal judicial system after more than 20 years?

3. The judgment of the ECJ

Before setting out its reasoning, the Court declared that, unlike Article 173 of the EEC Treaty, which excludes the Court's jurisdiction on instruments being of the nature of a recommendation, Article 177 assigns the Court the jurisdiction, without any exception, to make an interlocutory ruling on the validity of the interpretation of EU institutional instruments.

The Court then noted that, even if the question only referred to the recommendation of 23 July 1962, this also tended towards a specification of the precise effects, within internal judicial order, of recommendation 66/462, dated 20 July 1966. The question put must, then, be understood as establishing whether, in the absence of any national measure designed to ensure they be put in place, the above-mentioned recommendations created legally valid laws which could be used be-

fore a national judge. To this end, it was, in the meantime, necessary to establish, as a preliminary, whether they were of the nature to create a binding effect. The Court emphasised that the recommendations, which according to Article 189, fifth section of the Treaty, were not binding, were generally adopted by the Community institutions when they did not, by virtue of the treaty, possess the power to adopt them as compulsory instruments, or when they considered that they did not have grounds for enacting more forceful laws. Nevertheless, the Court declared that it was appropriate to ask if the contents of the instrument corresponded to the form ascribed to it. As regards the two recommendations which are the subject of the proceedings, the Court, after having examined the circumstances of their adoption, considered that they were truly recommendations, that is to say instruments which, with respect to their addressees, are not aimed at having an obligatory effect. As a result, they could not create rights which individuals could invoke before a national judge. Nevertheless, the Court emphasised that the instrument in question could not be considered as deprived of all legal effect. The national judges were obliged to take the recommendations into consideration when determining disputes submitted to them, in particular when casting light on the interpretation of national provisions put in place with the aim of ensuring their implementation, or again when acting with a view to completing Community provisions of an obligatory nature.

On these grounds, the Court answered the question submitted as follows:

In the light of Article 189, section five, of the EEC Treaty, the recommendations of the Commission dated 23 July 1962 relating to the adoption of a European list of industrial diseases and 66/462 dated 20 July 1966 concerning the conditions for compensation of victims of industrial diseases are not known by themselves to create rights [in principal amenable to rules] which can be employed before a national judge. However the latter are obliged to take the recommendations into consideration in ruling on the disputes submitted to them, in particular when they are of a nature to cast light on the interpretation of other national or Community provisions.

Case C-262/88
DOUGLAS HARVEY BARBER v GUARDIAN ROYAL EXCHANGE ASSURANCE GROUP
Date of judgment:
17 May 1990
Reference:
[1990] ECR I-1889
Content:
Equal pay for men and women — Compulsory redundancy — Early payment of a retirement pension (EEC Treaty, Article 119, Council Directive 75/117/EEC of 10 February 1975, and Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

Mr Barber was a member of the pension fund established by the Guardian Royal Exchange Assurance ('the Guardian') which applied a non-contributory scheme, i.e. a scheme wholly financed by the employer. That scheme, which was a contracted-out scheme approved under the Social Security Act 1975, involved the contractual waiver by members of the earnings-related part of the State pension scheme, for which the scheme in question was a substitute. Members of a scheme of that kind paid to the State scheme only reduced contributions corresponding to the basic flat-rate pension payable under the latter scheme to all workers regardless of their earnings. Under the Guardian pension scheme, the normal pensionable age fixed for the category of employees to which Mr Barber belonged was 62 for men and 57 for women. That difference was equivalent to that which existed under the State social security scheme, where the normal pensionable age was 65 for men and 60 for women. Members of the Guardian pension fund were entitled to an immediate pension on attaining the normal pensionable age provided for under that scheme. Entitlement to a deferred pension payable at the normal pensionable age was also conferred on members of the fund who were at least 40 years old and had completed 10 years' service with the Guardian when the employment relationship was terminated. The Guardian guide to severance terms, which formed part of Mr Barber's contract of employment, provided that, in the event of redundancy, members of the pension fund were entitled to an immediate pension, subject to having attained the age of 55 for men and 50 for women. Staff who did not fulfil those conditions received certain cash benefits calculated on the basis of their years of service and a deferred pension payable at the normal pensionable age.

Mr Barber was made redundant with effect from 31 December 1980, when he was aged 52. The Guardian paid him the cash benefits provided for in the severance terms, the statutory redundancy payment and an ex *gratia* payment. He would be entitled to a retirement pension as from the date of his 62nd birthday. Taking the view that he was a victim of unlawful discrimination based on sex, Mr Barber instituted proceedings in the industrial relations tribunal. When his claim was dismissed at first and second instance, he appealed to the Court of Appeal.

2. Questions referred to the ECJ

By an order of 12 May 1988, the Court of Appeal in London referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) When a group of employees is made compulsorily redundant by their employer in circumstances similar to those of this case and they receive benefits in connection with that redundancy, are all those benefits 'pay' within the meaning of Article 119 of the EEC Treaty and the equal pay Directive (75/117/EEC), or do they fall within the equal treatment Directive (76/207/EEC), or neither?

2) Is it material to the answer to question (1) that one of the benefits in question is a pension paid in connection with a private occupational pension scheme operated by the employer ('a private pension')?

3) Is the principle of equal pay referred to in Article 119 and the equal pay Directive infringed in the circumstances of the present case if:

   a) a man and a woman of the same age are made compulsorily redundant in the same circumstances, and in connection with that redundancy, the woman receives an immediate pension but the man receives only a deferred private pension, or

   b) the total value of the benefits received by the woman is greater than the total value of the benefits received by the man?

4) Are Article 119 and the equal pay Directive of direct effect in the circumstances of this case?

5) Is it material to the answer to question (3) that the woman's right to access to an immediate pension provided for by the severance terms could only be satisfied if she qualified for an immediate pension under the provisions of the private occupational scheme in that she was being treated as retired by the Guardian because she was made redundant within seven years of her normal pension date under the pension scheme?

3. The judgment of the ECJ

In reply to question (1), the Court firstly stated that the fact that certain benefits were paid after the termination of the employment relationship did not prevent them from being in the nature of pay, within the meaning of Article 119 of the Treaty. Hence, compensation granted to a worker in connection with his redundancy fell in principle within the concept of pay for the purposes of Article 119 of the Treaty. Moreover, said the Court, a redundancy payment made by the employer, such as that which was at issue, could not cease to constitute a form of pay on the sole ground that, rather than deriving from the contract of employment, it was a statutory or ex *gratia* payment. As far as statutory redundancy payments were concerned, the Court said that, according to its decision in Case 43/75 — *Defrenne II,* Article 119 also applied to discrimination arising directly from legislative provisions. This meant that benefits provided by law could come within the concept of pay for the purposes of that provision. In the case of ex *gratia* payments by the employer, it was clear from the judgment in Case 12/81 — *Garland,* that Article 119 also applied to advantages which an employer granted to workers although he was not required to do so by contract. Accordingly, concluded the Court, there was no need to discuss whether or not the Directive on equal treatment was applicable to the present situation.

In view of the above, the second question should be understood as seeking in substance to ascertain whether a retirement pension paid under a contracted-out private occupational scheme fell within the scope of Article 119, in particular where that pension was awarded in connection with compulsory redundancy. In that regard, the Court first pointed out that, the schemes in question were the result either of an agreement between workers and employers or of a unilateral decision taken by the employer. They were wholly financed by the employer or by both the employer and the workers without any contribution whatsoever being made by the public authorities. Accordingly, such schemes formed part of the consideration offered to workers by the employer. Secondly, such schemes were not compulsorily applicable to general categories of workers. On the contrary, they applied only to workers employed by certain undertakings, with the result that affiliation to those schemes derived, of necessity, from the employment relationship with a given employer. Thirdly, it was pointed out that even if contributions paid to those schemes and the benefits which they provided were in part a substitute for those of the general statutory scheme, that fact could not preclude the application of Article 119. Based on this, the Court concluded that, unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted-out scheme constituted consideration paid by the employer to the worker in respect of

his employment and consequently fell within the scope of Article 119.

In answer to the third and fifth questions, the Court found that it was sufficient to point out that Article 119 prohibited any discrimination with regard to pay as between men and women, whatever the system which gave rise to such inequality. Accordingly, it was contrary to Article 119 to impose an age condition which differed according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women was based on that provided by a national statutory scheme. The Court further mentioned several of its judgments in which it emphasised the fundamental importance of transparency and, in particular, of the possibility of review by the national courts, in order to prevent and, if necessary, eliminate any discrimination based on sex. With regard to the means of verifying compliance with the principle of equal pay, the Court stated that, if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of Article 119 would be diminished as a result. It followed that genuine transparency, permitting an effective review, was assured only if the principle of equal pay applied to each of the elements of remuneration granted to men or women.

In considering the fourth question, which concerned the direct effect of Article 119 in the circumstances of this case, the Court mentioned Case 96/80 — *Jenkins,* according to which that provision applied directly to all forms of discrimination which could be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit their application. The Court concluded by saying that if a woman was entitled to an immediate retirement pension when she was made compulsorily redundant, but a man of the same age was entitled in similar circumstances only to a deferred pension, then the result was unequal pay as between those two categories of workers which the national court could itself establish by considering the components of the remuneration in question and the criteria laid down in Article 119.

Last but not least, the Court considered the effects of this judgment *ratione temporis*. It followed from its ruling in Case 43/75 — *Defrenne II,* that it could, by way of exception, taking account of the serious difficulties which a judgment could create as regards events in the past, be moved to restrict the possibility for all persons concerned to rely on the interpretation which the Court, in proceedings on a reference to it, for a preliminary ruling, gave to a provision. The Court then stated that in the light of Article 7(1) of Directive 79/7 and Article 9(a) of Directive 86/378, the Member States and the parties concerned were reasonably entitled to consider that Article 119 did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere. In those circumstances, said the Court, overriding considerations of legal certainty precluded legal situations which had exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pension schemes. It was appropriate, however, to provide for an exception in favour of individuals who had taken action in good time in order to safeguard their rights. Finally, the Court pointed out that no restriction on the effects of the aforesaid interpretation could be permitted as regards the acquisition of entitlement to a pension as from the date of this judgment.

In answer to the questions referred to it, the Court ruled that:

1) *The benefits paid by an employer to a worker in connection with the latter's compulsory redundancy fall within the scope of the second para-*

graph of Article 119 of the EEC Treaty whether they are paid under a contract of employment by virtue of legislative provisions or on a voluntary basis.

2) *A pension paid under a contracted-oufprivate occupational scheme falls within the scope of Article 119 of the Treaty.*

3) *It is contrary to Article 119 of the Treaty for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal retirement age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme. The application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers.*

4) *Article 119 of the Treaty may be relied upon before the national courts. It is for those courts to safeguard the rights which that provision confers on individuals, in particular where a contracted-out pension scheme does not pay to a man on redundancy an immediate pension such as would be granted in a similar case to a woman.*

5) *The direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension, with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.*

Case C-33/89
MARIA KOWALSKA v FREIE UND HANSESTADT HAMBURG
Date of judgment:
27 June 1990
Reference:
[1990] ECR I-2591
Content:
Severance grant following termination of employment — Exclusion of part-time workers (EEC Treaty, Article 119 and Council Directive 75/117/ EEC of 10 February 1975).

1. Facts and procedure

The employment relationship between Mrs Kowalska and the Freie und Hansestadt Hamburg was governed by the Bundesangestelltentarifvertrag (Federal Civil Service Employees' Collective Agreement). Under Article 62 of that agreement, full-time employees, who satisfied the prescribed conditions, were entitled to a severance grant on the day they retired.

Mrs Kowalska's employer refused to pay her the severance grant under that provision on the grounds that she had worked part-time. Considering herself the victim of unlawful indirect discrimination, Mrs Kowalska brought an action before the Arbeitsgericht (Labour Court), Hamburg.

2. Questions referred to the ECJ

By order of 12 December 1988, the Arbeitsgericht Hamburg referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is there 'indirect discrimination against women' and hence an infringement of Article 119 of the EECTreaty of 1957 where a collective wage agreement applying to the public service of the Federal Republic of Germany provides for the payment of Übergangsgeld (a severance grant the historical basis of which lies in civil-service law) of up to four months' salary in the event that a person is discharged from his position as an employee without fault on his part (in particular on account of his attainment of the age-limit, retirement on that ground, incapacity for work or suffering significant loss of fitness for work) but excludes from the payment of that grant employees who have not contracted to work full normal working hours (38 hours per week), and the number of women part-time employees account for a significantly higher proportion of the total number of part-time employees covered by the collective agreement than women full-time employees account for in relation to the total number of full-time employees covered by the collective agreement?

2) If question (1) is answered in the affirmative: does Article 119 in conjunction with Article 117 of the EEC Treaty and/or the provisions of Council Directive 75/117/EEC require that part-time employees should be entitled to the said grant (in proportion to the amount of time worked) contrary to that which is provided in the collective agreement or is such an entitlement precluded on the grounds of freedom of contract of the parties to the collective agreement?

3. The judgment of the ECJ

In order to answer question (1), the Court first found it necessary to determine whether the severance grant paid to workers on termination of their employment relationship was covered by Article 119 of the Treaty. The Court recalled that the concept of pay, within the meaning of the second paragraph of Article 119, included any other consideration whether in cash or in kind, whether immediate or future, provided that the worker received it, albeit indirectly, from his employer in respect of his employment. Accordingly, said the Court, the fact that certain benefits were paid after the termination of the employment relationship did not prevent them from being in the nature of pay, within the meaning of Article 119.

Subsequently, the Court stated that the prohibition of discrimination between male and female workers contained in that provision, being mandatory, applied not only to the action of public authorities but extended also to all agreements which were intended to regulate paid labour collectively, as well as contracts between individuals (see Case 43/75 — *Defrenne II).* A collective agreement like the one at issue, observed the Court, which allowed employers to maintain a difference in total pay as between two categories of workers — those who worked a specified minimum number of hours each week and those who, whilst performing the same tasks, did not work that minimum number of hours — led to discrimination against female workers as compared with male workers in cases where a considerably lower percentage of men than women worked part-time.

Such an agreement should, in principle, be regarded as infringing Article 119. This would not be the case if the difference in the treatment accorded to the two categories of workers could be explained by objectively justified factors unrelated to any discrimination on grounds of sex (see Case 170/84 — *Bilka),* the assessment of which being the responsibility of the national courts.

In replying to the second question, the Court mentioned its decision in *Defrenne II* where it had held that Article 119 was sufficiently precise to be relied upon in proceedings brought by individuals before national courts seeking a declaration that a national provision was applicable, including one contained in a collective agreement which was not in conformity with that article. Moreover, the Court said that its ruling in *Ruzius-Wilbrink* (Case 102/88) applied equally to discriminatory provisions in a collective agreement.

In the present case, the Court ruled as follows:

1) *Article 119 of the EEC Treaty is to be interpreted as precluding the application of a clause in a collective wage agreement applying to the national public service under which employers may exclude part-time employees from the payment of a severance grant on termination of their employment when in fact a considerably lower percentage of men than of women work part-time, unless the employer shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.*

2) *Where there is indirect discrimination in a clause in a collective wage agreement, the class of persons placed at a disadvantage by reasons of that discrimination must be treated in the same way and made subject to the same scheme, proportionately to the number of hours worked, as other workers, such scheme remaining, for want of correct transposition of Article 119 of the EEC Treaty into national law, the only valid point of reference.*

Case C-188/89
A. FOSTER AND OTHERS v BRITISH GAS PLC
Date of judgment:
12 July 1990
Reference:
[1990] ECR I-3313
Content:
Equal treatment for men and women workers — Direct effect of a directive with regard to a nationalised company (Article 5(1) of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

By virtue of the Gas Act 1972, which governed the British Gas Corporation ('BGC') at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly over the supply of gas. The BGC was privatised under the Gas Act 1986. Privatization resulted in the establishment of British Gas pic to which the rights and liabilities of the BGC were transferred with effect from 24 August 1986.

Mrs Foster, Mrs Fulford-Brown, Mrs Morgan, Mrs Roby, Mrs Salloway and Mrs Sullivan were required to retire by the BGC on various dates between 27 December 1985 and 22 July 1986, on attaining the age of 60. These retirements reflected a general policy pursued by the BGC, which required its employees to retire upon reaching the age at which they were entitled to a State pension pursuant to British legislation (60 years of age for women and 65 for men). Mrs Foster and her colleagues, who wished to continue to work, brought proceedings for damages before the British courts asserting that their retirement by the BGC was contrary to Article 5(1) of Directive 76/207.

Although the parties agreed that the dismissals were contrary to the aforesaid article as well as British legislation in force at the material time, they were in dispute over the issue whether Article 5(1) of the Directive could be relied on against the BGC.

2. Question referred to the ECJ

By an order of 4 May 1989, the House of Lords referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

Was the BGC (at the material time) a body of such a type that the appellants are entitled in English courts and tribunals to rely directly upon Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, so as to be entitled to a claim for damages on the grounds that the retirement policy of the BGC was contrary to the Directive?

3. The judgment of the ECJ

First of all, and in accordance with its decisions, the Court pointed out that, where the Community authorities had, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and if national courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which had not adopted the implementing measures required by a directive within the prescribed period, could not plead, as against individuals, its own failure to perform the obligations which that directive entailed. Thus, wherever the provisions of a directive appeared, as far as their subject matter was concerned, to be unconditional and sufficiently precise, those provisions could, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which was incompatible with

the directive or in so far as the provisions defined rights which individuals were able to assert against the State.

Secondly, the Court mentioned its decision in Case 152/84 — *Marshall,* where it had held that where a person was able to rely on a directive as against the State, he could do so regardless of the capacity in which the latter was acting, whether as employer or as public authority. In either case it was necessary to prevent the State from taking advantage of its own failure to comply with Community law. On the basis of those considerations, the Court stated that it had held in a series of cases that unconditional and sufficiently precise provisions of a directive (this being so in the case of Article 5(1) of the Directive) could be relied on against organisations or bodies (whatever their legal form) which were subject to the authority or control of the State or had special powers beyond those which resulted from the normal rules applicable to relations between individuals.

In answer to the question referred to it, the Court ruled that:

Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions may be relied upon in a claim for damages against a body whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

Case C-177/88
ELISABETH JOHANNA PACIFICA DEKKER v STICHTING VORMINGSCENTRUM VOOR JONG VOLWASSENEN (VJV-Centrum) Plus
Date of judgment:
8 November 1990
Reference:
[1990] ECR I-3941
Content:
Equal treatment for men and women — Refusal to appoint a pregnant woman (Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

In June 1981, Mrs Dekker applied for the post of instructor at the training centre for young adults run by the Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) ('VJV'). On 15 June 1981, she informed the committee dealing with the applications that she was three months' pregnant. The committee nonetheless put her name forward to the board of management of the VJV as the most suitable candidate for the job. By letter of 10 July 1981, however, the VJV informed Mrs Dekker that she would not be appointed. The VJV explained that, if it were to employ her, its insurer, the Risicofonds Sociale Voorzieningen Bijzonder Onderwijs ('the Risicofonds') would not reimburse the daily benefits that the VJV would be obliged to pay her during her maternity leave. As a result, the VJV would be financially unable to employ a replacement during Mrs Dekker's absence and thus would be short-staffed. Under Article 6 of the Ziekengeldreglement (the internal rules of the Risicofonds governing daily sickness benefits) the board of management of the Risicofonds was empowered to refuse to reimburse to a member (the employer) all or part of the daily benefits in the event that an insured person (the employee) would become unable to perform his or her duties within six months of commencement of the insurance if, at the time when that insurance took effect, it was to be anticipated from the state of health of the person concerned that such incapacity would supervene within that period. Unlike Article 44(1)(b) of the Ziektewet (the Netherlands Law on sickness insurance), which laid down the insurance scheme generally applicable to private-sector employees, the Ziekengeldreglement, which alone applied to Mrs Dekker, contained no derogation for pregnancy from the rule permitting reimbursement of the daily benefits to be refused in cases of 'foreseeable sickness'.

The Arrondissementsrechtbank (District Court) Haarlem and the Gerechtshof (Regional Court of Appeal), in turn, dismissed Mrs Dekker's applications for an order requiring the VJV to pay her damages for her financial loss, whereupon she appealed to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

2. Questions referred to the ECJ

By judgment of 24 June 1988, the Hoge Raad der Nederlanden referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is an employer directly or indirectly in breach of the principle of equal treatment laid down in Article 2(1) and 3(1) of the Directive (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) if he refuses to enter into a contract of employment with a candidate, found by him to be suitable, because of the adverse consequences for him which are to be anticipated owing to the fact that the candidate was pregnant when she applied for the post, in conjunction with rules concerning unfitness for work laid down by a public authority under which inability to work in connection with pregnancy and confinement is assimilated to inability to work on account of sickness?

2) Does it make any difference that there were no male candidates?

3) Is it incompatible with Articles 2 and 3 that:

   a) if a breach of the principle that the rejected candidate must be accorded equal treatment is established, fault on the part of the employer is also required before a claim based on that breach such as the present can be upheld;

   b) if such a breach is established, the employer for his part can still plead justification, even if none of the cases provided for in Article 2(2) to (4) applies?

4) If the fault as referred to in question (3) above may be required or grounds of justification may be pleaded, is it then sufficient, in order for there to be absence of fault or for grounds of justification to exist, that the employer runs the risk referred to in the summary of the facts, or must Articles 2 and 3 be interpreted as meaning that he must bear the risks, unless he has satisfied himself beyond all doubt that the benefit on account of unfitness for work will be refused or that posts will be lost, and he has done everything possible to prevent that from happening?

3. *The judgment of the ECJ*

In reply to the first question, the Court observed that only women could be refused employment on grounds of pregnancy and that such a refusal therefore constituted direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy should be regarded as based, essentially, on the fact of pregnancy. Such discrimination could not be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave. Hence, said the Court, it was not necessary to consider whether national provisions such as those mentioned above exerted such pressure on the employer that they prompted him to refuse to appoint a pregnant woman, thereby leading to discrimination within the meaning of the Directive.

As far as the second question was concerned, the Court stated that, if the reason for the refusal to employ a woman was to be found in the fact that the person concerned was pregnant, then that decision was directly linked to sex of the candidate. In those circumstances the absence of male candidates could not affect the answer to the first question.

As to the third question, the Court observed that Article 2(2), (3), and (4) of the Directive provided for exceptions to the principle of equal treatment set out in Article 2(1), but that the Directive did not make liability on the part of the person guilty of discrimination conditional in any way on proof of fault or on the absence of any ground discharging such liability. Moreover, said the Court, Article 6 of the Directive recognised the existence of rights vesting in the victims of discrimination which could be pleaded in legal proceedings. Although full implementation of the Directive did not require any specific form of sanction for unlawful discrimination, it did entail that that sanction be such as to guarantee real and effective protection (see Case 14/83 — *von Colson).* It should, furthermore, have a real deterrent effect on the employer.

In view of the answer to the third question, the Court decided that there was no need to give a ruling on the fourth question.

On those grounds, the Court ruled that:

1) An employer is in direct contravention of the principle of equal treatment embodied in Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions if he refuses to enter into a contract

of employment with a female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities, which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness.

2) *The fact that no men applied for the job does not alter the answer to the first question.*

3) *Although Directive 76/207/EEC gives Member States, in penalising infringement of the prohibition of discrimination, freedom to choose between the various solutions appropriate for achieving its purpose, it nevertheless requires that, where a Member State opts for a sanction forming part of the rules on civil liability, any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law.*

Case C-179/88
HANDELS- OG KONTORFUNKTIONAERERNES FORBUND I DANMARK v DANSK ARBEJDSGIVERFORENING (Hertz v Aldi)
Date of judgment:
8 November 1990
Reference:
[1990] ECR I-3979
Content:
Equal treatment for men and women — Conditions governing dismissal — Absence due to illness attributable to pregnancy or confinement (Articles 2 and 5 of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

On 15 July 1982, Mrs Hertz was engaged as a part-time cashier and saleswoman with Aldi Marked. In June 1983, she gave birth to a child, after a pregnancy involving complications during which she was on sick leave with the consent of her employer.

On the expiry of her maternity leave which, in accordance with the provisions of the applicable Danish law, ran for 24 weeks after the birth, Mrs Hertz resumed her work in late 1983. She had no health problems until June 1984. Between June 1984 and June 1985, however, she was once more on sick leave, for 100 working days. It was common ground between the parties that Mrs Hertz's illness was a consequence of her pregnancy and confinement. By letter of 27 June 1985, Aldi Marked informed Mrs Hertz that it was terminating her contract of employment with the statutory four months' notice. It subsequently stated that Mrs Hertz's periods of absence were the ground for her dismissal and that it was normal practice to dismiss workers who were often absent owing to illness.

The So- og Handelsret (Maritime and Commercial Court) dismissed the action brought by Mrs Hertz against her dismissal, whereupon she appealed to the Hojesteret. In that appeal, the Handels- og Kontorfunktionaerernes Forbund i Danmark (Danish Union of Shop and Office Employees) acted on behalf of Mrs Hertz and the Dansk Arbejdsgiverforening (Danish Employers' Association) acted on behalf of Aldi Marked.

2. Questions referred to the ECJ

By decision of 30 June 1988, the Danish Hojesteret referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Do the provisions of Article 5(1), in conjunction with Article 2(1), of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions encompass dismissal as a consequence of absence due to illness which is attributable to pregnancy or confinement?

2) If the answer is affirmative, is protection against dismissal due to illness caused by pregnancy or confinement unlimited in time?

3. The judgment of the ECJ

The Court started by saying that it followed from Articles 2(1) and (3) and Article 5 of the Directive that the dismissal of female worker on account of pregnancy constituted direct discrimination on grounds of sex. However, the dismissal of a female worker on account of repeated periods of sick leave which were not attributable to pregnancy or confinement did not constitute direct discrimination on grounds of sex, inasmuch as such periods of sick leave would lead to the dismissal of a male worker in the same circumstances. The Directive, said the Court, did not envisage the case of illness attributable to pregnancy or confinement but permitted national provisions guaranteeing women specific rights on account of pregnancy and maternity, such as maternity leave. The Court was of the opinion that in the case of an illness manifesting itself after the maternity leave,

there was no reason to distinguish an illness attributable to pregnancy or confinement from any other illness. Such a pathological condition was therefore covered by the general rules applicable in the event of illness.

In view of the answer to the first question, the Court did not rule on the second question.

In the present case, the Court held that:

Without prejudice to the provisions of national law adopted pursuant to Article 2(3) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1) of that Directive, in conjunction with Article 2(1) thereof, does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement.

Case C-373/89
CAISSE D'ASSURANCES SOCIALES POUR TRAVAILLEURS INDÉPENDANTS 'INTEGRITY' v NADINE ROUVROY
Date of judgment:
21 November 1990
Reference:
[1990] ECR I-4243
Content:
Equal treatment for men and women — Social security — National rules which in certain circumstances grant exemption from social security contributions to married woman, widows and students (Article 4(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

In 1983, the Caisse d'Assurances Sociales pour Travailleurs Indépendants 'Integrity' ASBL ('Integrity') instituted proceedings against Mr Leloup, a self-employed architect, for the recovery of unpaid social security contributions. In the proceedings before the tribunal du travail, Nivelles, Mr Leloup, whose income was very modest, requested that Article 37 of the Royal Decree of 19 December 1967, to be applied to him. The first indent of that article provided that: 'When their income from employment within the meaning of Article 11(2) and (3) of Royal Decree No 38, on which the calculation of their contributions for a specific year was to be based, was less than BEF 77 472.00, married women, widows and students to whom Royal Decree No 38 applied might, for that year in question, apply to be treated as persons covered by Article 12(2) of that decree'. Pursuant to Article 12(2) of the Royal Decree No 38, a person to whom that decree applied, and who, in addition to the activity giving rise to the application to him of the provisions governing self-employed persons, habitually engaged in another occupation as a main occupation was not liable to pay contributions under Royal Decree No 38, if his income from working as a self-employed person remained below a specified ceiling. This exception from contributions did not deprive the person concerned of the benefits available under the provisions applicable to self-employed persons. Integrity contested that application on the ground that Article 37 applied only to married women, widows and students but not to married men and widowers.

Mrs Nadine Rouvroy and her children, who continued the proceedings after Mr Leloup's death, maintained that Article 37 infringed the principle of equal treatment for men and women in matters of social security.

2. Question referred to the ECJ

By interlocutory judgment of 4 December 1989, the tribunal du travail, Nivelles (Belgium), Wavre Division, referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

Does Article 37 of the Royal Decree of 19 December 1967 laying down general rules for the implementation of Royal Decree No 38 of 27 July 1967 organising social security for self-employed persons comply with Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security?

3. The judgment of the ECJ

According to the Court, the national court was asking, in particular, whether Article 4 of Directive 79/7/EEC should be interpreted as prohibiting a Member State from granting exclusively to married women, widows and students the possibility of being assimilated to persons who were not required to make any social security contributions where their income as self-employed persons was modest and where they habitually engaged in another occupation as a main occupation. The Court observed that in a case of direct discrimination, the members of the group placed at a disadvantage were entitled to have the same rules applied to them as were applied to the members of the group placed at an advantage who were in

the same circumstances, such rules remaining the only valid point of reference so long as the Directive had not been implemented correctly (see Case C-102/88 — *Ruzius-Wilbrink*). Moreover, said the Court, according to the internal logic of the Directive, Article 4, which defined the extent of the principle of equal treatment, only applied within the scope *ratione personae* and *rationae materiae* of the Directive (see Joined Cases 48, 106 and 107/88 — *Riele and Others).* In that connection, added the Court, the Advocate-General correctly observed in his Opinion that, where indivisible social security contributions related to social security benefits, which only partly came within the scope *rationae materiae* of Directive 79/7, the principle of equal treatment nevertheless applied to all such contributions. The position was different where it was possible to apportion the contributions among individual benefits.

In reply to the question submitted to it, the Court ruled that:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding national legislation which reserves to married women, widows and students the possibility of being assimilated to persons not liable to pay any social security contributions without granting the same possibility of exemption from liability to pay contributions to married men or widowers who for the rest satisfy the same conditions.

Case C-184/89
H. NIMZ v FREIE UND HANSESTADT HAMBURG
Date of judgment:
7 February 1991
Reference:
[1991] ECR I-297
Content:
Equal pay — Sex discrimination (EEC Treaty, Article 119 and Articles 1 and 4 of Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

Mrs Nimz had been a civil servant of the Freie und Hansestadt Hamburg (Free and Hanseatic City of Hamburg) since 1 January 1977. She had worked, since 1 January 1983, for 20 hours per week and had been paid from that date in accordance with scale VB, category 1 of the collective agreement for national public service employees (Bundesangestelltentarifvertrag ('BAT'). After six years' service in this grade, employees automatically moved to salary scale IVB, category 2. On 28 January 1988, the administration of the City of Hamburg refused to move her to the higher salary bracket IVB, category 2, relying on the provisions of Article 23(a) of the BAT. This provided that seniority was fully taken into account for employees working for at least three quarters of the normal working hours of a full-time employee, but that only half of the period of service was taken into account where employees worked for at least half but less than three quarters of the normal working hours of a full-time employee. The provisions of the BAT were amended from 1 January 1988, without taking into account periods of seniority acquired before that date.

Mrs Nimz, therefore, submitted to the Hamburg Labour Court that the provisions in question were contrary to Article 119 of the EEC Treaty.

2. Questions referred to the ECJ

By order of 13 April 1989, the Labour Court of Hamburg referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is there 'indirect discrimination against women' and consequently a violation of Article 119 of the EEC Treaty when a collective agreement for the public service establishes — for employees in the administration of a university — as a condition of passage to a higher salary grade at the end of a qualifying period that:

   the periods during which the person concerned regularly worked at least three-quarters of the normal working hours of a full-time employee are fully taken into account, while the periods during which he or she worked for at least half of that time are only counted as half that period of service, and that where more than 90 % of the part-time employees working for less than three-quarters of the normal working hours of a full-time employee are women, while of all the full-time employees and part-time employees working for at least three quarters of the normal working hours of a full-time employee, little more than 55 % are women?

2) If the answer to the first question is in the affirmative:

   Do the combined provisions of Article 119 and Article 117 of the EEC Treaty and/or the provisions of Council Directive 75/117/EEC require an employer to apply a qualifying period of the same duration to part-time employees working for less than three quarters of the normal working hours of a full-time employee as for full-time employees and part-time employees working for at least three quarters of the normal working hours of a full-time employee? or

   Should the Court, having regard to the freedom of action of the social partners, refuse to rule in this respect and leave the parties to the collective agreement to resolve this question?

3. The judgment of the ECJ

The Court was of the opinion that, in order to give a proper answer to question (1), it should be first determined whether the passage to a higher salary grade fell within the provisions of Article 119 of the Treaty. The Court observed that in the present case there was a quasi-automatic system of salary scales operating on the basis of rules based on seniority contained in a collective agreement. These rules determined the gradual increase in salary due to an employee who remained in the same position. It followed that, in these circumstances, such rules fell, in principle, within the concept of pay within the meaning of Article 119. Moreover, as far as the above provision was concerned, the Court recalled that, as it was of a mandatory nature, the prohibition of discrimination between men and women at work applied not only to public authorities but also extended to all agreements intended to apply collectively to salaried work, as well as to contracts between individuals (see Case C-33/89 — *Kowalska)*. The Court further stressed that a collective agreement such as the one under examination led to discrimination against female employees in comparison with male employees, when it turned out that in fact a considerably smaller percentage of men than women were employed part-time and, therefore, in principle, should be considered as contrary to Article 119. This would only be otherwise if the difference in treatment between the two categories of employees could be objectively justified by factors unrelated to any discrimination on grounds of sex (see Case 170/84 — *Bilka)*. The Court also remarked that although seniority went hand-in-hand with experience which, in principle, should allow the employee to carry out his tasks all the better, the objectivity of such a criterion depended on all the circumstances in each case and notably on the relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of working hours had been worked. This was, however, an issue to be resolved by the national courts.

As to the second question, the Court stated that where there was indirect discrimination in a provision of a collective agreement the members of the group discriminated against should be treated in the same way and should have the same arrangements applied to them as other employees, arrangements which, until Article 119 had been correctly implemented into national law, remained the only valid system of reference. The Court also recalled that, according to its established case law, the national court which had to apply provisions of Community law was obliged to ensure the full effect of these measures, refusing to apply, wherever necessary, on its own authority, any contrary provision of national legislation, without requesting or waiting for the removal of that provision by legislative means or by any other process. The Court concluded by saying that these considerations were equally applicable in a case where a provision contrary to Community law arose in a collective agreement.

The Court ruled as follows:

1) *Article 119 of the EEC Treaty must be interpreted as precluding a collective agreement, entered into within national public services, from providing for the seniority of workers performing at least three quarters of normal working time to be fully taken into account for reclassification in a higher salary grade, where only one half of such seniority is taken into account in the case of workers whose working hours are between one half and three quarters of those normal working hours, where the latter group of employees comprises a considerably smaller percentage of men than women, unless the employer can prove that such a provision is justified by factors which depend for their objectivity in particular on the relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of working hours have been worked.*

2) *Where there is discrimination in a provision of a collective agreement, the national court is*

required to display that provision, without requesting or awaiting its prior removal by collective negotiation or any other procedure, and to apply to members of the group which is disadvantaged by that discrimination the same arrangements as are applied to other employees, arrangements which, failing the correct application of Article 119 of the EEC Treaty in national law, remains the only valid system of reference.

Case C-377/89
A. COTTER AND N. McDERMOTT v MINISTER FOR SOCIAL WELFARE AND ANOTHER (II)
Date of judgment:
13 March 1991
Reference:
[1991] ECR I-1155
Content:
Equal treatment in matters of social security — Principle of national law prohibiting unjust enrichment (Article 4(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

As far as the facts are concerned, the present case should be read in conjunction with Case 286/85 — *McDermott and Cotter I*.

As to the present case, it should be added that before the Court of Justice ruled on the abovementioned case, the Irish legislature, in implementing Directive 79/7, enacted the Social Welfare (No 2) Act 1985 ('the Act'), but this did not come into effect until various dates in 1986. The aim of the Act was to remove married women from the category of automatic dependency and to treat them as having the same status within the social welfare code as married men. This was done by confining the payment of an increase in benefit in respect of an adult dependent to a situation where the actual dependency could be shown, irrespective of the sex of the claimant. However, transitional Regulations in 1986 provided that claimants (in practice, only married men) who did not have a spouse actually dependent on them and therefore ceased to be eligible for an increase would nevertheless become entitled to a compensatory allowance (these 'transitional' increases were extended in 1987 and again in 1988).

Mrs Cotter and Mrs McDermott initiated fresh proceedings (with which the present case is concerned) seeking declarations of entitlement to various payments which a married man in their circumstances would have received from 23 December 1984. These new proceedings and the proceedings brought on 4 February were heard together before the High Court. This Court allowed their claim only in part, rejecting in particular their claims in respect of increases for adult and child dependents and in respect of the transitional compensatory payments. The High Court took the view that it would be inequitable to pay those sums to the claimants when their spouses were not financially dependent upon them. On appeal to the Supreme Court of Ireland, the Minister for Social Welfare and Attorney General argued that to allow the claims would be against the principle of unjust enrichment, which under Irish law constitutes a ground for restricting *or* refusing relief.

2. Questions referred to the ECJ

By order of 27 July 1989, the Supreme Court of Ireland referred two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is the ruling of the Court of Justice in Case 286/85, McDermott and Cotter v Minister for Social Welfare and Attorney General [1987] ECR 1453, whereby the Court of Justice answered the second question referred to it pursuant to Article 177 EEC by the High Court in its interpretation of the provisions of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 as follows:

   'In the absence of measures implementing Article 4(1) of the Directive women are entitled to have the same rules applied to them as are applied to men who are in the same situation, since, where the Directive has not been implemented, those rules remain the only valid point of reference.'

   to be understood as meaning that married women are entitled to increase in social welfare benefits in respect of

   a) a husband as dependant, and

b) a child dependant, even where it is proved that no actual dependency existed or even if as a result double payments of such increases in respect of dependents would occur?

2) In a claim by a woman for compensatory payments in respect of discrimination alleged to have been suffered by reason of the failure to apply to them the rules applicable to men in the same situation, is Council Directive 79/7/EEC to be interpreted as meaning that a national court or tribunal may not apply rules of national law such as to restrict or refuse such compensation in circumstances where the granting of such compensation would offend against the principle prohibiting unjust enrichment?

3. The judgment of the ECJ

In answer to the first question, the Court noted that Article 4(1) of the Directive stated that it was applicable, in particular, in 'the calculation of benefits including increases due in respect of a spouse and for dependents'. The very wording of that Article, said the Court, included any increases due in respect of spouses who were not dependents. With regard to other persons, in particular children, no proof of their actual dependency was required under the Directive as a prior condition for the application of the principle of equal treatment to the payment of the increases in questions. Consequently, while Member States might stipulate whatever conditions they wished for entitlement to increases in social security benefits, they were required to comply fully with the principle of equal treatment laid down in Article 4(1) of the Directive. The Court moreover added that if after 23 December 1984 a married man automatically received increases in benefits in respect of persons deemed to be dependents without having to prove that those persons were actually dependent on him, a married woman, in the same circumstances, was also entitled to those increases, and no additional conditions applicable only to married women could be imposed.

In replying to the second question, the Court said that the Directive did not provide for any derogation from the principle of equal treatment laid down in Article 4(1) in order to authorise the extension of the discriminatory effects of earlier provisions of national law. It followed that, a Member State might not maintain beyond 23 December 1984, any inequalities of treatment attributable to the fact that the conditions for entitlement to compensatory payments were those which applied before that date. That was so notwithstanding the fact that those inequalities were the result of transitional provisions (see Case 80/87 — *Dik).* Subsequently, the Court made clear that such belatedly adopted implementing measures should fully respect the rights which Article 4(1) had conferred on individuals in a Member State as from the expiry of the period allowed to the Member States for complying with it.

As far as both questions were concerned, the Court emphasised that, if the national authorities could rely on the principle of national law prohibiting unjust enrichment they would be able to use their own unlawful conduct as a ground for depriving Article 4(1) of the Directive of its full effect.

The Court held that:

1) Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as meaning that if, after the expiry of the period allowed for implementation of the Directive, married men have automatically received increases in social security benefits in respect of a spouse and children deemed to be dependants without having to prove actual dependency, married women without actual dependants are entitled to the same increases even if in some circumstances that will result in double payment of the increases.

2) Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as meaning that where a Member State has included in the legislation intended to implement that article, adopted after the expiry of the period al-

lowed by the Directive, a transitional provision providing for compensatory payments to married men who have lost their entitlement to an increase in their social security benefits in respect of a spouse deemed to be dependent because of actual dependency cannot be shown to exist, married women in the same family circumstances are entitled to the same payments even if that infringes the prohibition on unjust enrichment laid down by national law.

Case C-229/89
COMMISSION OF THE EUROPEAN COMMUNITIES v KINGDOM OF BELGIUM
Date of judgment:
7 May 1991
Reference:
[1991] ECR I-2205
Content:
Social security — Unemployment benefit — Invalidity and sickness benefit (Articles 4(1) and 8(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

The Belgian legislation relating to unemployment benefit (Royal Decree of 8 August 1986 and Ministerial Decree of 23 January 1987) and sickness and disability benefit (Royal Decree of 30 July 1986) allocated those eligible to one of three groups: (1) an employed person who cohabited with one or more persons who had no income, (2) an employed person living alone, and (3) an employed person cohabiting with a person receiving an income. Prior to 1986, these groups were respectively called 'heads of household', 'sole workers', and 'cohabitants'. For both unemployment benefit and sickness benefit, the entitlement under this system was calculated on the basis of previous earned income, which was tiered to allow a different rate for each group. As far as unemployment benefit was concerned, as a starting point, all those eligible received a basic benefit corresponding to 35 % of their former income. However, after 18 months without employment, plus three months for each year worked, members of the third group were entitled to receive a lumpsum benefit accompanied by a subsequent supplement should the aggregate monthly benefit of cohabitants not reach a certain level. Next, those eligible in groups 1 and 2 received a supplement equivalent to 5 % of their former income for loss of the sole income. Thirdly, a transitional supplement equivalent to 20 % of the former income was paid to all those eligible, but for those members of groups 2 and 3, this was limited to the first year of unemployment. As for the sickness and disability benefits, the total benefit was fixed to 65 % of the former income for group 1, 45 % for group 2 and 40 % for group 3.

The statistics given in a letter addressed by the Belgian authorities to the Commission on 12 September 1983, and based on a survey of 6 % of those unemployed persons receiving benefit in June 1982, showed that the unemployed in group 1 were 81.4 % male and that, by contrast, 65.2 % of the persons making up group 3 were female.

The Commission was of the opinion that the Belgian unemployment and sickness benefit systems lead to indirect discrimination against women contrary to Article 4(1) of Council Directive 79/7. Therefore, it brought infringement proceedings under Article 169 of the EEC Treaty, seeking a declaration that by failing to take all measures necessary for the complete and precise application of the abovementioned Directive, the Kingdom of Belgium had failed to fulfil its obligation under the EEC Treaty.

2. The judgment of the ECJ

By way of introduction, the Court recalled that according to its established case law Article 4(1) of the Directive prohibited less favourable treatment of a social group when it turned out that group was composed of a far higher number of persons of one or other sex, unless the measure in question was 'justified by objective factors unrelated to any discrimination on grounds of sex' (Case 33/89 — *Kowalska)*. The Court also recalled that it had declared, in particular, that a benefit system which provided for supplements which were not related to the sex of those eligible but would take into account their matrimonial and family status, the result of which was that an appreciably lower percentage of women than men were able to benefit from those supplements, would be contrary to Article 4(1), if this system of benefits could not be justified by reasons excluding discrimination on grounds of sex (Case 30/85 — *Teuling*).

In the first place, the Belgian Government argued that the difference in the ratio of men to women between the three categories of beneficiaries was a product of a social phenomenon arising from the fact that the number of women in employment was lower than that of men. The Court, however, was of the opinion that such consideration could not be regarded as forming the basis of objective criteria unrelated to any discrimination on grounds of sex.

Secondly, the Belgian Government maintained that its national system was designed to provide, within the limits which were necessarily implied by budgetary resources available, each individual, for an unlimited period of time, with a minimum replacement income, taking into account the family status of the eligible party who might either be responsible for meeting the supplementary needs of people in his or her charge or might on the other hand benefit from the income of a spouse. In considering this argument, the Court observed that these principles and objectives were part of a social policy which, under current Community law, was a matter for Member States which had a reasonable margin of discretion in so far as social security measures and concrete means to put them into effect were concerned (Case 184/83 — *Hofmann).* Moreover, the Court noted that the Belgian system, as it stood, tended to give the replacement income programme instituted in Belgium the character of a guaranteed minimum income for families. Where the guarantee of the minimum means of subsistence was concerned, the Court had already stated that Community law was not opposed to a Member State which, in controlling its social expenditure, took into account the relatively greater needs of those persons eligible who had a spouse who was either totally dependent or who received only a very low income or for those who had a dependent child, by comparison to persons living alone. Thus, the Court concluded that if, in order to fulfil the needs of its social policy, a Member State could exclude workers living alone from entitlement to benefit, it could all the more, reduce, because of the absence of any dependent persons, the benefit which was paid to them. The Court rejected the application of the Commission on the grounds that the Belgian Government had shown that its system of unemployment and sickness benefit fulfilled a legitimate objective of its social policy, that the supplements included were likely to achieve that objective and were necessary to that end and that it was thus justified by factors unrelated to any discrimination on grounds of sex.

The Court ruled as follows:

1) *The Commission's application is dismissed.*

2) *The Commission is ordered to pay the costs.*

Joined Cases C-87/90, C-88/90 and C-89/90
A. VERHOLEN v SOCIALE VERZEKERINGSBANK AMSTERDAM, T.H.M. VAN WETTEN-VAN UDEN v SOCIALE VERZEKERINGSBANK AMSTERDAM AND G.H. HEIDERIJK v SOCIALE VERZEKERINGSBANK AMSTERDAM
Date of judgment:
11 July 1991
Reference:
[1991] ECR I-3757
Content:
Equal treatment for men and women — Social security (Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

The Dutch legislation Algemene Ouderdomswet CAOW) instituted for the benefit of Dutch residents as well as non-residents over the age of 65, who had been taxed on income earned from employment in the Netherlands, a general old-age pension scheme under which rights were calculated on the basis of past periods of insurance. Under this scheme, applicable until an amendment to the law came into effect on 1 April 1985, a married woman, resident in the Netherlands, whose spouse, also a Dutch resident, was not insured under the AOW because he was pursuing an occupation abroad and was insured under the scheme there, was herself excluded from the scheme during the corresponding period. On the other hand, a married man, resident in the Netherlands, whose wife was not insured under the scheme remained eligible under the Dutch pension scheme. The beneficiary of a pension whose dependent spouse had not yet reached 65 received an increased pension. This supplement was nevertheless reduced according to the number of years during which the spouse had not been insured under the scheme.

Mrs A. Verholen (Case C-87/90), after having pursued an occupation in the Netherlands up to the age of 61, took early retirement under a scheme linked to her contract of employment. Mrs T.H.M. Van Wetten-Van Uden (Case C-88/90), as well as the wife of Mr G.H. Heiderijk (Case C-89/90), had never pursued an occupation. Having reached the age of 65, Mrs Verholen and Mrs Van Wetten-Van Uden were refused a full pension by the Sociale Verzekeringsbank on the ground that their spouses, resident in the Netherlands, had, during certain periods, pursued an occupation abroad, and had been insured there. Mr Heiderijk had the supplement to his old-age pension, in respect of a dependent spouse who had not yet reached the age of 65, reduced according to the number of years during which she had not been insured, including those during which he worked in West Germany.

The claimants appealed against the decisions of the Sociale Verzekeringsbank to the Raad van Beroep.

2. Questions referred to the ECJ

By three orders of 30 January and 15 February 1990, the Raad van Beroep of 's-Hertogenbosch (Netherlands) referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

In Case C-87/90:

Is the fact that a national provision which excluded only married women from insurance under the AOW continues to be effective after 22 December 1984, in the sense that after that date it continues to be the case that the pension received by these women may be reduced because they have failed to fulfil a requirement for cover which need not be fulfilled by men, compatible with Article 4(1) (and/ or Article 5) of Directive 79/7/EEC?

In Case C-88/90:

1) Does Community law prevent a national court from taking into consideration of its own motion whether a national scheme conforms with an EEC directive when the period

for implementation of that directive has elapsed, if the party does not rely on that same directive (for example because he is unaware of it)?

2) Does Community law prevent the national court from taking into consideration whether national legal rules comply with an EEC directive when the period for implementation of that directive has elapsed, in a case where that party cannot rely on the said directive because he does not fall within the scope of that directive with regard to persons, even if the party does fall within the scope of national legislation to which that same directive applies?

3) Does Article 2 of Directive 79/7/EEC refer to the scope with regard to persons of the Directive itself or can it be considered as restricting the application of the national legislation covered by that same Directive (in addition to the restrictions under Article 3 of that Directive)?

In Case C-89/90:

In proceedings before a national court, can a party rely on Article 4(1) (and/or Article 5) of Directive 79/7/EEC if he suffers the effects of a discriminatory national provision regarding his spouse, who is not a party to the said proceedings?

3. The judgment of the ECJ

As far as question (1) of Case C-88/90 was concerned, the Court observed that it had already recognised that Article 177 of the EEC Treaty conferred on national courts the power, and, where appropriate, imposed on them the obligation to make a preliminary reference as soon as the judge had held, either of his own motion, or at the request of the parties, that the proceedings gave rise to a point falling within the scope of its first subsection. Such a question might, specifically, concern a directive which had not been implemented by the national authorities within the time prescribed, which was obligatory on Member States and whose precise and unconditional provisions might, according to the case law of the Court, be applied directly by a national court. Consequently, said the Court, the recognised right of a party to rely, under certain conditions, before a national court, on a directive for which the period of implementation had elapsed could not exclude the power of the national judge to consider that directive, even if the party had not relied on it.

The Court took the view that the second and third questions of Case C-88/90 raised the same problems. In replying to both questions, the Court mentioned its ruling in Joined Cases 48, 106 and 107/88 — *Achterberg-te Riele,* in which it had held that the scope of the Directive with regard to persons was determined by Article 2, under which the Directive applied to the working population, those seeking employment, as well as those whose employment had been interrupted by one of the risks specified in Article 3(1)(a). In view of this, the Court concluded that the national court should not extend the scope of Directive 79/7 with regard to the persons covered on the grounds that the parties were covered by a national scheme, such as the AOW, to which the Directive did apply by reason of another provision thereof (Article 3) relating to its scope *ratione materiae.*

Concerning the question referred to in Case C-89/90, the Court mentioned at the outset that the right to rely on the provisions of Directive 79/7 was not restricted to persons who fell within the scope of the Directive, to the extent that it could not be ruled out that others might have a direct interest in seeing the principle of non-discrimination respected on behalf of the persons protected. The Court added that if, in principle, it was for national law to determine who had the capacity to be a party and what should be the extent of his interest, Community law nevertheless required that national law did not restrict his right to effective legal protection and that the application of national law could not make the exercise

of rights conferred by the Community legal order impossible in practice. As to the present case, the Court stated that a party suffering the effect of a discriminatory national provision might only be permitted to rely on Directive 79/7 on the basis that his wife, who was the victim of the discrimination, fell within the scope of that Directive herself.

In answer to the question referred in Case C-87/90, the Court mentioned Case 384/85 — *Borrie Clarke,* where it stressed that Directive 79/7 did not provide for any derogation from the principle of equal treatment under Article 4(1) which could authorise prolonging the discriminatory effect of any previous national provision. Moreover, according to its ruling in Case 80/87 — *Dik,* a Member State could not, after 23 December 1984, continue inequality of treatment on the grounds that the conditions that needed to be fulfilled before a right to benefit would rise had been established before that date.

In answer to the questions referred to it, the Court held that:

1) *Community law does not preclude a national court from examining of its own motion whether national legal rules comply with the precise and unconditional provisions of a Directive, the period for whose implementation has elapsed, in the case where the person concerned has not relied on that Directive before the national court.*

2) *Article 2 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as referring to the scope ratione personae of that Directive, the content of which cannot vary according to the scope ratione materiae, under Article 3 thereof.*

3) *An individual may rely on Directive 79/7 before a national court if he suffers the effects of discriminatory national provisions regarding his spouse, who is not a party to the proceedings, provided, however, that his spouse also comes within the scope of the Directive.*

4) *Directive 79/7 must be interpreted as not allowing Member States to retain in force, after expiry of the period for implementation laid down in Article 8, the effects of earlier national legislation which excluded married women in certain circumstances from old-age insurance cover.*

Case C-31/90
ELSIE RITA JOHNSON v CHIEF ADJUDICATION OFFICER
Date of judgment:
11 July 1991
Reference:
[1991] ECR I-3723
Content:
Equal treatment for men and women in matters of social security (Articles 2 and 4 of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

Mrs Johnson ceased working in about 1970 to look after her daughter, who was then aged six and with whom she lived alone. In 1980, she wished to resume working but was unable to do so because of a back condition. In 1981, by reason of her incapacity for work she was awarded a non-contributory invalidity pension pursuant to section 36(2) of the Social Security Act 1975 which was then in force. However, payment of that pension was stopped when Mrs Johnson began to cohabit with her present partner on the ground that she could not establish that she fulfilled the additional condition imposed by section 36(2) on cohabiting women, namely that she should be incapable of performing normal household duties. By section 11 of the Health and Social Security Act 1984, the non-contributory invalidity pension was abolished as from 20 November 1984, and the new benefit, the severe disablement allowance, which was open to claimants of both sexes on the same conditions, was introduced with effect from 29 November 1984. However, regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984, allowed persons who could have claimed the old non-contributory invalidity pension to benefit automatically from the new severe disablement allowance as from 29 November 1984, without having to show that they fulfilled the new conditions.

On 17 August 1987, Mrs Johnson made a claim through a citizens' advice bureau for a severe disablement allowance based on the aforesaid regulation. The Adjudication Officer rejected that claim by a decision dated 13 November 1987 and her appeal was dismissed by the Sutton Social Security Appeal Tribunal by a decision of 24 October 1988. She then appealed to the Social Security Commissioners.

2. Questions referred to the ECJ

By a decision of 25 January 1990, the Social Security Commissioners referred four questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is Article 2 of Directive 79/7/EEC to be interpreted as including within its personal scope a woman (or man) who was a worker but who left employment for the purposes of childcare and who was later prevented from returning to employment by illness?

2) In particular, is such a woman (or man) to be regarded as included within the personal scope of the Directive if she would be working or seeking employment but for illness, or is it necessary in all cases for a person who claims to be within the personal scope of the Directive to have left employment in the first place not because of childcare but because of the materialisation of one of the risks referred to in Article 3?

3) Is it material for the consideration of the position of such a woman in relation to Article 2 of the Directive to determine whether or not she has sought employment in the period between the end of her childcare responsibilities and the onset of the illness that now prevents her from working?

4) Does Article 4 of Directive 79/7/EEC have direct effect so as to provide a woman with a right to benefit (benefit 'B') for the period af-

ter she makes her claims in circumstances where:

a) a Member State had provided an invalidity benefit (such as the non-contributory invalidity benefit considered in Clarke) (benefit 'A') that was subject to a provision preventing married or cohabiting women qualifying for it unless they met an additional test not applied to any man;

b) benefit 'A' has been abolished and replaced by benefit 'B';

c) entitlement to benefit 'B' is at least in some cases based on prior entitlement to the abolished benefit 'A';

d) the woman did not establish entitlement to benefit 'A' as a matter of domestic law, by making a claim for it before its abolition, and any claim now made would secure entitlement to benefit because entitlement cannot be obtained for any period more than 12 months before the date on which a claim for the benefit is made?

3. *The judgment of the ECJ*

The questions referred to the Court raised two distinct issues: first, the determination of the personal scope of Directive 79/7/EEC (first, second and third questions) and, secondly, the determination of the meaning of the principle of equal treatment referred to in Article 4 of the same Directive with regard to the conditions for obtaining a social security benefit (fourth question).

As far as the personal scope of the Directive was concerned, the Court stated that it followed from Articles 2 and 3 of Directive 79/7, read in conjunction, that the Directive applied only to persons who were available on the labour market or who had ceased to be so owing to the materialisation of one of the risks specified in the Directive. Therefore, a person who had given up his or her occupational activity in order to attend to the upbringing of his or her children did not fall within the scope of the Directive. However, that person might still be regarded as falling within the scope of the Directive as a person seeking employment whose search was made impossible by the materialisation of one of the risks specified in Article 3(1)(a) of the Directive, provided that documents proving that the person concerned was actually seeking employment were presented before national courts. Furthermore, the Court pointed out that the protection guaranteed by Directive 79/7 to persons who had given up their occupational activity in order to attend to the upbringing of their children was afforded only to those persons in that category who suffered incapacity for work during a period in which they were seeking employment. As far as the social protection of mothers remaining at home was concerned, it followed from Article 7(1)(b) of the Directive that the acquisition of entitlement to benefits following periods of interruption of employment due to the upbringing of children was still a matter for the Member States to regulate. In those circumstances, concluded the Court, it was for the Community legislature to take such measures as it considered appropriate to remove the discrimination which still existed in this regard in some bodies of national legislation.

With reference to the determination of the meaning of the principle of equal treatment referred to in Article 4 of Directive 79/7, the Court started its reasoning by recalling its ruling in Case 384/85 — *Borne Clarke*. There it had held that the Directive did not provide for any derogation from the principle of equal treatment laid down in its Article 4(1), so as to authorise the continuation of the discriminatory effects of earlier provisions of national law. Therefore, after 22 December 1984, the date on which the period laid down by the Directive for bringing national legislation into conformity with it expired, a Member State could not maintain any inequalities of treatment. Accordingly, the Court stated that the British legislation which made entitlement to a benefit subject to the previous submission of a claim for a different benefit which entailed a condition discriminating

against female workers, should be regarded as incompatible with Article 4(1) of Directive 79/7.

In answer to the questions submitted to it, the Court ruled that:

1) *Article 2 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that the Directive does not apply to a person who has interrupted his or her occupational activity in order to attend to the upbring of his or her children and who is prevented by illness from returning to employment unless that person was seeking employment and his or her search was interrupted by the materialisation of one of the risks specified in Article 3(1)(a) of the Directive, it being unnecessary to make a distinction according to the reason for which that person left previous employment. It is for the national court to determine that the person relying on Directive 79/7/EEC was actually seeking employment at the time when one of the risks specified in Article 3(1)(a) of the Directive materialised.*

2) *Since 23 December 1984, it has been possible to rely on Article 4 of Directive 7917/EEC in order to have set aside national legislation which makes entitlement to a benefit subject to the previous submission of a claim in respect of a different benefit which has since been abolished and which entailed a condition discriminating against female workers. In the absence of appropriate measures for implementing Article 4 of Directive 79/7/EEC, women placed at a disadvantage by the maintenance of the discrimination are entitled to be treated in the same manner and to have the same rules applied to them as men who are in the same situation, since, where the Directive has not been implemented correctly, those rules remain the only valid point of reference.*

Case C-345/89
MINISTÈRE PUBLIC v ALFRED STOECKEL
Date of judgment:
25 July 1991
Reference:
[1991] ECR I-4047
Content:
Equal treatment for men and women — Legislation prohibiting night work for women (Article 5 of Council Directive 76/207/EEC of 9 February 1976).

1. Facts and procedure

On 28 October 1988, Mr Stoeckel, director of Suma S.A. in France, was charged with having employed 77 women on night-work, contrary to Article L213-1 of the French Code du Travail.

The said provision prohibited the employment of women at night, in factories, workshops and the like. A certain number of derogations regarding, for instance, female members of the board, work of a technical character, or in cases of national interest were envisaged providing that certain requirements would be fulfilled and the applicable procedures followed.

As a result of foreign competition, Suma suffered economic constraints and had filed applications for dismissal permits regarding 200 of its employees. Based on the assumption that this number could be reduced by creating a system of shift-work, thus enabling a continuous production, day and night, Suma had entered into negotiations with the trade unions. The resulting agreement provided that the system of shift-work was considered to be of exceptional character and that Suma would return to the initial situation as soon as its economic difficulties had disappeared. In order to give equal opportunities to female employees, available jobs were offered to both men and women, after the majority of the women had voted in favour of the new system of shift-work.

In the proceedings before the tribunal de police, Mr Stoeckel maintained that Article L213-1 of the Code du Travail contravened Article 5 of Directive 76/207 and the ruling in Case 312/86 — *Commission v France,* whereby the Court had held that the French Republic had failed to fulfil its obligations regarding the adoption of all measures mentioned therein, which were needed for removing the inequalities prohibited under that Directive.

2. Question referred to the ECJ

By a judgment of 4 October 1989, the Tribunal de Police, Illkirch (France), referred a question to the Court of Justice for a preliminary ruling under Article 177 of the Treaty:

(1) Is Article 5 of Directive 76/207/EEC precise to impose on a Member State an obligation not to lay down in its legislation the principle that night work by women is prohibited, as in Article L213-1 of the French Code du Travail?

3. The judgment of the ECJ

The Court commenced by reiterating that the purpose of Directive 76/207 was to introduce the principle of equal treatment for men and women as regards, for instance, access to work and working conditions. Subsequently, the Court stated that, as it had held in Case 152/84 — *Marshall,* Article 5 of the said Directive did not confer on the Member States the right to limit the application of the principle of equal treatment, or to subject it to any conditions. Moreover, the Court recalled that Article 5 was sufficiently precise and unconditional to be relied upon by an individual before a national court so as to avoid the application of any national provision which did not conform with it. The Court further mentioned its ruling in Case 222/84 — *Johnston:* Article 2(3) of the abovementioned Directive, which allowed provisions aimed at the protection of women with respect to pregnancy and maternity, intended to protect a woman's biological condition and the special relationship which exists between a woman and her child. The French and Italian Governments argued that

the prohibition of night work for women, qualified by numerous derogations, was in keeping with the general aims of protecting female employees and with special considerations of a social nature, such as the risks of assault and the greater burden of household work borne by women. As regards the aims of protecting female employees, the Court held that it was not evident that, except in cases of pregnancy and maternity, the risks incurred by women in such work were broadly different in kind from the risks incurred by men. As far as risks of assault were concerned, the Court ruled that, on the assumption that they were greater at night then during the day, suitable measures could be adopted to deal with them without jeopardising the fundamental principle of equal treatment. With regard to family responsibilities, the Court recalled that in Case 184/83 — *Hofmann,* it had stated that the Directive is not designed to settle questions concerned with the organisation of the family, or to alter the division of responsibility between parents. In addition, turning to the numerous derogations from the prohibition on night work for women, to which the French and Italian Governments had referred, the Court held that they were inadequate to give effect to Directive 76/207, since that Directive did not allow any general principle excluding women from night work; the derogations could, indeed, be a source of discrimination.

Hence, the Court held:

Article 5 of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, is sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that obligation is subject to exceptions, where night work for men is not prohibited.

Case C-208/90
T. EMMOTT v MINISTER FOR SOCIAL WELFARE AND ATTORNEY GENERAL
Date of judgment:
25 July 1991
Reference:
[1991] ECR I-4269
Content:
Equal treatment in matters of social security — Disability benefit — Direct effect and time limits for initiating proceedings before national courts (Article 4(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

Mrs Emmott was a married woman who, since December 1983, had been in receipt of disability benefit under Irish social security legislation. Until 18 May 1985, she received that benefit at the reduced rate applicable at the time to all married women. On 19 May 1986, a first adjustment to that benefit was made on the basis of the new legislation adopted in implementation of Directive 79/7; from then on, Mrs Emmott received the disability benefit at the rate applicable to a man who did not have any adult or child dependents. From 17 November 1986, the benefit was increased on account of her three dependent children. In June 1988, a third adjustment was made. It was only after the delivery on 24 March 1987 of the judgment of the Court in Case 286/85 — *McDermott and Cotter I* that she seemed to have realised that the Directive had given her a right to equal treatment which she had been entitled to exercise since 23 December 1984. Some days later, she entered into correspondence with the Minister for Social Welfare to obtain the benefit of the provisions of the Directive with effect from 23 December 1984. The Irish authorities replied that, so long as the High Court had not settled the question of the retroactivity of the benefits to 23 December 1984, in the *McDermott and Cotter I* case, no decision could be taken in her case. However, they let it be understood that her application would be considered as soon as that case was settled. In January 1988, Mrs Emmott finally instructed solicitors who, in July, obtained leave to bring an action before the High Court subject to the Minister for Social Welfare and Attorney General's right to plead failure to observe the procedural time limits. The national authorities concerned did in fact plead that Mrs Emmott's delay in initiating proceedings constituted a bar to her claim.

2. Questions referred to the ECJ

By order of 22 June 1990, the High Court of Ireland referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

Is the ruling of the Court of Justice of 24 March 1987 in Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and Attorney General* [1987] ECR 1453 whereby the Court of Justice answered the questions referred to it pursuant to Article 177 of the EEC Treaty by the High Court in its interpretation of the provisions of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 as follows:

'1) Where Council Directive 79/7/EEC of 19 December 1978 has not been implemented, Article 4(1) of the Directive, which prohibits all discrimination on grounds of sex in matters of social security, could be relied on as from 23 December 1984 in order to preclude the application of any national provision inconsistent with it.

2) In the absence of measures implementing Article 4(1) of the Directive, women are entitled to have the same rules applied to them as are applied to men who are in the same situation since, where the Directive has not been implemented, those rules remain the only valid point of reference.'

to be understood as meaning that, in a claim before a national court or tribunal made in

purported reliance upon Article 4(1) of that Directive by a married woman for equal treatment and for compensatory payments in respect of discrimination alleged to have been suffered by reason of the failure to apply to her the rules applicable to men in the same situation, it is contrary to the general principles of Community law for the relevant authorities of a Member State to rely upon national procedural rules, in particular rules relating to time-limits, in bringing claims in defence of that claim such as to restrict or refuse such compensation?

3. The judgment of the ECJ

In replying to the questions referred to it, the Court, first of all, recalled that it had consistently held that in the absence of Community rules on the subject, it was for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of rights which individuals derived from the direct effect of Community law, provided that such conditions were not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law. Whilst the laying down of reasonable time limits which, if unobserved, barred proceedings, in principle satisfied the two conditions mentioned above, account should nevertheless be taken of the particular nature of directives. The Court stressed that the Member States were required to ensure the full application of directives in a sufficiently clear and precise manner so that, where directives were intended to create rights for individuals, they could ascertain the full extent of those rights and where necessary, rely on them before the national courts. The Court subsequently pointed out that so long as a directive had not been properly transposed into national law, individuals were unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsisted even after the Court had delivered a judgment finding that the Member State in question had not fulfilled its obligation under a given directive and even if the Court had held that a particular provision or provisions of that directive were sufficiently precise and unconditional to be relied upon before a national court. The Court concluded that until such time as a directive had been properly transposed, thereby creating legal certainty, a defaulting Member State could not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of a directive and that the period laid down by national law within which proceedings should be initiated could not begin to run before that time.

Based on this reasoning the Court ruled as follows:

Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by Article 4(1) of Directive 79/7/EECof 19 December 1979 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, on national procedural rules relating to time limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system.

Case C-243/90
THE QUEEN v SECRETARY OF STATE FOR SOCIAL SECURITY, EX-PARTE FLORENCE ROSE SMITHSON
Date of judgment:
4 February 1992
Reference:
[1992] ECR I-467
Content:
Equal treatment of men and women — Social security — Invalidity pensions — Housing benefit (Article 4 of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

In the United Kingdom, housing benefit was paid pursuant to the Social Security Act 1986 to persons whose real income was lower than a notional income known as the 'applicable amount'. One of the elements which might be taken into account in order to determine that applicable amount was the 'higher pensioner premium' which was applicable, *inter alia,* to persons aged between 60 and 80, who lived alone and were in receipt of one or more other social security benefits, including, in particular, an invalidity pension. Under the Social Security Act 1975, an invalidity pension was payable up to pensionable age, which was 60 for women and 65 for men.

Persons who had passed that age but remained in regular employment were also paid an invalidity pension for a period of five years after the date on which they reached pensionable age. Anyone who had retired but not yet reached the age of 65 (for women) or 70 (for men) might elect to withdraw from the pension scheme in order to obtain an invalidity pension.

Ms Smithson ceased at the age of 60 to draw the invalidity pension which she had been receiving until then. She was informed that the higher pensioner premium did not apply to her because she did not fulfil the supplementary condition of being in receipt of an invalidity pension. Since she was 67, Ms Smithson was also unable to elect to leave the pension scheme in order to draw an invalidity pension. She then made an application for judicial review based on the argument that the national legislation was incompatible with the prohibition of discrimination in Article 4 of Directive 79/7.

2. Questions referred to the EC

By an order of 26 June 1990, the High Court of Justice, Queen's Bench Division, referred the following questions to the Court for a preliminary ruling under Article 177 of the Treaty:

1) Does the inability of a woman aged between 65 and 70 to claim and receive higher pension premium on the basis of paragraph 10(1)(b)(i) of Schedule 2 to the Housing Benefit (General) Regulations 1987 contravene Article 4 of Council Directive 79/7?

2) Is a woman aged between 65 and 70 entitled, by reason of the combined effect of section 2 of the European Communities Act 1972 and Article 4 of Council Directive 79/7, to give notice of deretirement pursuant to section 30(3) of the Social Security Act 1975, to claim and receive (if otherwise eligible) invalidity benefit under section 15 of that Act, and to claim and receive higher pension premium on the basis of paragraph 10(1)(b)(i) of Schedule 2 to the Housing Benefit (General) Regulations 1987?

3. The judgment of the ECJ

With regards to question (1), the Court first mentioned that according to its Article 3(1), Directive 79/7 applied to statutory schemes which provided protection against, *inter alia,* the risk of invalidity or old age, and to provisions concerning social assistance, in so far as they were intended to supplement the invalidity scheme. In order to fall within the scope of that Directive, therefore, a benefit should constitute the whole or part of a statutory scheme providing protection against one of the

specified risks or a form of social assistance having the same objective (Case 150/85 — *Drake)*. It followed from the judgment just cited that, although the mode of payment was not decisive as regards the identification of a benefit as one which fell within the scope of Directive 79/7, in order to be so identified the benefit should be directly and effectively linked to the protection provided against one of the risks specified in Article 3(1) of the Directive. However, added the Court, Article 3(1)(a) did not refer to statutory schemes which were intended to guarantee any person whose real income was lower than a notional income, calculated on the basis of certain criteria, a special allowance enabling that person to meet housing costs. The age and invalidity of the beneficiary were only two of the criteria applied in order to determine the extent of thebeneficiary's financial need for such an allowance. The fact that those criteria were decisive as regards eligibility for the higher pensioner premium was not sufficient to bring that benefit within the scope of Directive 79/7. The Court went on to conclude that the premium was in fact an inseparable part of the whole benefit which was intended to compensate for the fact that the beneficiary's income was insufficient to meet housing costs and could not be characterised as an autonomous scheme intended to provide protection against one of the risks listed in the above mentioned Article 3(1).

In view of the answer given to question (1), the Court took the opinion that the second question did not require an answer.

In reply to the questions referred to it, the Court ruled as follows:

Article 3(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as not applying to a scheme for housing benefit the amount of which is calculated on the basis of the relationship between a notional income to which the beneficiary is deemed to be entitled and his or her actual income, even if criteria concerning protection against some of the risks listed by the Directive, such as sickness or invalidity are applied in order to determine the amount of the notional income.

Case C-360/90
ARBEITERWOHLFAHRT DER STADT BERLIN E. v MONIKA BÖTEL
Date of judgment:
4 June 1992
Reference:
[1992] ECR I-3589
Content:
Employment — Sex discrimination — Equal pay — Training courses — Part-time workers (EEC Treaty, Article 119; Council Directive 75/117/EEC of 10 February 1975).

1. Facts and procedure

Mrs Bötel, a part-time home nurse, worked an average of 29.25 hours per week. Since 1985, she had been chairman of one of her employer's district staff committees. In 1989, she attended six training courses on topics necessary for the work of staff committees within the meaning of section 37(6) of the Act on the Organisation of Enterprises (Betriebsverfassungsgesetz) of 15 January 1972, and which covered employment law and the law of enterprises in particular. Pursuant to the combined provisions of subsections (2) and (6) of section 37 of the abovementioned act, members of a staff committee who attended such courses should be released from their work obligations by their employer, without a reduction in pay. Under these provisions Mrs Bötel was paid by her employer for the working hours which she spent on the courses and during which she did not therefore work, but only in respect of her individual working hours. Consequently she received no compensation for the time she spent on training over and above her individual working hours. If Mrs Bötel had been employed full-time, the association in question would have been required by the aforesaid national provisions to compensate her within the limit of the full-time working hours, *viz.* for additional time of 50.3 hours.

She brought an action against her employer before the Arbeitsgericht Berlin, for compensation for this extra time in form of paid leave or payment for overtime. By judgment of 18 May 1990, the Arbeitsgericht ordered the employer to grant her 50.3 hours' paid leave. The employer, in turn, appealed to the Landesarbeitsgericht Berlin.

2. Question referred to the ECJ

By order of 24 October 1990, the Landesarbeitsgericht Berlin, referred the following question to the Court for a preliminary ruling under Article 177 of the Treaty:

Is it compatible with Article 119 EEC and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women for legislative provisions, to guarantee staff committee members compensation (according to the loss-of-pay principle) for work-time lost by reason of attendance on courses (which provide knowledge necessary for the work of the staff committee), whilst not providing compensation in the form of leave or money, up to a level corresponding to full working hours, for staff committee members who work part-time but are obliged to devote further time in addition to their individual working hours to such courses, even though the proportion of women affected by these provision is significantly higher than that of men?

3. The judgment of the ECJ

In reply to the question referred to it, the Court firstly found it necessary to determine whether compensation, in the form of paid leave or payment for over time, for training courses on topics necessary for the work of staff committees, was in the nature of 'pay' within the meaning of Article 119 of the Treaty and Directive 75/117. According to its settled case law, the definition of pay within the meaning of Article 119 covered all consideration, whether in cash or in kind, whether immediate or future, provided that the worker received it,

albeit indirectly, in respect of his employment from his employer, whether under a contract of employment, by virtue of legislative provision or on a voluntary basis. The Court held that this definition was applicable to a case such as the one examined here and went on to state that although compensation of the kind in question did not arise as such from the contract of employment, it was nevertheless paid by the employer by virtue of legislative provisions and by reason of the existence of an employment relationship. Staff committee members were necessarily employees of the enterprise and they had the task of safeguarding the interests of the staff, thus promoting harmonious employment relationships within the enterprise and in its general interest. Moreover, added the Court, such compensation had the object of providing staff committee members with a source of income even though during the training courses they were not doing the work laid down by their contract of employment. Secondly, the Court also found it necessary to determine whether, by reason of the application of national legislation, staff committee members who were employed part-time were treated differently from those working full-time with regard to compensation for attending training courses. The Court pointed out that the two categories of staff committee members devoted the same number of hours to attending the courses in question. However, as the members employed part-time received from the employer compensation which was less than that of members with full-time employment, this amounted to a difference in treatment. Thirdly, the Court observed that staff committee members with part-time employment were generally women and their number was far more than men in the same condition. It followed that, with regard to compensation for attending training courses, the application of legislative provisions such as those in question entailed in principle, so far as pay was concerned, indirect discrimination against female workers in relation to men, which was contrary to Article 119 and Directive 75/117. It was argued before the Court that the difference in treatment was entirely due to the difference in working hours because the German legislation provided compensation only for working hours which were not worked by reason of attending training courses, without making any other distinction. Therefore, discrimination could be only regarded as established if activities on staff committees were classified as a particular form of work to be done under the contract of employment. The Court did not accept this argument as an objectively justified factor unrelated to discrimination based on sex, unless the Member State concerned could show the contrary before the national court. It based its reasoning, firstly, on the fact that legal definitions and classifications in national law could not affect the interpretation or binding force of Community law and, consequently, the scope of the principle of equal pay for men and women laid down in Article 119 and Directive 75/117 and developed by its case law. Moreover, the argument that the compensation granted by national law for attending training courses was calculated solely by reference to working hours which were not in fact worked did not alter the fact that staff committee members who were employed part-time received smaller compensation than their full-time counterparts, although in the final analysis both categories of workers received the same number of hours' training for the purpose of effectively safeguarding the interests of employees in good labour relations and for the general well-being of the enterprise. Lastly, in the Court's opinion, a situation of this kind was likely to dissuade the category of part-time workers, of whom the majority were undoubtedly women, from accepting the duties of members of a staff committee or acquiring the knowledge necessary for that purpose, thus making it more difficult for that category to be represented by qualified staff committee members.

In answer to the question submitted to it, the Court held that:

Article 119 of the EEC Treaty and Council Directive 75/117/EECof 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women make it unlawful for national legislation ap-

plicable to many more women than men to limit, on the basis of their individual work timetable, the compensation that members of staff committees employed part-time are to receive from their employer in the form of paid holiday or pay for overtime in respect of their participation in training courses concerned with the activities of staff committees organised within the full-time work timetable in force in an undertaking but exceeding their individual work timetables, whilst the members of staff committees who work full time are compensated, for their participation in the same training courses, on the basis of a full-time work timetable. It is open to a Member State to establish that such legislation is justified by objective factors unconnected with any discrimination based on sex.

Case C-9/91
THE QUEEN v SECRETARY OF STATE FOR SOCIAL SECURITY, EX-PARTE THE EQUAL OPPORTUNITIES COMMISSION
Date of judgment:
7 July 1992
Reference:
[1992] ECR I-4297
Content:
Equal treatment for men and women — Contribution periods (Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

The Equal Opportunities Commission (EOC) brought an application for judicial review in the High Court, seeking a declaration that the UK contributory State pension scheme unlawfully discriminated on grounds of sex against men contrary to EEC law, in that it required men to pay contributions for 44 years and women for 39 years in order to qualify for the same full basic retirement pension, and in that a man working between the ages of 60 and 64 paid contributions whereas a woman in the same situation did not. The EOC also sought a declaration that by failing to bring relevant provisions of the Social Security Act 1975 and the Social Security Pensions Act 1975 into line with EEC Social Security Directive 79/7, the Secretary of State for Social Security was in breach of the obligation laid down in Article 5 of the Directive requiring Member States to take the necessary measures to ensure that any discriminatory provisions falling within the scope of the Directive were abolished.

2. Question referred to the ECJ

By order of 3 December 1990, the High Court of Justice of England and Wales, Queen's Bench Division, referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

Where:

a) pursuant to Article 7(1)(a) of Directive 79/7/EEC a Member State preserves different pensionable ages for men and women (65 for men, 60 for women) for the purpose of granting old-age and retirement pensions;

and

b) national insurance contributions fund a range of benefits including state retirement pension;

does Article 7(1)(a) of Directive 79/7/EEC permit a Member State to derogate from the principle of equal treatment for men and women in matters of social security set out in Article 4 thereof:

- by requiring men to pay national insurance contributions for five years longer than women in order to be entitled to the same basic pension; and

- by requiring men who continue in gainful employment up to the age of 65 to continue to pay national insurance contributions up to that age, when women over the age of 60 are not required to pay national insurance contributions whether or not they remain in gainful employment after that age?

3. The judgment of the ECJ

By its questions the High Court sought to ascertain whether those forms of discrimination described above, which were in principle contrary to Article 4(1) of the Directive, were nonetheless temporarily permissible by virtue of the power conferred upon Member States by Article 7(1)(a) to derogate from the Directive by fixing different pensionable ages for men and women for the purposes of granting old-age and retirement pensions. The question, therefore, was whether that power of derogation merely allowed men

and women to be treated unequally with respect to the moment at which they became entitled to a pension or whether it also covered other legislative and financial consequences flowing from a different pensionable age, such as the obligation to contribute until reaching that age.

Since the text of the derogation referred to 'the determination of pensionable age for the purpose of granting old-age and retirement pensions', the Court said that it was clear that it concerned the moment from which pensions became payable. The text did not, however, refer expressly to discrimination in respect of the extent of the obligation to contribute for the purposes of the pension or the amount thereof. The Court maintained, therefore, that such forms of discrimination fell within the scope of the derogation only if they were found to be necessary in order to achieve the objectives which the Directive was intended to pursue by allowing Member States to retain a different pensionable age for men and women. In that regard the Court noted that the express purpose of the Directive was to achieve the progressive implementation of the principle of equal treatment for men and women in matters of social security. The progressive nature of the implementation was reflected in a number of derogations, including the one provided for by Article 7(1)(a), and manifested itself by the absence of any precise time limit for their maintenance. The Court then stated that it could be deduced from the nature of the exceptions contained in Article 7(1) of the Directive that the Community legislation intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect, without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. Those advantages included the possibility for female workers of qualifying for a pension earlier than male workers, as envisaged by Article 7(1)(a). Moreover, the Court considered that the derogation laid down in Article 7(1)(a) would be rendered nugatory if the Member States concerned would have been obliged, before the expiry of the sw-year period laid down by Article 8 for the implementation of the Directive, to undertake a general restructuring of the system of contributions and benefits and to alter substantially a financial equilibrium based on an obligation to contribute until pensionable ages that were different for men and women. The Court concluded that to exclude from the derogation discrimination concerning contributions periods, determined according to pensionable age would thus be contrary to the very objective of Article 7(1).

In answer to the question submitted to it, the Court ruled that:

Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as authorising the determination of a statutory pensionable age which differs according to sex for the purposes of granting old-age and retirement pensions and also forms of discrimination such as those described by the national court which are necessarily linked to that difference.

Joined Cases C-63/91 and C-64/91
SONIA JACKSON AND PATRICIA CRESSWELL v CHIEF ADJUDICATION OFFICER
Date of judgment:
16 July 1992
Reference:
[1992] ECR I-4737
Content:
Equal treatment of men and women — Social security — Employment and vocational training — Low-income benefit (Council Directive 79/7/EEC of 19 December 1978 and Council Directive 76/207/ EEC of 9 February 1976).

1. Facts and procedure

In the United Kingdom, the Supplementary Benefits Act 1976 introduced for persons whose means were insufficient to meet their needs a benefit known as 'supplementary allowance' for those between 16 years of age and pensionable age and a 'supplementary pension' for those over pensionable age. Whereas under the regulations implementing the 1976 Act child-minding expenses were in principle deductible from earnings from employment, they were not deductible from allowances paid during vocational training organised by the Manpower Services Commission, a British statutory body responsible for vocational training. The Social Security Act 1986, which replaced the Supplementary Benefits Act 1976 as from April 1988, introduced 'income support', which was granted to anyone aged at least 18 whose income did not exceed a specified amount and who was not engaged in remunerative work. Like the regulations implementing the 1976 Act, those implementing the 1986 Act exempted a sole parent responsible for a child, who was a member of his household, from the requirement of being available for work which recipients of the benefit in question normally had to fulfil. Moreover, under the regulations implementing the 1986 Act, persons working less than 24 hours a week were not regarded as being in remunerative work and child-minding expenses were not deductible from earnings from part-time work.

At the time of the events giving rise to the main proceedings, Ms Jackson, an unmarried mother with a small child, was unemployed and in receipt of supplementary allowance. In 1986, she started a vocational training course arranged by the Manpower Services Commission, in respect of which she received a weekly allowance. The Adjudication Officer took account of that income and withdrew her entitlement to supplementary allowance while refusing her the right to deduct from her income the child-minding expenses which she incurred in respect of her child during her period in training.

At the time of the events giving rise to the main proceedings, Mrs Cresswell, a divorced mother responsible for two young children, was unemployed and in receipt of income support. She then took up part-time employment for less than 24 hours a week. The Adjudication Officer, taking account of that income, reduced her income support but refused to deduct from her income the expenses for minding her children.

They initiated proceedings against these decisions of the Chief Adjudication Officer.

2. Questions referred to the ECJ

By orders dated 21 December 1990, the Court of Appeal of England and Wales referred three questions to the Court for a preliminary ruling under Article 177 of the Treaty:

1) Is supplementary allowance (Case C-63/91) or income support (Case C-64/91) — which is (or, in the case of supplementary allowance, was) a benefit available in a variety of personal circumstances to persons whose means are insufficient to meet their needs as defined by statute and who may or may not have suffered from one of the risks listed in Article 3 of Directive 79/7 — within the scope of Article 3 of Directive 79/7?

2) Is the answer to question (1) the same in all cases or does it depend on whether a person is suffering from one of the risks listed in Article 3 of Directive 79/7?

3) Are the conditions of entitlement for receipt of supplementary allowance (Case C-63/91) or income support (Case C-64/91) capable of falling within Directive 76/207 where those conditions relate solely to access to supplementary allowance or income support but the effect of application of those conditions may be such as to affect the ability of a single parent to take up access to part-time employment or vocational training?

3. The judgment of the ECJ

In reply to the first two questions, the Court first pointed out that a benefit, if it was to fall within the scope of Directive 79/7, should constitute the whole or part of a statutory scheme providing for protection against one of the specified risks or a form of social assistance having the same objective (Cases 150/85 — *Drake* and C-243/90 — *Smithson).* In the latter case it stated that, although the mode of payment was not decisive as regards the identification of a benefit as one which fell within the scope of the aforesaid Directive, nevertheless, in order to fall within the scope of the Directive, the benefit should be directly and effectively linked to the protection provided against one of the risks specified in Article 3(1). However, observed the Court, Article 3(1) did not refer to a statutory scheme which, on certain conditions, provided for persons with means below a legally defined limit with a special benefit designed to enable them to meet their needs.

That finding was not affected by the circumstance that the recipient of the benefit was in fact in one of the situations covered by Article 3(1) of the Directive. Consequently, said the Court, exclusion from the scope of Directive 79/7 was justified a *fortiori where,* as in the cases at issue, the law set the amount of the theoretical needs of the persons concerned, used to determine the benefit in question, independently of any consideration relating to the existence of any of the risks listed in Article 3(1) of the Directive.

Moreover, in certain situations, in particular those presented here, the national schemes at issue exempted claimants from the obligation to be available for work. That showed that the benefit in question could not be regarded as being directly and effectively linked to protection against the risk of unemployment.

In order to answer the third question concerning the scope of Directive 76/207, the Court recalled that Article 1(2) thereof provided that, with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council acting on a proposal from the Commission, would adopt provisions defining its substance, its scope and the arrangements for its application. In this connection, it noted that it had interpreted that provision as meaning that Directive 76/207 was not intended to apply in social security matters (Case 192/85 — *Newstead).* This exception should, however, be interpreted strictly (Case 152/84 — *Marshall).* It followed that, because of the risk of detracting from the objective of Directive 76/207, a scheme of benefits could not be excluded from the scope of the Directive solely because, formally, it was part of a national social security benefit. Nevertheless, pointed out the Court, such a scheme would fall within the scope of that Directive only if its subject matter was access to employment, including vocational training and promotion, or working conditions. Consequently, concluded the Court, the assertion that the method of calculating claimants' actual earnings, which were used as the basis for determining the amount of the benefits, might affect sole mothers' ability to take up access to vocational or part-time employment, was not sufficient to bring such schemes within the scope of Directive 76/ 207.

In reply to the questions submitted to it, the Court ruled that:

1) *Article 3(1) of Directive 79/7/EEC is to be interpreted as not applying to a benefit, such as supplementary allowance or income support, which may be granted in a variety of personal situations to persons whose means are insufficient to meet their needs as defined by statute; that answer does not depend on whether the claimant is suffering from one of the risks listed in Article 3 of the Directive.*

2) *Directive 76/207/EEC is to be interpreted as not applying to a social security scheme, such as supplementary allowance or income support, simply because the conditions of entitlement for receipt of the benefits may be such as to affect the ability of a single parent to take up access to vocational training or part-time employment.*

Case C-226/91
J. MOLENBROEK v BESTUUR VAN DE SOCIALE VERZEKERINGSBANK
Date of judgment:
19 November 1992
Reference:
[1992] ECR I-5943
Content:
Equality between men and women — Social security — Old-age pension (Article 4(1) of Council Directive 79/7/EEC of 19 December 1978).

1. Facts and procedure

The Algemene Ouderdomswet ('AOW') (Dutch General Old-Age Law) provided that any married man or woman was entitled, on reaching the age of 65, to an old-age pension in the amount of 50 % of the net minimum wage. As from 1 April 1988, a married man or woman whose dependent spouse had not yet reached the age of 65 received 70 % of the net minimum wage. Moreover, he/she was entitled to a supplement of 30 % of the net minimum wage, which was reduced in accordance with the spouse's own income from or in connection with work.

Mr Molenbroek was granted, upon reaching the age of 65, a full married man's pension, i.e., 70 % of the net minimum wage. The Sociale Verzekeringsbank ('SVB'), taking account of the fact that Mr Molenbroek's wife, who was younger, continued to receive an incapacity allowance, deducted that income from the maximum supplement to which Mr Molenbroek was entitled. As result, Mr Molenbroek received only 27.70 % of the maximum supplement to which he was entitled.

Mr Molenbroek appealed against the SVB's decision to the Raad van Beroep of Amsterdam.

2. Questions referred to the ECJ

By an order dated 24 July 1991, the Raad van Beroep of Amsterdam, referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1) Is Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 to be interpreted as precluding national legislation on old-age pensions which, regardless of sex, makes the award to a pensioner of a supplementary allowance, and the amount thereof, for a partner not yet 65 dependent exclusively on whether the younger partner receives income from or in connection with work, if the consequences of that condition is that more men than woman qualify for the allowance?

2) a) Is Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 to be interpreted as precluding application of the legislation described in question (1), the purpose of which is to guarantee a minimum income for pensioners with a younger partner, but which also results in an allowance being granted for the younger partner who has no income from work, or very little, even if in addition to a pension the pensioner receives income of his own from or in connection with work, such as a supplementary occupational pension or investment income, in which case guaranteeing a minimum income is in principle not relevant?

   b) Can the application of national legislation such as that described in question (1), the result of which is that more men than women qualify for the allowance payable for the younger partner, be justified under Directive 79/7/EEC by the fact that the AOW is a basic minimum scheme, regardless of the fact that the allowance may also be paid when it is not essential in order to guarantee an adequate means of existence for the pensioner and the younger partner?

3) In a case such as this does incompatibility with Article 4 (1) of Directive 79/7/EEC have

the result that pensioners with partners under 65 may always, regardless of any income received by the younger partner from or in connection with work, claim the allowance (in full)?

3. The judgment of the ECJ

In reply to questions (1) and (2), the Court first referred to its ruling in Case 30/85 — *Teuling,* where it had held that the award of a pension supplement in case of a dependent spouse was forbidden when it was directly or indirectly connected with the sex of the pensioner. In the second place, the Court recalled that in the same case it had declared that a system of benefits providing for a supplement which, although not directly based on the pensioners' sex, took into account their marital or family status, the result of which was that fewer women than men could benefit from the supplement, was contrary to Article 4(1) of Directive 79/7. Thirdly, the Court observed that it had not been denied that many more men than women received the supplement. According to the Court, this was caused by the fact that, in married couples, the man is usually the older spouse and, even when he is not, he usually receives a greater income which prevents his wife from being entitled to a pension supplement. Under these conditions, said the Court, such legislation amounted, in principle, to indirect discrimination against female employees, unless it could be justified by objective factors unrelated to any discrimination based on grounds of sex. This was the case when the chosen means corresponded to a legitimate purpose of the social policy of the Member State involved and were both suitable and necessary to reach that goal (Case C-229/89 — *Commission* v *Belgium).* In this respect, noted the Court, the AOW's aim was to provide the persons concerned with a social minimum income regardless of possible additional income. The Court went on to mention that, according to its ruling in the abovementioned case, the Member States had a reasonable discretion as to the nature and execution of social protective measures. The Court then pointed out that by not taking into account other possible income of the pensioner, the AOW assured a mutual income which at least equalled the income the couple would be entitled when both had reached the pensionable age and the supplement would be then eliminated. In view of this, the Court concluded that the supplement was necessary to preserve the character of the AOW as a basic social benefit and to guarantee a married couple, in which one spouse had not yet reached pensionable age, a minimum income corresponding to that income which they would receive when both were pensioners. In these circumstances, added the Court, the fact that in some cases a pensioner who received the supplement had additional income did not remove the necessary character of the means chosen. The national legislation, therefore, corresponded to a legitimate purpose of social policy and the supplement provided therein was both necessary and suitable to reach that aim and justified by factors other than discrimination based on grounds of sex.

In view of its answer to questions (1) and (2), the Court did not reply to question (3).

The Court answered the questions submitted to it as follows:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that it does not preclude the application of national legislation on old-age insurance which, without distinction of sex, makes the grant and amount of an allowance payable to recipients of a pension whose dependent spouse has not yet reached retirement age dependent on the income received by such spouse from or in relation to an occupation, even though the result of the legislation is that a larger number of men than women receive the allowance.

Case C-173/91
COMMISSION OF THE EUROPEAN COMMUNITIES v KINGDOM OF BELGIUM
Date of judgment:
17 February 1993
Reference:
[1993] ECR I-673
Content:
Failure of a Member State to fulfil its obligations — Equal pay for men and women — Additional redundancy payments.

1. Facts and procedure

Collective Agreement No 17 established a scheme of additional payments for workers who are made redundant at a particular age. Article 3 provides that the scheme is to apply to workers aged 60 and over who are made redundant, whilst Article 4 provides that such workers are entitled to the additional payment provided that they are in receipt of unemployment benefits. The additional payment is payable by the worker's last employer. It is equal to half the difference between the net reference wage and the unemployment benefit (Article 5). The Belgian Government concedes that, in most cases, the sum of the additional payment and the unemployment benefit exceeds the amount of the pension. Pursuant to Article 144 of the Royal Decree of 20 December 1963 on employment and unemployment, as amended by Article 13 of the Royal Decree of 7 August 1984, 'unemployed persons shall cease to be entitled to unemployment benefit as from the first day of the calendar month following that in which their 65th *or* 60th birthday falls, in the case of men and women respectively'. That provision, which reflects the earlier difference in retirement age as between men and women, was maintained despite the entry into force of the Law of 20 July 1990 introducing a flexible retirement age between 60 and 65 for workers of both sexes. It is common ground that, as a result of the combined application of the various national provisions mentioned above, only male workers qualify for the system of additional payments introduced by Collective Agreement No 17.

The Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by retaining legislation which excludes female workers over the age of 60 from eligibility for the additional redundancy payments provided for by Collective Agreement No 17, rendered compulsory by the Royal Decree of 16 January 1975, the Kingdom of Belgium failed to fulfil its obligations under Article 119 of the Treaty or, in the alternative, under Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40).

2. Judgment of the Court

The Court pointed out firstly that the concept of pay within the meaning of the second paragraph of Article 119 comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer. The fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being in the nature of pay within the meaning of Article 119 of the Treaty (see, in particular, the judgment of 17 May 1990 in Case C-262/88 *Barber,* [1990] ECR I-1889, paragraph 12). On the other hand, that definition of 'pay' cannot cover social security schemes or benefits such as, for example, retirement pensions, which are governed by statute without any element of negotiation within the undertaking or branch of activity concerned, and which apply compulsorily to general categories of workers. Such schemes provide workers with the benefit of a statutory system to the financing of which the workers, the employers and, in some cases, the public authorities contribute to an extent determined less by the employment relationship between the employer and the worker than by con-

siderations of social policy (judgment of 25 May 1971 in Case 80/70 *Defrenne,* [1971] ECR 445, paragraphs 7 and 8). Having regard to the criteria thus elicited by the Court, the additional payment at issue, although *sui generis* in certain respects, must be deemed to constitute 'pay' within the meaning of Article 119 of the Treaty. The Belgian Government's argument that the additional payment and the unemployment benefit form an indivisible unit, namely the 'contractual early-retirement pension', and that consequently the additional payment should, like unemployment benefit, be regarded as a social security benefit cannot be upheld, mainly on the ground that, under Collective Agreement No 17, the additional payment, although linked to the unemployment benefit as regards the manner in which it is made, is independent of the general social security scheme as regards both its structure and its financing, the latter being the responsibility of the employer alone.

The Court hereby:

1) *Declares that by retaining legislation which excludes female workers over the age of 60 from eligibility for the additional redundancy payments provided for by Collective Agreement No 17, rendered compulsory by the Royal Decree of 16 January 1975, the Kingdom of Belgium has failed to fulfil its obligations under Article 119 of the Treaty.*

2) *Orders the Kingdom of Belgium to pay the costs.*

Case C-328/91
SECRETARY OF STATE FOR SOCIAL SECURITY v EVELYN THOMAS AND OTHERS
Date of judgment:
30 March 1993
Reference:
[1993] ECR I-1247
Content:
Equal treatment — Invalidity benefits — Link with pensionable age.

1. Facts and procedure

In the United Kingdom, the Social Security Act 1975, as amended, provides for the grant of severe disablement allowance to people who are incapable of work and invalid care allowance to people engaged in caring for a severely disabled person. People who have attained pensionable age, which is 65 for men and 60 for women, are not entitled to those benefits. Mrs Thomas and Mrs Morley were refused severe disablement allowance on the ground that they had ceased employment because of invalidity after attaining pensionable age. Similarly, Mrs Cooze, Mrs Beard and Mrs Murphy were refused invalid care allowance on the ground that they had applied for that benefit after attaining pensionable age.

An appeal was lodged by the Secretary of State for Social Security against a judgment of the Court of Appeal, which had held that the United Kingdom legislation was incompatible with Directive 79/7, and the House of Lords decided to stay the proceedings until the Court of Justice had given a ruling on the following questions.

2. Questions referred to the Court

1) Where, pursuant to Article 7(1)(a) of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, a Member State preserves different pensionable ages for men and women for the purpose of granting old-age and retirement pensions, is the scope of the derogation permitted by the words 'possible consequences ... for other benefits' in Article 7(1)(a) limited to:

   a) provisions in schemes for those other benefits which are necessary to enable the schemes to operate consistently with the schemes for old-age and retirement pensions without illogicality, unfairness or absurdity; or

   b) provisions in schemes for those other benefits which the Member State has linked to provisions in old-age and retirement pension schemes, in the exercise of its discretion, acting in accordance with the principle of proportionality; or

   c) some other provisions, and if so which ones?

2) If the principle of proportionality applies, is the Member State required to show:

   a) that the provision is appropriate and necessary to achieve the aim of the Member State; or

   b) that the provision is appropriate and necessary to achieve the aim of Directive 79/7; or

   c) both (a) and (b) above; or

   d) that the provision was enacted for the purpose of reducing, minimising or limiting the overall discriminatory effects of providing different pensionable ages for men and women; or

   e) that some other test is satisfied, and if so which one?

3) Is the Member State permitted by Article 7(1)(a):

a) to rely upon statistical data relating to male and female working and retirement patterns to justify the differential treatment of men and women; or

b) to rely upon the derogation notwithstanding that in a particular case the applicant for the benefit can show that, although over pensionable age, she does not in fact receive an old-age or retirement pension and/or she would have been working but for the occurrence of the relevant risk (invalidity or severe disablement)?

4) Where national law provides that there shall be pensionable ages of 60 for women and 65 for men for the purpose of granting old-age and retirement pensions and that there shall be an invalidity benefit scheme for persons of working age, does Directive 79/7 require a Member State to apply the same upper age limit (if any) for both men and women when defining the scope of the scheme for invalidity benefit?

3. Judgment of the Court

Firstly, national legislation of the kind described by the national court, which denies women who have attained the age of 60 entitlement to the benefits in question whereas men continue to receive them until the age of 65, is discriminatory and may therefore be justified only under Article 7(1)(a) of Directive 79/7, according to which the directive is to be without prejudice to the right of the Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

Next, having regard to its earlier case law *(Equal Opportunities Commission* — Case C-9/91, [1992] ECR I-4297, paragraph 15), the Court held that, although the preamble to Directive 79/7 does not state the reasons for the derogations which it lays down, it can be deduced from the nature of the exceptions contained in Article 7(1) that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in that respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. It follows that forms of discrimination provided for in benefit schemes other than old-age and retirement pension schemes can be justified, as being the consequence of determining a different retirement age according to sex, only if such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes.

As regards the requirement of preserving financial equilibrium as between the old-age pension scheme and the other benefit schemes, it should be noted that the grant of benefits under non-contributory schemes, such as severe disablement allowance and invalid care allowance, to persons in respect of whom certain risks have materialised, regardless of the entitlement of such persons to an old-age pension by virtue of contribution periods completed by them, has no direct influence on the financial equilibrium of contributory pension schemes. Furthermore, it is pointed out that discrimination between men and women is unnecessary to preserve the financial equilibrium of the entire social security system, particularly since the national rules contain provisions to prevent overlapping between benefits such as severe disablement allowance or invalid care allowance and the old-age pension and, in fact, the grant of those benefits takes the place of benefits paid under other non-contributory schemes, such as benefits paid to people who have insufficient resources to support themselves.

As regards preservation of the consistency between schemes such as those of the severe disablement allowance and the invalid care allowance, on the one hand, and the pension scheme on the other, the United Kingdom's argument that those

benefits are intended to replace income in the event of materialisation of the risk, far from generally precluding the grant of such benefits to women who have attained retirement age, should, on the contrary, justify it in circumstances such as those at issue in the main proceedings.

The Court (Sixth Chamber), hereby rules:

Where, pursuant to Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits' contained in Article 7(1)(a), is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in retirement age.

Case C-154/92
REMI VAN CANT v RIJKSDIENST VOOR PENSIOENEN
Date of judgment:
1 July 1993
Reference:
[1993] ECR I-3811
Content:
Equal treatment — Old-age pension — Method of calculation — Pensionable age

1. Facts and procedure

Belgian Royal Decree No 50 of 24 October 1967 on the retirement and survival pension of employed workers *(Moniteur belge* of 27 October 1967, p. 11258) had determined the normal pensionable age at 65 for men and 60 for women. Entitlement to the retirement pension was acquired, for each year, at the rate of a fraction of salary whose denominator could not be higher than 45 for men and 40 for women. The Law of 20 July 1990 introducing a flexible retirement age for employed workers and adapting their pensions to trends in general well-being *(Moniteur belge* of 15 August 1990, p. 15875) allows all employees, both male and female, to take retirement at the age of 60. As regards the calculation of the amount of the pension, however, that law maintains the rules established by Royal Decree No 50.

Having reached the age of 65, Mr Remi van Cant has, since 1 June 1991, received a retirement pension calculated by the Pensions Office on the basis of the 45 most advantageous calendar years of his employment record. Mr van Cant claimed that the method of calculation of the pension applicable to female workers, which takes into account the 40 most favourable years of the worker's activity, would result in a higher pension than the one granted to him and brought an action before the Arbeidsrechtbank Antwerpen for the annulment of the decision whereby the Pensions Office determined the amount of his pension.

2. Questions referred to the Court

1) Does the method of calculating a man's retirement pension involve discrimination on grounds of sex for the purposes of Article 4 of Directive 79/7/EEC, where a different method is laid down for calculating a woman's retirement pension which can result in the grant of a higher retirement pension for the same employment record because, in particular, a man's retirement pension is calculated on the basis of 1/45 x 60 % or 75 % of the flat-rate, notional or actual salaries of each reckon-able calendar year of employment, whereas a woman's pension is calculated on the basis of 1/40 x 60 % or 75 % of the same salaries, and because — in certain cases — account is taken of the 45 most favourable years of the employment record in the case of a man and the 40 most favourable years in the case of a woman, all of the foregoing being considered in the light of the fact that men and women may choose to receive their retirement pension from the first day of the month following their 60th birthday?

2) If so, does Article 4(1) of Directive 79/7/EEC have direct effect in the circumstances of the present dispute? And if so:

3) Does that mean that the retirement pension for men must be calculated on the basis of the more favourable rules of calculation which at present apply exclusively to women by virtue of Article 3 of the Law of 20 July 1990 introducing a flexible pensionable age for employees and adapting employees' pensions to trends in general well-being?

3. Judgment of the Court

The Court pointed out firstly that national legislation which prescribes a different method of calculating retirement pensions according to a worker's sex is discriminatory for the purposes of Directive 79/7. It further held that such discrimination may be justified only under Article7(1)(a) of Directive

79/7, according to which the directive does not preclude Member States from exercising their right to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. Consequently, the Court's answer to the first question is that if national legislation has abolished the difference in pensionable age between male and female workers — a question of fact which it is for the national court to determine — Article 7(1)(a) of Directive 79/7 may not be relied on in order to justify maintaining a difference, which was linked to that difference in pensionable age, concerning the method of calculating the retirement pension.

For the purpose of answering the second question, it should be observed that the Court has consistently held that wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, individuals may rely on those provisions in the absence of implementing measures adopted in the prescribed time as against any national provision which is incompatible with the directive (see, in particular, the judgment of 4 December 1986, *Federatie Nederlandse Vakbeweging,* Case 71/85, [1986] ECR 3855, paragraph 13). As regards Article 4(1) of Directive 79/7, the Court has already held that that provision does not confer on Member States the power to make conditional or to limit the application of the principle of equal treatment within its field of application and that it is sufficiently precise and unconditional to allow individuals to rely on it before the national courts as from 23 December 1984, the date on which the Directive had to be transposed in the Member States, in order to preclude the application of any national provision inconsistent with that article (see the judgment in *Federatie Nederlandse Vakbeweging,* cited above, paragraph 21; judgment of 24 March 1987, *McDermott and Cotter,* Case 286/85, [1987] ECR 1453, paragraph 14; judgment of 24 June 1987, *Borrie Clarke,* Case 384/85, [1987] ECR 2865, paragraph 9).

In answering the third question, it should be observed that in its judgment in *McDermott and Cotter* the Court held that until such time as the Member State had adopted the necessary implementing measures, women were entitled to have the same rules applied to them as were applied to men in the same situation, since in such circumstances those rules remained the only valid point of reference. That finding, made by the Court in respect of a situation where female workers were disadvantaged in comparison with male workers, applies irrespective of which group is disadvantaged on grounds of sex.

The Court (Sixth Chamber), hereby rules:

1) *Articles 4(1) and 7(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security preclude national legislation which authorises male and female workers to take retirement as from an identical age from retaining in the method of calculating the pension a difference according to sex which is itself linked to the difference in pensionable age which existed under the previous legislation.*

2) *Article 4(1) of Directive 79/7 may be relied on as from 23 December 1984 by individuals before national courts to preclude the application of any national provision inconsistent with that article.*

3) *Where there has been an infringement of Article 4(1) of Directive 79/7, the disadvantaged group is entitled to have the same rules applied to it as those applied to the advantaged group in the same situation, those rules remaining, in the absence of the correct implementation of the Directive, the only valid point of reference.*

Case C-158/91
MINISTÈRE PUBLIC AND DIRECTION DU TRAVAIL ET DE L'EMPLOI v JEAN-CLAUDE LEVY
Date of judgment:
2 August 1993
Reference:
[1993] ECR I-4287
Content:
Equal treatment for men and women — Statutory prohibition of night work for women — Convention No 89 of the International Labour Organisation prohibiting night work for women

1. Facts and procedure

Criminal proceedings were brought by the Ministère Public (Public Prosecutor) and the Direction du Travail et de l'Emploi (Department of Labour and Employment) against Jean-Claude Levy, Director of Nouvelle Falor S.A., who was accused of having employed, on 22 March 1990, 23 women on night work, contrary to Article L 213-1 of the French Code du Travail (hereafter 'the French Code'), an infringement which is punishable by a fine pursuant in particular to Article R 261-7 of that Code. Those provisions were adopted in order to implement Convention No 89 of 9 July 1948 of the International Labour Organisation (ILO) on nightwork for women in industry. The wording of Article 3 of the ILO Convention, which is essentially set out in the French Code, provides that: 'Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed.' In the proceedings before the Tribunal de Police, Metz, Mr Levy claimed that the French Code was incompatible with Article 5 of Directive 76/207.

2. Question referred to the Court

Are Articles 1 to 5 of Directive 76/207/EEC of 9 February 1976 to be interpreted as meaning that national legislation prohibiting night work solely for women amounts to discrimination, having regard *inter alia* to Article 3 of Convention No 89 of the International Labour Organisation prohibiting night work for women, to which France is a signatory?

3. Judgment of the Court

The Court referred firstly to its judgment of 25 July 1991, *Stoeckel* (Case C-345/89), [1991] ECR I-4047), in which it held that Article 5 of the Directive is sufficiently precise to impose on Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that is subject to exceptions, where night work by men is not prohibited. It follows that, in principle, a national court is under a duty to give full effect to that rule, refusing to apply any conflicting provision of national legislation (see judgment of 9 March 1978, *Simmenthal,* Case 106/77, [1978] ECR 629).

The Court then observed that the question referred for a preliminary ruling seeks essentially to ascertain whether a national court is under the same obligation where the national provision which is alleged to be incompatible with Community law is intended to implement an agreement, such as the ILO Convention, which was concluded by the Member State concerned with other Member States and non-member countries prior to the entry into force of the EEC Treaty.

In this connection, the first paragraph of Article 234 of the Treaty provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand, and one or more non-member countries on the other, are not affected by the provisions of the Treaty. Nonetheless, the second paragraph obliges the Member States to take all appropriate steps to eliminate any incompatibilities between such an agreement and the Treaty. Article 234 is of general scope and applies to any international agreement, irrespective of subject matter, which is capable of affecting the

application of the Treaty (see judgment of 14 October 1980, *Burgoa,* Case 812/79, [1980] ECR 2787, paragraph 6). According to the judgment of 27 February 1962, *Commission* v *Italy,* Case 10/61, [1962] ECR 1, the purpose of the first paragraph of Article 234 is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of non-member countries under an earlier agreement and to comply with its corresponding obligations. It follows that, in that provision, the terms 'rights and obligations' refer, as regards 'rights', to the rights of non-member countries and, as regards 'obligations', to the obligations of Member States. Consequently, in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations whose performance may still be required by non-member countries which are parties to it.

The Court took the view that, while it is true that equal treatment of men and women constitutes a fundamental right recognised by the Community legal order, its implementation, even at Community level, has been gradual, requiring the Council to take action by means of directives, and that those directives allow, temporarily, certain derogations from the principle of equal treatment. In those circumstances, it is not sufficient to rely on the principle of equal treatment in order to evade performance of the obligations which are incumbent on a Member State in that field under an earlier international agreement and observance of which is safeguarded by the first paragraph of Article 234 of the Treaty.

The Court, hereby rules:

The national court is under an obligation to ensure that Article 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty.

Case C-271/91
M. H. MARSHALL v SOUTHAMPTON AND SOUTH-WEST HAMPSHIRE AREA HEALTH AUTHORITY
Date of judgment:
2 August 1993
Reference:
[1993] ECR I-4367
Content:
Directive 76/207/EEC — Equal treatment for men and women — Right to compensation in the event of discrimination

1. Facts and procedure

Miss Marshall submitted a claim for compensation for damage sustained as a result of her dismissal by the Authority. The claim is based on the illegality of that dismissal which is not contested in the main proceedings, the Court having held, in its judgment of 26 February 1986, *Marshall (Case* 152/84, [1986] ECR 723), in reply to questions submitted for a preliminary ruling by the Court of Appeal, that Article 5(1) of the Directive is to be interpreted as meaning that a general policy of termination of employment whereby a woman's employment is terminated solely because she has attained or passed the qualifying age for a State pension, that age being different under national legislation for men and for women, constitutes discrimination on grounds of sex contrary to the Directive. The dispute in the main proceedings arose because the Industrial Tribunal, to which the Court of Appeal remitted the case to consider the question of compensation, assessed Miss Marshall's financial loss at GBP 18 405, including GBP 7 710 by way of interest, and awarded her compensation of GBP 19 405, including a sum of GBP 1 000 compensation for injury to feelings.

Under section 65(2) of the Sex Discrimination Act 1975 ('SDA'), however, the amount of compensation awarded may not exceed a specified limit, which at the relevant time was GBP 6 250. It also appears from the case file that at that time an Industrial Tribunal had no power — or at least that the relevant provisions were ambiguous as to whether it had such a power — to award interest on compensation for an act of unlawful sex discrimination in relation to employment. The Industrial Tribunal held that compensation was the only appropriate remedy in Miss Marshall's case, but the limit laid down by section 65(2) of the SDA 1975 rendered that compensation inadequate and in breach of Article 6 of the Directive. Following the Industrial Tribunal's decision, the Authority paid Miss Marshall the sum of GBP 5 445 in addition to the GBP 6 250 corresponding to the abovementioned statutory limit which it had paid even before the case had been remitted to the Industrial Tribunal. However, it appealed against award of GBP 7 710 in respect of interest.

2. Questions referred to the Court

1) Where the national legislation of a Member State provides for the payment of compensation as one remedy available by judicial process to a person who has been subjected to unlawful discrimination of a kind prohibited by Council Directive 76/207/EEC of 9 February 1976 ('the Directive'), is the Member State guilty of a failure to implement Article 6 of the Directive by reason of the imposition by the national legislation of an upper limit of GBP 6 250 on the amount of compensation recoverable by such a person?

2) Where the national legislation provides for the payment of compensation as aforesaid, is it essential to the due implementation of Article 6 of the Directive that the compensation to be awarded:

   a) should not be less than the amount of the loss found to have been sustained by reason of the unlawful discrimination, and

   b) should include an award of interest on the principal amount of the loss so found from the date of the unlawful discrimination to the date when the compensation is paid?

3) If the national legislation of a Member State has failed to implement Article 6 of the Directive in any of the respects referred to in questions 1 and 2, is a person who has been subjected to unlawful discrimination as aforesaid entitled as against an authority which is an emanation of the Member State to rely on the provisions of Article 6 as overriding the limits imposed by the national legislation on the amount of compensation recoverable?

3. Judgment of the Court

As the Court has consistently held, the third paragraph of Article 189 of the Treaty requires each Member State to which a directive is addressed to adopt, in its national legal system, all the measures necessary to ensure that its provisions are fully effective, in accordance with the objective pursued by the directive, while leaving to the Member State the choice of the forms and methods used to achieve that objective. It is therefore necessary to identify the objectives of the Directive and in particular to see whether, in the event of a breach of the prohibition of discrimination, its provisions leave Member States a degree of discretion as regards the form and content of the sanctions to be applied. Having regard to the case law of the Court, *Von Colson and Kamann* (Case 14/83, [1984] ECR 1891, paragraph 18), Article 6 of the Directive does not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but leaves Member States free to choose between the different solutions suitable for achieving the objective of the Directive, depending on the different situations which may arise. However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. Referring to the same *Von Colson and Kamann* judgment; the Court stated that those measures must be such as to guarantee real and effective judicial protection and have a genuine deterrent effect on the employer.

The Court reasoned that such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal contrary to Article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained. Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.

It also follows from that interpretation that the fixing of an upper limit of the kind at issue in the main proceedings cannot, by definition, constitute proper implementation of Article 6 of the Directive, since it limits the amount of compensation a *priori* to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate redress for the loss and damage sustained as a result of discriminatory dismissal. With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.

With regard to the third question, in the light of the answers given to the first two questions, the Court stated that Article 6 of the Directive is an essential factor for attaining the fundamental objective of equal treatment for men and women, in particular as regards working conditions, including the conditions governing dismissal, referred to in Article 5(1) of the Directive, and that, where, in the event of discriminatory dismissal, financial compensation is the measure adopted in order to restore that equality, such compensation must be

full and may not be limited a *priori* in terms of its amount. Accordingly, the combined provisions of Article 6 and Article 5 of the Directive give rise, on the part of a person who has been injured as a result of discriminatory dismissal, to rights which that person must be able to rely upon before the national courts as against the State and authorities which are an emanation of the State. The fact that Member States may choose among different solutions in order to achieve the objective pursued by the Directive, depending on the situations which may arise, cannot result in an individual being prevented from relying on Article 6 in a situation such as that in the main proceedings where the national authorities have no degree of discretion in applying the chosen solution.

The Court, hereby rules:

1) *The interpretation of Article 6 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the efluxion of time until the capital sum awarded is actually paid.*

2) *A person who has been injured as a result of discriminatory dismissal may rely on the provisions of Article 6 of the Directive as against an authority of the State acting in its capacity as an employer in order to set aside a national provision which imposes limits on the amount of compensation recoverable by way of reparation.*

Case C-109/91
GERARDUS CORNELLS TEN OEVER v STICHTING BEDRUFSPENSIOENFONDS VOOR HET GLAZENWASSERS- EN SCHOONMAAKBEDRIJF
Date of judgment:
6 October 1993
Reference:
[1993] ECR I-4879
Content:
Equal pay for men and women — Survivor's pension — Limitation of the effects in time of the Barber judgment

1. Facts and procedure

Until her death on 13 October 1988, Mr Ten Oever's wife was a member of an occupational pension scheme funded by employers and employees. At that time, the rules of the scheme provided for a survivor's pension for widows only. It was not until 1 January 1989 that this entitlement was extended to widowers. Following the death of his wife Mr Ten Oever requested the grant of a widower's pension. This was refused by the Pension Fund on the ground that it was not provided for in the rules of the scheme at the time when Mrs Ten Oever died. In reply to an argument of Mr Ten Oever based on the *Barber* judgment, to the effect that the pension he requested was to be treated as pay within the meaning of Article 119 of the Treaty and that no discrimination between men and women was therefore permissible, the Pension Fund said that the *Barber* judgment had been delivered after the death of Mrs Ten Oever and that its effects had been limited in time.

2. Questions referred to the Court

1) Must 'pay' within the meaning of Article 119 of the EEC Treaty be understood as covering the payment of non-statutory benefits to surviving relations (such as in this case the payment of a widower's pension)?

2) In the event that question 1 is answered in the affirmative, does Article 119 of the EEC Treaty apply in relation to the plaintiff with the result that he can claim payment of a widower's pension:

   a) with effect from the date of his wife's death (13 October 1988); or

   b) with effect from the Court's judgment of 17 May 1990; or

   c) not at all because his wife died before 17 May 1990?

3. Judgment of the Court

Referring to the first question, it is settled law that the concept of pay, within the meaning of the second paragraph of Article 119, comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer. The fact that certain benefits are paid after the end of the employment relationship does not prevent them from being pay within the meaning of Article 119 (see, in particular, the *Barber* judgment, paragraph 12). However, the concept of pay as thus defined cannot cover social security schemes or benefits such as, for example, retirement pensions, which are directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned and which are obligatorily applicable to general categories of workers. These schemes assure for the workers the benefit of a statutory scheme, to whose financing workers, employers and, possibly, the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy (judgment of 25 May 1971, *Defrenne,* Case 80/70, [1971] ECR 445, paragraphs 7 and 8). In the present case, it is apparent from the documents before the Court that the rules of the pension scheme in question were not laid down directly by law but were the result of an

agreement between both sides of the industry concerned. All that the public authorities did was, at the request of such employers' and trade union organisations as were considered to be representative, to declare the scheme compulsory for the whole of the industry concerned. It is also established that this pension scheme is funded wholly by the employees and employers in the industry concerned, to the exclusion of any financial contribution from the public purse. Consequently, the Court found that the survivor's pension in question falls within the scope of Article 119 of the Treaty notwithstanding the fact that, by definition, a survivor's pension is not paid to the employee but to the employee's survivor.

With regard to the second question, which is concerned with the precise scope of the limitation of the effects in time of the *Barber* judgment, the Court pointed out that the precise context in which that limitation was imposed was that of benefits (in particular, pensions) provided for by private occupational schemes which were treated as pay within the meaning of Article 119 of the Treaty. This ruling took account of the fact that it is a characteristic of this form of pay that there is a time-lag between the accrual of entitlement to the pension, which occurs gradually throughout the employee's working life, and its actual payment, which is deferred until a particular age. The Court also took into consideration the way in which occupational pension funds are financed and thus the accounting links existing in each individual case between the periodic contributions and the future amounts to be paid. The Court concluded that, given the reasons explained in the *Barber* judgment for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the *Barber* judgment, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.

The Court, hereby rules:

1) *A survivor's pension provided for by an occupational pension scheme having the characteristics of that in question in the main proceedings falls within the scope of Article 119 of the EEC Treaty.*

2) *By virtue of the judgment of 17 May 1990 in Case C-262/88, Barber, the direct effect of Article 119 of the Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.*

Case C-337/91
A.M. VAN GEMERT-DERKS v NIEUWE INDUSTRIELE BEDRIJFSVERENIGING
Date of judgment:
27 October 1993
Reference:
[1993] ECR I-5435
Content:
Equal treatment for men and women — Social security — Loss of benefits for incapacity for work on grant of a survivor's pension

1. Facts and procedure

In the Netherlands, the Algemene Arbeidsongeschiktheidswet (General Law on Incapacity for Work, hereafter 'the AAW') confers a right to benefits after the first year of incapacity for work until the person concerned reaches the age of 65. The Algemene Weduwen- en Wezenwet (General Law on Widows and Orphans, hereafter 'the AWW') entitles widows of insured persons, subject to certain conditions, to widows' pensions up to the age of 65. Mrs van Gemert-Derks, born on 16 January 1937, became self-employed in 1972. In February 1982 she was found to be unfit for work and was granted a benefit under the AAW from 31 January 1983 for incapacity of work of 80 to 100 %. On 23 October 1987 her husband died. Mrs van Gemert-Derks was consequently granted a widow's pension under the AWW from 1 October 1987. By decision of 8 January 1988, the Bestuur van de Bedrijfsvereniging voor de Chemische Industrie (Board of the Trade Association for the Chemical Industry), the predecessor in law of the Nieuwe Industriele Bedrijfsvereniging (New Trade Association for Industry), withdrew the plaintiff's benefit under the AAW with effect from 1 October 1987, pursuant to Article 32(1)(b) of the AAW. It appears from the order making the reference that the transfer from the AAW scheme to the AWW scheme entailed, for Mrs van Gemert-Derks, a reduction of between some tens of guilders and NLG 100 per month, in the net benefit she was receiving. Mrs van Gemert-Derks lodged an appeal against this decision with the Raad van Beroep, 's-Hertogenbosch.

2. Questions referred to the Court

1) Is it compatible with Community law for a national court to interpret Article 26 of the International Covenant on Civil and Political Rights — which is binding on (at least) 11 of the 12 Member States — as meaning that that Article requires, as from 23 December 1984, full equal treatment as between men and women in the field of statutory survivors' pensions, if that area is only temporarily excluded from the jurisdiction of the Community?

2) Is a national provision such as that contained in Article 32(1)(b) of the AAW — which according to the Centrale Raad van Beroep ceased on 23 December 1984 to have direct discriminatory effect with regard to women inasmuch as the effect of benefits being lower as a result of the transition from AAW benefit to AWW benefit may now occur just as well in the case of men — compatible with Article 4(1) of Directive 79/7/EEC if the national provision continues in practice to bring about a drop in income for all widows who are unfit for work (whether 100 % or, as in this case, partially) and only in exceptional cases (that is to say, in cases where special hardship has led to the award of a widower's pension with long retroactive effect and there is a possibility of claiming back the AAW benefit) for widowers in a comparable situation?

3) If question 1 or question 2 is answered in the negative: under Community law is it for the national court to decide whether national legislation such as that described in the second question is wholly inapplicable or to interpret it as requiring a deduction to be made? If not, which approach is most compatible with Community law?

3. Judgment of the Court

With regard to the first question, the Court pointed out that Directive 79/7 seeks to implement gradually the principle of equal treatment for men and women in matters of social security, but does not yet extend to the whole of this field. Thus, according to Article 3(2), it does not apply to provisions concerning survivors' benefits. Consequently, in the absence of harmonisation in this area, these benefits are regulated by the provisions of domestic and international law in force in the Member State concerned. National case law which, on the basis of Article 26 of the International Covenant, extends the principle of equal treatment to an area which is not at present covered by Directive 79/7 cannot affect the gradual implementation of the principle contemplated by the same Directive, which is itself the first stage in that implementation.

In connection with the second question, it was noted that Article 32(1)(b) of the AAW concerns the withdrawal of benefits for incapacity for work and that Directive 79/7 applies to such benefits by virtue of Article 3(1)(a). This finding is not invalidated by the fact that withdrawal is effected following the grant of a benefit which is not within the scope of Directive 79/7, in the present case a survivor's benefit, bearing in mind that Article 4(1) of Directive 79/7 prohibits all discrimination on the ground of sex, in particular as concerns the conditions of access to statutory schemes, including that which provides protection against the risk of invalidity. By virtue of that provision, women are entitled to claim benefits for incapacity for work under the same conditions as those applicable to men. A national provision depriving women of the right to claim benefits which men in the same situation continue to receive thus constitutes discrimination within the meaning of Directive 79/7. The defendant in. the main proceedings contended that an AAW pension, which entails the withdrawal of the benefit for incapacity under Article 32(1)(b) of the AAW, is granted only when claimed and that the claim can be withdrawn before the pension is granted. It was pointed out also that, since mid-July 1989, insured persons claiming a pension under the AWW are informed of all the consequences which the grant of the pension could have. The Court observed that equal treatment is not achieved in the case of the voluntary surrender by a widow of the benefit for incapacity unless she is given clear, specific information on the potential financial consequences of replacing that benefit by an AWW pension. It is for the national court to determine whether such surrender has actually been made.

With regard to the third question, the Court has held on many occasions (see, *inter alia,* judgment of 13 December 1989, *Ruzius-Wilbrink,* Case C-102/88, [1989] ECR4311, paragraph 19) that Article 4(1), considered above and in the light of the purpose and content of that directive, is sufficiently precise to be relied upon by an individual before a national court in order to have any national provision not in conformity with that article disapplied. It is clear from the judgment of 4 December 1986, *Federatie Nederlandse Vakbeweging* (Case 71/85, [1986] ECR 3855) that women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the Directive has not been implemented, those rules remain the only valid point of reference. Although Article 4(1.) of Directive 79/7 has the recognised effect of excluding the application of an incompatible national provision, it does not restrict the power of national courts to apply such procedures of domestic law as will safeguard the individual rights conferred by Community law.

The Court, hereby rules:

1) *Community law does not preclude a national court from interpreting Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966 as requiring equal treatment for men and women as regards survivors' benefits, inasmuch as that matter lies outside the scope of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementa-*

tion of the principle of equal treatment for men and women in matters of social security.

2) *Article 4(1) of Directive 79/7 precludes a national rule which withdraws from widows who are unfit for work the benefits applicable to that risk on their being granted a widow's pension, if that withdrawal is not the result of a voluntary renunciation by the beneficiary and is not applicable to widowers who are entitled to benefits for. incapacity for work.*

3) *In the absence of adequate measures transposing Article 4(1) of Directive 79/7 into national law, it is for the national courts to apply such procedures of domestic law as will guarantee to women the benefit of the same rules as are applicable to men in the same situation.*

Case C-338/91
H. STEENHORST-NEERINGS v BESTUUR VAN DE BEDRIJFSVERENIGING VOOR DETAILHANDEL, AMBACHTEN EN HUISVROUWEN
Date of judgment:
27 October 1993
Reference:
[1993] ECR I-5475
Content:
Equal treatment for men and women — Social security — Restriction on the retroactive effect of claims for benefits — Transfer from benefits for incapacity for work to survivors' benefits

1. Facts and procedure

In the Netherlands, the Algemene Arbeidsongeschiktheidswet (General Law on Incapacity for Work, hereafter 'the AAW') entitled men and unmarried women to benefits after the first year of incapacity for work up to the age of 65. The Wet Invoering Gelijke Uitkeringsrechten voor Mannen en Vrouwen (Law of 20 December 1979 introducing equal treatment for men and women as regards entitlement to benefits) extended that entitlement to married women, with the exception of those whose incapacity for work arose before 1 October 1975.

By several judgments of 5 January 1988, the Centrale Raad van Beroep (Higher Social Security Court) held that in so far as that exception only applied to married women it constituted discrimination on the ground of sex, contrary to Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966. It concluded that from 1 January 1980, the date when the law of 20 December 1979 referred to above came into force, married women whose incapacity for work arose before 1 October 1975 were also entitled to AAW benefits. By virtue of Article 25(2) of the AAW, benefits for incapacity for work are payable not earlier than one year before either the date on which they are claimed or the date on which they are automatically granted, save in special cases where authorised by the competent trade association. Article 32(1)(b) of the AAW provides as follows: 'Benefits for incapacity for work shall be withdrawn: ... (b) when a woman to whom they have been granted becomes entitled to a widow's pension or temporary widow's benefit under the Algemene Weduwen- en Wezenwet.' The Algemene Weduwen- en Wezenwet (General Law on Widows and Orphans, hereafter 'the AWW'), entitles widows of insured persons, subject to certain conditions, to widows' pensions up to the age of 65.

As from 1963, Mrs Steenhorst-Neerings, born on 13 August 1925, was paid an invalidity pension under the Invaliditeitswet, the legislation in force at that time. In view of the judgments delivered by the Centrale Raad van Beroep on 5 January 1988 previously referred to, she applied to the Trade Association for Retailers, Craftsmen and Housewives ('Detam') on 17 May 1988 for AAW benefits. By decision of 9 November 1989, the Board of Detam granted the benefits she had applied for, on the basis of incapacity for work of between 80 and 100 %, with effect from 17 May 1987, that is to say, in accordance with Article 25(2) of the AAW, one year before the claim was submitted. In the same decision, applying Article 32(1)(b) of the AAW, it withdrew the benefits with effect from 1 July 1989 on the ground that since that date Mrs Steenhorst-Neerings was entitled to a widow's pension under the AWW. Mrs Steenhorst-Neerings lodged an appeal against this decision with the Raad van Beroep, 's-Hertogenbosch.

2. Questions referred to the Court

1) Does Community law require that married women who became unfit for work before 1 October 1975 be entitled to benefits under the Algemene Arbeidsongeschiktheidswet with retroactive effect to 23 December 1984, the expiry date for transposal of Directive 79/7/EEC, if those women did not apply for the benefits, for the reasons set out in the

order making the reference, until after 5 January 1988 (the date on which certain judgments were delivered by the Centrale Raad van Beroep regarding equal treatment of men and women)?

2) Is a national provision such as that contained in Article 32(1)(b) of the Algemene Arbeidsongeschiktheidswet compatible with Article 4(1) of Directive 79/7/EEC if it is applied in practice (at least from 1 December 1987) to both widows and widowers who are unfit for work, but refers on the face of it exclusively to widows who are unfit for work?

3. Judgment of the Court

The first point made by the Court is that, by virtue of Article 4(1) of Directive 79/7, Member States may not maintain beyond 23 December 1984, the expiry date for transposal of the Directive, any inequality of treatment which is attributable to the previously applicable conditions for entitlement to benefit (judgment of 8 March 1998, *Dik and Others,* Case 80/87, [1988] ECR 1601); if the Directive has not been implemented, that provision may be relied on by individuals after that date in order to preclude the application of any national provision inconsistent with the Directive (judgment of 4 December 1986, Federatie Nederlandse Vakbeweging, Case 71/85, [1986] ECR 3855). The right to claim benefits for incapacity for work under the same conditions as men conferred on married women by the direct effect of Article 4(1) of Directive 79/7 must be exercised under the conditions determined by national law, provided that, as the Court has consistently held, those conditions are no less favourable than those relating to similar domestic actions and that they are not framed so as to render virtually impossible the exercise of rights conferred by Community law (see, *inter alia,* the judgment of 25 July 1991, *Emmott,* Case C-208/90, [1991] ECR I-4269, paragraph 16). In the Court's view, the national rule restricting the retroactive effect of a claim for benefits for incapacity for work satisfies the two conditions set out above.

However, the Commission argued that, according to the *Emmott* judgment (paragraphs 21, 22 and 23), the time limits for proceedings brought by individuals seeking to avail themselves of their rights are applicable only when a Member State has properly transposed the directive and that that principle applies in this case. The Court rejected this argument; it had found in *Emmott* that so long as a directive has not been properly transposed into national law individuals are unable to ascertain the full extent of their rights, and that therefore until such time as a directive has been properly transposed a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive, and that a period laid down by national law within which proceedings must be brought cannot begin to run before that time. In the *Emmott* case, the applicant in the main proceedings had relied on the Court's judgment of 24 March 1987, *McDermott and Cotter* (Case C-286/85, [1987] ECR, 1453) in order to claim entitlement by virtue of Article 4(1) of Directive 79/7, with effect from 23 December 1984, to invalidity benefits under the same conditions as those applicable to men in the same situation. The administrative authorities had then declined to adjudicate on her claim since Directive 79/7 was the subject of proceedings pending before a national court. Finally, even though Directive 79/7 had still not been correctly transposed into national law, it was claimed that the proceedings she had brought to obtain a ruling that her claim should have been accepted were out of time. The Court noted first that, unlike the rule of domestic law fixing time limits for bringing actions, the rule described in the question referred for a preliminary ruling in this case does not affect the right of individuals to rely on Directive 79/7 in proceedings before the national courts against a defaulting Member State. It merely limits the retroactive effect of claims made for the purpose of obtaining the relevant benefits. The time-bar resulting from the expiry of the time limit for bringing proceedings serves to ensure that the legality of administrative decisions cannot be challenged indefinitely. The *Emmott*

judgment indicates that that requirement cannot prevail over the need to protect the rights conferred on individuals by the direct effect of provisions in a directive so long as the defaulting Member State responsible for those decisions has not properly transposed the provisions into its national law. The aim of the rule restricting the retroactive effect of claims for benefits for incapacity for work is quite different from that of a rule imposing mandatory time limits for bringing proceedings. This type of rule, of which examples can be found in other social security laws in the Netherlands, serves to ensure sound administration, most importantly so that it may be ascertained whether the claimant satisfied the conditions for eligibility and so that the degree of incapacity, which may well vary over time, may be fixed. It also reflects the need to preserve financial balance in a scheme in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during that same year.

As regards the second question, the first point to note is that, pursuant to Article 3(2) of Directive 79/7, the Directive does not apply to provisions concerning survivors' benefits and that, therefore, the question arises whether a provision regulating the concurrence of benefits for incapacity for work with survivors' benefits, such as Article 32(1)(b) of the AAW, falls within the scope of the Directive. Furthermore, Article 32(1)(b) of the AAW concerns the withdrawal of benefits for incapacity for work and Directive 79/7 applies to such benefits by virtue of Article 3(1)(a). It is deemed irrelevant that the withdrawal occurs as a result of the award of a benefit, in this case survivors' benefits, falling outside the scope of Directive 79/7. A national provision depriving women of the right to claim benefits which men in the same situation continue to receive thus constitutes discrimination within the meaning of Directive 79/7. Consequently, a Member State may not maintain a provision which, according to its wording, gives rise to a discrimination within the meaning of Article 4(1) of Directive 79/7 between men and women. If, however, despite its wording, the national: courts consistently apply such a provision without distinction to women and men in the same situation, the national courts *are* not precluded from continuing to apply that provision in disputes before them in accordance with such case law, which enables them to ensure that Article 4(1) of Directive 79/7 is given full effect for so bng as the Member State has not yet adopted the legislation necessary to implement it in full.

The Court, hereby rules:

1) *Community law does not preclude the application of a national rule of law according to which benefits for incapacity for work are payable not earlier than one year before the date of claim, in the case where an individual seeks to rely on rights conferred directly by Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security with effect from 23 December 1984 and where, on the date the claim for benefit was made, the Member State concerned had not yet properly transposed that provision into national law.*

2) *Article 4(1) of Directive 79/7 does not preclude the application by the national courts of a legislative provision according to which only women forfeit their benefits for incapacity for work on being awarded a widow's pension, if that provision is consistently applied by the courts to both widows and widowers who are unfit for work.*

Case C-127/92
DR PAMELA ENDERBY v FRENCHAY HEALTH AUTHORITY AND SECRETARY OF STATE FOR HEALTH
Date of judgment:
27 October 1993
Reference:
[1993] ECR I-5535
Content:
Equal pay for men and women — Burden of proof

1. Facts and procedure

Dr Enderby, who is employed by the Frenchay Health Authority as a speech therapist, considered herself to be a victim of sex discrimination due to the fact that, at her level of seniority within the National Health Service (NHS) (Chief III), members of her profession, which is overwhelmingly a female profession, are appreciably less well paid than members of comparable professions in which, at an equivalent professional level, there are more men than women. In 1986, she brought proceedings against her employer before an industrial tribunal, claiming that her annual pay was only GBP 10 106 while that of a principal clinical psychologist and of a Grade III principal pharmacist, jobs which were of equal value to hers, was GBP 12 527 and GBP 14 106 respectively.

2. Questions referred to the Court

1) Does the principle of equal pay enshrined in Article 119 of the Treaty of Rome require the employer to justify objectively the difference in pay between job A and job B?

2) If the answer to question 1 is in the affirmative, can the employer rely as sufficient justification for the difference in pay upon the fact that the pay of jobs A and B respectively have been determined by different collective bargaining processes which (considered separately) do not discriminate on grounds of sex and do not operate so as to disadvantage women because of their sex?

3) If the employer is able to establish that at times there are serious shortages of suitable candidates for job B and that he pays the higher remuneration to holders of job B so as to attract them to job B but it can also be established that only part of the difference in pay between job B and job A is due to the need to attract suitable candidates to job B

   a) is the whole of the difference of pay objectively justified

      or

   b) is that part but only that part of the difference which is due to the need to attract suitable candidates to job B objectively justified

      or

   c) must the employer equalise the pay of jobs A and B on the ground that he has failed to show that the whole of the difference is objectively justified?

3. Judgment of the Court

In this case, the Court of Appeal decided, in accordance with British legislation and with the agreement of the parties, to examine the question of the objective justification of the difference in pay before that of the equivalence of the jobs in issue, which may require more complex investigation. It is for that reason that the preliminary questions were based on the assumption that those jobs were of equal value.

It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against

his employer with a view to removing the discrimination. However, it is clear from the case law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 of the Treaty, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex (judgment of 13 May 1986, *Bilka,* Case 170/84, [1986] ECR 1607, paragraph 31; judgment of 27 June 1990, *Kowalska,* Case C-33/89, [1990] ECR I-2591, paragraph 16; judgment of 7 February 1991, *Nimz,* Case C-184/89, [1991] ECR I-297, paragraph 15). Similarly, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (judgment of 17 October 1989, *H.K. Forbund* v *Danfoss,* Case 109/88, [1989] ECR 3199, paragraph 16).

The Court pointed out that the circumstances in this case are not exactly the same as in the other cases referred to. First, it is not a question of de facto discrimination arising from a particular sort of arrangement such as may apply, for example, in the case of part-time workers. Secondly, there can be no complaint that the employer has applied a system of pay wholly lacking in transparency since the rates of pay of NHS speech therapists and pharmacists are decided by regular collective bargaining processes in which there is no evidence of discrimination as regards either of those two professions. However, if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid. It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.

Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (see, by analogy, the *Danfoss* judgment, cited above, paragraph 13).

As to the second question, the fact that the rates of pay at issue are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not preclude a finding of prima facie discrimination where the results of those processes show that two groups with the same employer and the same trade union are treated differently. If the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as sufficient justification for the difference in pay, he could, as the German Government pointed out, easily circumvent the principle of equal pay by using separate bargaining processes.

With regard to the third question, the Court has consistently held that it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds *(Bilka* judg-

ment, cited above, paragraph 36, and *Nimz* judgment, cited above, paragraph 14). Those grounds may include, if they can be attributed to the needs and objectives of the undertaking, different criteria such as the worker's flexibility or adaptability to hours and places of work, his training or his length of service *(Danfoss* judgment, cited above, paragraphs 22 to 24).

The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground within the meaning of the case law cited above. How it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court. If the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality. If that is not the case, it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all of the difference.

The Court, hereby rules:

1) *Where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.*

2) *The fact that the respective rates of pay of two jobs of equal value, one carried out almost exclusively by women and the other predominantly by men, were arrived at by collective bargaining processes which, although carried out by the same parties, are distinct and, taken separately, have in themselves no discriminatory effect, is not sufficient objective justification for the difference in pay between those two jobs.*

3) *It is for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question.*

Case C-132/92
BIRDS EYE WALLS LTD v FRIEDEL M. ROBERTS
Date of judgment:
9 November 1993
Reference:
[1993] ECR I-5579
Content:
Equal pay for men and women — Bridging pension

1. Facts and procedure

The case centres on the amount of the bridging pension paid to Mrs Roberts under Unilever's occupational pension scheme, to which she had been affiliated before taking early retirement on 14 August 1987 at the age of 57 years and two months on grounds of ill health. The bridging pension, financed in its entirety by the employer, constitutes an ex *gratia* payment to employees who are compelled on grounds of ill health to take early retirement before reaching the statutory retirement age which, in the United Kingdom, is 60 for women and 65 for men. The additional payment in question is therefore made where the employee is not yet entitled to payment of the State pension and is entitled to the occupational pension only at a reduced rate on the basis of the number of years still to be completed until the statutory retirement age. The method of calculating the bridging pension, which is based on a number of factors such as the employee's final rate of pay, the number of years of service he would have completed until the age of 60 or 65 and the State and occupational pensions to which he would be entitled, means that the amount paid to a particular individual varies according to the changes occurring in that person's financial position with the passage of time. From the age of 60, on the other hand, the amount of the bridging pension paid to a woman is reduced on the ground that she is in receipt of the State pension, while the bridging pension paid to a man is not reduced until five years later, when he in turn becomes entitled to the State pension.

Mrs Roberts challenged that method of calculation which, in the case of persons aged between 60 and 65, entails payment to a woman of a smaller bridging pension than that paid to a man whose position is comparable in all other respects.

2. Questions referred to the Court

1) Is it a breach of Article 119 of the EEC Treaty for an employer to operate a discretionary occupational pension scheme, using a formula common to male and female ex-employees, whereby the same total retirement pension (occupational and State in the aggregate) is calculated for them and there is deducted from that total that part of the State retirement pension in respect of which contributions were paid by the employer and the ex-employee during the ex-employee's pensionable employment with that employer, and the employer pays directly to the employee that reduced amount, the object being to equalise the total retirement pension (as calculated under the common formula) for male and female ex-employees alike, with the result that between the ages of 60 and 65 the employer pays less to a female employee than to a male employee because a deduction is made for female ex-employees by reason of their entitlement to State pension from the age of 60 whereas no such deduction is made for male ex-employees since they are not entitled to State pension until the age of 65?

2) Is the answer to question 1 affected in circumstances where the female is not entitled to a State pension because, as a married woman, she has a choice of paying national insurance contributions at the full rate, entitling her to a full State pension in her own right, or at a reduced rate, not entitling her to a State pension (or entitling her to only a reduced pension) and she chooses the latter?

3) Are the answers to the foregoing affected in circumstances where the employee, though

not entitled to a State retirement pension (or entitled only to less than the full pension) is in fact entitled to, and receives, a State widow's pension equal in amount to a full State retirement pension?

3. Judgment of the Court

There is no disputing the fact that the bridging pension falls within the concept of pay within the meaning of the second paragraph of Article 119 of the Treaty.

It should be noted that the principle of equal treatment laid down by Article 119 of the Treaty, like the general principle of non-discrimination which it embodies in a specific form, presupposes that the men and women to whom it applies are in identical situations. However, that would not appear to be so where the deferred payment which an employer makes to those of his employees who are compelled to take early retirement on grounds of ill health is regarded as a supplement to the financial resources of the man or woman concerned. Accordingly, although until the age of 60 the financial position of a woman taking early retirement on grounds of ill health is comparable to that of a man in the same situation, neither of them as yet entitled to payment of the State pension, that is no longer the case between the ages of 60 and 65 since that is when women, unlike men, start drawing that pension. That difference as regards the objective premise, which necessarily entails that the amount of the bridging pension is not the same for men and women, cannot be considered discriminatory. What is more, given the purpose of the bridging pension, to maintain the amount for women at the same level as that which obtained before they received the State pension would give rise to unequal treatment to the detriment of men who do not receive the State pension until the age of 65.

Referring to the second and third questions, the Court held that the option of paying lower contributions towards their State pension is a matter in which married women, who in so doing undoubtedly derive financial benefit, have freedom of choice. It would be irrational to disregard that factor and to calculate the bridging pension by reference to the amount of the State pension which the woman concerned actually receives. To compel a company to make up for tire loss of State pension arising directly from the woman's decision to pay contributions at a reduced rate would amount to conferring an unfair advantage on married women taking early retirement, who have opted to pay contributions at that rate, in relation to persons who had no such choice and have always had to pay contributions at the full rate, namely men and unmarried women, as well as to married women who have not exercised the option available to them. The Court concluded that, in view of the purpose of the bridging pension, it would be unfair not to take account of the payment of a widow's pension equivalent to a full State pension, inasmuch as that would also give rise to unequal treatment by favouring women in receipt of a widow's pension in relation to men and to married women entitled to a full State pension which would be taken into account in calculating the amount of the bridging pension.

The Court (Second Chamber), hereby rules:

1) *It is not contrary to Article 119 of the EEC Treaty, when calculating the amount of a bridging pension which is paid by an employer to male and female employees who have taken early retirement on grounds of ill health and which is intended to compensate, in particular, for loss of income resulting from the fact that they have not yet reached the age required for payment of the State pension, to take account of the amount of the State pension which they will subsequently receive and to reduce the amount of the bridging pension accordingly even though, in the case of men and women aged between 60 and 65, the result is that a female ex-employee receives a smaller bridging pension than that paid to her male counterpart, the difference being equal to the amount of the*

State pension to which she is entitled as from the age of 60 in respect of the periods of service completed with that employer.

2) *It is not contrary to Article 119 of the Treaty, when calculating the bridging pension, to take account of the full State pension which a married woman would have received if she had not opted in favour of paying contributions at a reduced rate, entitling her to a reduced pension only, or not entitling her to a pension, or of the widow's pension which may be drawn by the woman concerned and which is equivalent to a full State pension.*

Case C-189/91
PETRA KIRSAMMER-HACK v NURHAN SIDAL
Date of judgment:
30 November 1993
Reference:
[1993] ECR I-6185
Content:
National legislation on protection against unfair dismissal — Exclusion of small businesses — State aid — Equal treatment for men and women

1. Facts and procedure

Mrs Kirsammer-Hack worked as a dental assistant in Mrs Sidal's dental practice, which had a total staff of two full-time employees, two employees, including Mrs Kirsammer-Hack, who did not work full-time but worked more than 10 hours per week and four part-time employees working fewer than 10 hours per week or 45 hours per month. On 13 February 1991, Mrs Kirsammer-Hack was dismissed by her employer on the grounds that she was unpunctual, she was not a reliable worker and the quality of her work was unsatisfactory. Mrs Kirsammer-Hack brought an action against that decision before the Arbeitsgericht Reutlingen ('the Arbeitsgericht') for a declaration that her dismissal was socially unjustified within the meaning of the Kuendigungschutzgesetz (Law of 25 August 1969 on protection against unfair dismissal, 'the KSchG').

Pursuant to paragraphs 9 and 10 of the KSchG, an employee must be reinstated if he has been dismissed on grounds which are unrelated either to his behaviour or to overriding needs of the undertaking which preclude the continuation of the working relationship. However, where it appears from the circumstances of the case that it is not possible to maintain the working relationship, the court may decide that the employee is not to be reinstated but is entitled to compensation. In the proceedings brought against her by Mrs Kirsammer-Hack, the employer claimed that the system of protection described above was not applicable to her practice by virtue of the second and third sentences of paragraph 23(1) of the KSchG, according to which the system of protection in question does not apply 'to undertakings and authorities which normally employ no more than five employees, excluding persons employed as part of their vocational training. In determining the number of persons employed for the purpose of the second sentence, account is to be taken only of those employees whose normal period of work exceeds 10 hours per week or 45 hours per month.'

The national court, wondering whether paragraph 23(1) of the KSchG should not be disregarded on the ground that it constitutes an aid which is incompatible with the common market within the meaning of Article 92(1) of the Treaty and that it is contrary to the principle of equal treatment for men and women as it emerges from Articles 2 and 5 of the Directive, referred two questions to the Court of Justice for a preliminary ruling.

2. Questions referred to the Court

1) Is the exclusion of small businesses from the system of protection against unfair dismissal under the second sentence of paragraph 23(1) of the Kuendigungsschutzgesetz (Law on unfair dismissal, as amended by the first Arbeitsrechtsbereinigungsgesetz (Law on the revision of labour law) of 25 August 1969) compatible with Article 92(1) of the EEC Treaty?

2) Does the third sentence of paragraph 23(1) of the Law on unfair dismissal (as amended by Article 3 of the Beschaeftigungsfoerderungsgesetz (Law on the promotion of employment) of 26 April 1985) constitute indirect discrimination against women, contrary to Articles 2 and 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working: conditions?

3. Judgment of the Court

On the issue of State aid, the Court considered that a measure such as the one in question does not constitute a means of granting directly or indirectly an advantage through State resources.

With regard to the second question, concerning indirect discrimination against women, the Court has consistently held that national rules discriminate indirectly against women where, although worded in neutral terms, they are more disadvantageous to women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex (judgment of 13 July 1989, *Rinner-Kuehn,* Case 171/88, [1989] ECR 2743, paragraph 12). In that respect, it should be noted that the mere fact of not being taken into account in determining whether or not the national system of protection must be applied to the undertaking is not, in itself, disadvantageous for part-time employees. It is only under the combined provisions of the second and third sentences of paragraph 23(1) of the KSchG that undertakings which employ a number of employees below the stipulated threshold are not subject to the national system of protection and that their employees therefore suffer the disadvantage of being excluded from that system. The combination of the two sentences in question thus leads to a difference in treatment not between part-time employees and others but between all workers employed in small businesses not subject to the system of protection and all workers employed in undertakings which, by reason of the fact that they employ a. greater number of employees, are subject to it.

The much greater proportion of women among part-time employees in Germany does not therefore justify the conclusion that the provision in question constitutes indirect discrimination against women contrary to Articles 2(1) and 5(1) of the Directive. There would be such discrimination only if it were established that small businesses employ a considerably higher percentage of women than men. The Court found that, in the present case, the information provided by the national court did not establish such a disproportion. It should moreover be added that, even if such a disproportion were established, it would still be necessary to examine whether the disputed measure might be justified by objective reasons unrelated to the sex of the employees.

The Court, hereby rules:

1) *Exclusion of small businesses from a national system of protection of workers against unfair dismissal does not constitute aid within the meaning of Article 92(1) of the EEC Treaty.*

2) *The principle of equal treatment for men and women as regards the conditions of dismissal as it emerges from Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 does not preclude the application of a national provision which, like the third sentence of paragraph 23(1) of the Kuendigungsschutzgesetz (Law of 25 August 1969 on protection against unfair dismissal), does not take into account employees whose working hours are not more than 10 hours per week or 45 hours per month when determining whether or not an undertaking must apply the system of protection against unfair dismissal, where it is not established that undertakings which are not subject to that system employ a considerably greater number of women than men. Even if that were the case, such a measure might be justified by objective reasons not related to the sex of the employees in so far as it is intended to alleviate the constraints weighing on small businesses.*

Case C-110/91
MICHAEL MORONI v COLLO GMBH
Date of judgment:
14 December 1993
Reference:
[1993] ECR I-6591
Content:
Equal pay for men and women — Occupational pensions — Limitation of the effects in time of the judgment in Case C-262/88, *Barber*

1. Facts and procedure

Mr Moroni, born in 1948, was an employee of Collo from 1968 to 1983 and by virtue of that employment was a member of the company's occupational old-age pension scheme. Under that scheme, which was supplementary to the statutory scheme, male workers may not claim a company pension before the age of 65 whilst female workers may receive such a pension from the age of 60 provided that, at that time, the employee, male or female, had worked in the undertaking for at least 10 years. Under the Gesetz zur Verbesserung der betrieblichen Altersversorgung (Law on the Enhancement of Old-Age Pensions ('BetrAVG')), an employee who leaves the undertaking before reaching retirement age retains the pension rights acquired during the period of employment and those rights may be asserted at the age of 65 or 60, depending on whether the employee is a man or a woman. The amount of the pension is then calculated by applying to the pension which ought to have been acquired upon normal retirement age a reduction coefficient equal to the proportion which the employee's actual length of service bears to total theoretical service. Since women have to serve fewer years before reaching retirement age, their pensions *are* reduced less than those of their male counterparts.

Relying on Article 119 of the Treaty, Mr Moroni argued that he should be entitled to a company pension at the age of 60 like female employees and that his pension rights should therefore be reduced only on the basis of the number of years between the time when his service ended and his 60th birthday.

2. Questions referred to the Court

1) Does an occupational pension scheme in the form of a direct entitlement conferring an occupational pension on a male employee at the age of 65 but on a female employee at the earlier age of 60 already now infringe Article 119 of the EEC Treaty, regard being had to Directive 86/378/EEC as well?

2) If the answer is affirmative, are the legal consequences of infringement already those that are envisaged in Directive 86/378/EEC only from 1993? May a male employee covered by such a pension scheme claim an occupational pension as soon as he reaches the age of 60, and must that pension be paid without any reduction even though the claim precedes accrual of the direct entitlement?

3) At present, does an infringement of Article 119 of the EEC Treaty still have no consequences — having regard also to Directive 86/378/EEC —

   a) if the employee has left, or will leave, his employer's service prematurely, after acquiring an indefeasible right vested in interest to a pension but before notification of Directive 86/378/EEC, before delivery by the Court of Justice of its judgment of 17 May 1990 (Case C-262/88, *Barber v Guardian Royal Exchange Assurance Group),* or before the date of 1 January 1993 specified in Article 8(1) of Directive 86/378/EEC;

   or only

   b) if the former employee was already in receipt of an occupational pension on one

of the determining dates listed as alternatives;

or only insofar as

c) the claims to an occupational pension were already met by one of the alternative dates, with the result that in respect of future pension rights an increase may still be demanded;

or

d) does the issue presented in the above alternatives as to the effect of Article 119 of the EEC Treaty *ratione temporis* remain, in circumstances such as the present, a matter for the national court to decide?

3. Judgment of the Court

Referring to the first question, the Court pointed out that, in the *Barber* judgment (paragraph 32), it held that Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality, and, in particular, the imposition of an age condition which differs according to sex in respect of pensions paid under a contracted-out occupational scheme, even if the difference between the pensionable ages for men and women is based on the one provided for by the national statutory scheme. The Court reached this conclusion after holding that occupational pensions are pay within the meaning of the second paragraph of Article 119, while pointing out that the facts underlying the *Barber* judgment concerned a contracted-out occupational scheme and not a supplementary occupational scheme as in the case in question. However, it must be pointed out that in ruling that pensions paid under this type of scheme fall within the scope of Article 119, the Court applied the same criteria as those to which it had referred in its earlier case law to distinguish statutory social security schemes from occupational pension schemes.

The Court stated that an obligation imposed by a national provision to pay the occupational pension at the same time as the statutory pension cannot have the effect of excluding the occupational scheme from the scope of Article 119 of the Treaty.

As to the second question, the Court again pointed out that it is settled case law that Article 119 applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by that Article, without national or Community measures being required to define them with greater precision in order to permit their application (see, in particular, paragraph 37 of the *Barber* judgment). It follows that a worker who is discriminated against by the setting of different retirement ages for men and women may in principle assert his rights to payment of the company pension at the same age as his female counterpart and any reduction in the event of early departure from the service of the undertaking must be calculated on the basis of that age.

With regard to the third question, the Court referred to its judgment in the *Ten Oever* case, in which it ruled that the limitation of the effects in time of the *Barber* judgment was imposed in the precise context of benefits (in particular, pensions) provided for by private occupational schemes treated as pay within the meaning of Article 119 of the Treaty. The Court also took into consideration the way in which occupational pension funds are financed and thus of the accounting links existing in each individual case between the periodic contributions and the future amounts to be paid.

The Court, hereby rules:

1) *As may be concluded from the judgment of 17 May 1990, Barber (Case C-262/88), it is contrary to Article 119 of the EEC Treaty if under a supplementary occupational pension scheme, a male employee is entitled to claim a company pension only at a higher age than a female em-*

ployee in the same situation owing to the setting of different retirement ages for men and women.

2) *Subject to what is stated in reply to the third preliminary question, Council Directive 86/3 78/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes cannot prevent Article 119 of the Treaty from being relied upon directly and immediately before national courts.*

3) *By virtue of the abovementioned judgment of 17 May 1990, the direct effect of Article 119 of the EEC Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.*

Case C-152/91
DAVID NEATH v HUGH STEEPER LTD
Date of judgment:
22 December 1993
Reference:
[1993] ECR I-6935
Content:
Equal pay for men and women — Occupational pensions — Use of actuarial factors differing according to sex — Limitation of the effects in time of the judgment in Case C-262/88, *Barber*

1. Facts and procedure

Mr Neath was employed by Hugh Steeper from 29 January 1973 to 29 June 1990, the date on which he was made redundant. At that time he was 54 years and 11 months old. During that period he was successively a member of two private occupational pension schemes run by his employer, the entitlements acquired under the first scheme having been transferred to the scheme of which he was a member at the time when he was made redundant and which was a 'contracted-out' scheme (i.e. contracted out of the State Earnings-Related Pension Scheme). According to the rules of that contracted-out scheme, male employees may not claim a full company pension until they are 65 years of age whilst female employees may receive a full pension at 60 years of age. However, any member may, with the consent of the employer and the scheme trustees, take early retirement at any time after his 50th birthday and receive a pension which is payable immediately but which is reduced according to the length of the period between the actual retirement date and the normal retirement date. If the employer or the trustees refuse their consent, as they did in Mr Neath's case, the member is entitled only to have his acquired pension rights transferred to another pension scheme or to receive a deferred pension payable on the normal retirement date, unless he then opts to have part of that pension converted into a capital sum.

When making his choice, Mr Neath realised, on the basis of the figures given by the scheme, that if he opted to have his pension rights transferred, his financial situation would be more favourable if the interpretation of the *Barber* judgment were that any male employee retiring, like himself, after 17 May 1990 (the date of the judgment) is entitled to have his pension recalculated on the same basis as his female counterpart in relation to the entire period of his service. If the interpretation were that such entitlement may be claimed only in respect of periods of service subsequent to that date, he would be entitled to a smaller sum. Mr Neath noted also that, on either interpretation, the transfer value will in any case be lower than his female colleagues would have received because of the use, in the assessment of the capital sum transferred, of actuarial factors based on life expectancy which differ for men and women. Similarly, if he were to opt for a deferred pension and ask for part of it to be converted into a capital sum, he would receive, owing to those same actuarial factors, a sum less than his female counterpart would receive.

2. Questions referred to the Court

1) Whether Article 119 and the *Barber* judgment have the simple effect of entitling a male employee whose employment ends on or after 17 May 1990 to the same pension as that which he would have received if he had been a woman?

2) Whether the same applies to his exercising options under the pension scheme to

   a) transfer benefits, and

   b) lump-sum options?

3) If the answer to question 1 or question 2, or both, is no, what considerations, if any, have to be given to

   a) his service prior to 17 May 1990, and

b) the use of sex-based actuarial assumptions in the pension scheme?

3. Judgment of the Court

On the matter of the precise scope of the limitation of the effects in time of the *Barber* judgment, the Court referred to its *Ten Oever* judgment.

As regards transfer benefits and lump-sum options with which the second question is concerned, since by virtue of the *Barber* judgment Article 119 cannot be invoked to call in question the financial basis of pension rights accrued before 17 May 1990 on the basis of different retirement ages, it follows that its capital equivalent must necessarily be subject to the consequences of that temporal limitation.

As regards the use of actuarial factors differing according to sex, with the aim of an occupational retirement pension scheme being to provide for the future payment of periodic pensions, the scheme's financial resources, accrued through funding, must be adjusted to the pensions which, according to forecasts, will have to be paid. The assessments needed to give effect to this system are based on a number of objective factors, such as the return on the scheme's investments, the rate of increase in salaries and demographic assumptions, in particular those relating to the life expectancy of workers. The fact that women live on average longer than men is one of the actuarial factors taken into account in determining how the scheme in question is to be funded. This is why the employer has to pay higher contributions for his female employees than for his male employees. In order to clarify whether the situation in which male employees are entitled to sums lower than those to which female employees are entitled is compatible with Article 119, it must be determined whether transfer benefits and lump-sum options constitute pay within the meaning of Article 119. On the basis of the *Barber* judgment, the Court pointed out that, in the context of a defined-benefit occupational pension scheme, the employer's commitment to his employees concerns the payment, at a given moment in time, of a periodic pension for which the determining, criteria are already known at the time when the commitment is made and which constitutes pay within the meaning of Article 119. However, that commitment does not necessarily have to do with the funding arrangements chosen to secure the periodic payment of the pension, which thus remain outside the scope of application of Article 119. In contributory schemes, funding is provided through the contributions made by the employees and those made by the employers. The contributions made by the employees are an element of their pay since they are deducted directly from an employee's salary, which by definition is pay (see judgment of 11 March 1981, *Worringham,* Case 69/80, [1981] ECR 767). The amount of those contributions must therefore be the same for all employees, male and female, which is indeed so in the present case. This is not so in the case of the employer's contributions which ensure the adequacy of the funds necessary to cover the cost of the pensions promised, so securing their payment in the future, that being the substance of the employer's commitment. It follows that, unlike periodic payment of pensions, inequality of employers' contributions paid under funded defined-benefit schemes, which is due to the use of actuarial factors differing according to sex, is not struck at by Article 119. That conclusion necessarily extends to the conversion of part of the periodic pension into a capital sum and the transfer of pension rights, the value of which can be determined only by reference to the funding arrangements chosen.

The Court, hereby rules:

1) *By virtue of the judgment of 17 May 1990 in Case C-262/88, Barber, the direct effect of Article 119 of the EEC Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before*

that date, initiated legal proceedings or raised an equivalent claim under the applicable national law. The value of transfer benefits and lump-sum options is affected likewise.

2) *The use of actuarial factors differing according to sex in funded defined-benefit occupational pension schemes does not fall within the scope of Article 119 of the EEC Treaty.*

Case C-13/93
OFFICE NATIONAL DE L'EMPLOI v MADELEINE MINNE
Date of judgment:
3 February 1994
Reference:
[1994] ECR I-371
Content:
Night work for women

1. Facts and procedure

From 15 July 1986 to 31 March 1990, Mrs Minne, who was living in Belgium, worked in the hotel, and catering industry at Capellen (Luxembourg), where she was required to work nights. She ceased working when she moved to live in the Province of Liège (Belgium), where she applied for unemployment benefit from 2 April 1990. The ONEM (Employment Office) refused to grant her that benefit on the ground that she had declared that she was no longer prepared to work at night for family reasons. The Tribunal du Travail (Labour Court), Verviers, before which the matter was brought at first instance, took the view that the decision by the ONEM was unjustified on the ground that Belgian legislation prohibited women in the hotel, and catering industry from working between midnight and 6 a.m. Following the annulment of its decision by the Tribunal du Travail, Verviers, the ONEM appealed to the Cour du Travail de Liège. As it was uncertain whether the Belgian legislation was compatible with Community law, that court decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling.

2. Question referred to the Court

Does Article 5 of Directive 76/207/EEC require a Member State which lays down in its domestic law the principle of general prohibition of night work for male and female workers alike to ensure strict similarity in the derogations provided for male and female workers (save where the need to treat men and women differently is justified) by refraining from introducing for male and female workers divergent systems of derogations differing primarily in respect of the procedure for the adoption of derogations and of the duration of the night work authorised, such as the systems resulting, under the Belgian legal system, from Articles 36 and 37 of the Law on Employment of 16 March 1971 and Articles 5 and 6 of the Royal Decree on the Employment of Women of 24 December 1968?

3. Judgment of the Court

The Court referred firstly to its judgment in the *Stoeckel* case, in which it ruled that Article 5 of the Directive is sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that obligation is subject to exceptions, where night work by men is not prohibited. Unlike the situation in *Stoeckel,* the discrimination in the present case does not lie in the principle of the prohibition of night work, which applies without distinction to men and women, but rather in the derogations from that principle. It is apparent from the judgment making the reference that the difference between the two systems of derogations does not so much concern the number or nature of the exceptions provided for as the procedure for their adoption and the conditions attaching to them. The derogations applicable to men are set out in the Law, whereas those applicable to women are, in accordance with Article 36(1) of the Law, laid down by Royal Decree. Moreover, with regard to women, authorised night work is sometimes limited to specified hours of the night, whereas this is not so in the case of men.

In asking whether that difference in treatment is justified in the light of Article 2(3) of the Directive, which provides that the Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, the Court declared that, in the present case, it does not follow from the legislation at issue that

the nature of the differences between the two systems of derogations is justified by the need to ensure protection of a woman's biological condition or by the special relationship which exists between a woman and her child. In those circumstances, unequal treatment cannot be justified on the basis of Article 2(3) of the Directive. It follows from the foregoing that Article 5(1) of the Directive precludes a Member State from maintaining in its legislation derogations from a general prohibition of night work which are subject to more restrictive conditions in respect of women than in respect of men and which cannot be justified by the need to ensure protection of a woman's biological condition or by the special relationship which exists between a woman and her child.

Bearing in mind, however, that the judgment making the reference cites several conventions dealing with night work by women and binding on Belgium (Convention No 89 of the International Labour Organisation of 9 July 1948 concerning Night Work of Women employed in Industry), the Court noted that, without it being necessary to consider whether the present case comes within the scope of the Convention, the Kingdom of Belgium has denounced that convention in order to comply with its Community obligations.

The Court (Sixth Chamber), hereby rules:

Article 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment vocational training and promotion, and working conditions precludes a Member State which prohibits night work for both men and women from maintaining divergent systems of derogations which differ primarily in respect of the procedure for the adoption of derogations and of the duration of the night work authorised, if such a difference is not justified by the need to ensure the protection of women, particularly with regard to pregnancy and maternity. Article 5 of the Directive cannot apply to the extent to which those national provisions were adopted in order to ensure the performance by the Member State of obligations arising under an international agreement concluded with non-member countries before the entry into force of the EEC Treaty.

Case C-343/92
M.A. DE WEERD, NÉE ROKS, AND OTHERS v BESTUUR VAN DE BEDRIJFSVERENIGING VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN AND OTHERS
Date of judgment:
24 February 1994
Reference:
[1994] ECR I-571
Content:
Social security — Directive 79/7/EEC — Effects of late transposition on rights acquired under the directive

1. Facts and procedure

The Algemene Arbeidsongeschiktheidswet (Netherlands General Law on Incapacity for Work, hereafter referred to as 'the AAW'), which came into force on 1 October 1976, originally conferred on men and on unmarried women, at the end of one year's incapacity for work, entitlement to benefits for incapacity for work the amount of which did not depend on either the other income or the loss of income of the beneficiary. Entitlement to benefits under the AAW was extended to married women by the Wet Invoering Gelijke Uitkeringsrechten voor Mannen en Vrouwen (Law introducing equal treatment for men and women as regards entitlement to benefits) of 20 December 1979. At the same time, that Law made entitlement to benefits subject, for all those insured, except certain categories, to the condition that during the year preceding the commencement of his incapacity for work the beneficiary received from his employment or in connection therewith a certain income. This income requirement applied to all persons whose incapacity for work had commenced after 1 January 1979. By virtue of the transitional provisions contained in the Law, men and unmarried women whose incapacity for work had commenced before 1 January 1979 continued to be entitled to benefits without having to satisfy the income requirement. Married women whose incapacity had commenced before 1 October 1975 were not entitled to benefits even if they satisfied the income requirement. As for those whose incapacity had commenced between 1 October 1975 and 1 January 1979, they were entitled to benefits only if they satisfied the income requirement.

By several judgments of 5 January 1988, the Centrale Raad van Beroep (Higher Social Security Court) held that these transitional provisions constituted discrimination on the ground of sex, contrary to Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966. The transitional provisions deemed discriminatory against married women were repealed by a Law of 3 May 1989. Article III of that Law, however, provided that persons whose incapacity for work arose before 1 January 1979 and who applied for AAW benefits after 3 May 1989 had to satisfy the income requirement, and Article IV provided that AAW benefits were to be withdrawn from persons whose incapacity for work arose before 1 January 1979 if they did not satisfy the income requirement. By a judgment of 23 June 1992 the Centrale Raad van Beroep ruled that the amount of income required, which in 1988 was NLG 4 403.52 a year, constituted indirect discrimination against women, contrary to Article 26 of the International Covenant referred to above, and to Article 4(1) of Directive 79/7, and that the income requirement must be regarded as being satisfied if, during the year preceding the commencement of his incapacity for work, the beneficiary had received 'some income'.

On 8 May 1989 Mrs De Weerd, whose incapacity for work commenced on 1 January 1976, applied for AAW benefits to the Board of the Bedrijfsvereniging voor Detail ha ndel, Ambachten en Huisvrouwen, which rejected her application on the basis of Article III of the Law of 3 May 1989. The other plaintiffs in the main action had the benefits for incapacity for work which they had been receiving withdrawn by the relevant trade associations with effect from 1 July 1991 on the basis of Article IV of the Law of 3 May 1989 on the ground that they did not satisfy the income requirement.

Mrs De Weerd and the other plaintiffs in the main proceedings brought an action challenging the decisions to refuse or withdraw benefits before the Raad van Beroep, 's-Hertogenbosch.

2. Questions referred to the Court

1) Is a provision such as that set out in Article III of the Netherlands Law of 3 May 1989 (Staatsblad 126) — whereby the rights of married women to AAW benefit, acquired by virtue of Community law as from 23 December 1984 but not (yet) asserted, have been taken away in their entirety on account of the fact that the benefit was applied for out of time as a result of the introduction in the meantime of a new condition for the acquisition of entitlement to benefit — contrary to the Community principle of legal certainty or to any other principle of Community law, such as the requirement of proper implementing legislation?

2) Is a provision such as that set out in Article IV of the Netherlands Law of 3 May 1989 (Staatsblad 126), as amended by the Law of 4 July 1990 (Staatsblad 386) — whereby the rights of married women to AAW benefit (and the rights of others to such a benefit) acquired by virtue of Community law as from 23 December 1984 and (usually only subsequently) asserted, have been taken away as from 1 July 1991 as a result of the introduction in the meantime of a new condition for the acquisition of entitlement to benefit — contrary to the Community principle of legal certainty or to any other principle of Community law, such as the requirement of proper implementing legislation?

3) Can provisions such as those set out in Articles III and IV of the Netherlands Law of 3 May 1989 (Staatsblad 126) — which (in practice) affect exclusively (Article III) or largely (Article IV) married women and which thus in principle create indirect discrimination against those women within the meaning of Article 4(1) of Directive 79/7/EEC — be objectively justified by budgetary considerations? Can that be the case where the setting aside of the measures contained in those provisions would lead to socially unacceptable consequences for the national budget and/or the financing of social security? Can expenditure amounting to approximately NLG 85 million per year and approximately NLG 1 000 million on a once-only basis be regarded as unacceptable consequences of that kind?

4) Must a measure such as that set out in Articles III and IV of the Netherlands Law of 3 May 1989 (Staatsblad 126) — in the event of an affirmative answer to question 1 and/or question 2 — be declared non-binding *erga omnes?*

3. Judgment of the Court

As regards the first question, the Court pointed out that Article 4(1) of Directive 79/7 may, in the absence of appropriate implementing measures, be relied on by individuals before the national courts in order to preclude the application of any provision of national law inconsistent with that Article and that, as from 23 December 1984, the date on which the time allowed for transposing the Directive expired, women are entitled to be treated in the same manner and to have the same rules applied to them as men who are in the same situation, since, where the Directive has not been implemented correctly, those rules remain the only valid point of reference (see *inter alia* judgment of 24 June 1987, *Borrie Clarke,* Case 384/85, [1987] ECR 2865, paragraphs 11 and 12). As a result, married women whose incapacity for work arose before 1 January 1979 were entitled as from 23 December 1984, by virtue of the direct effect of Article 4(1) of Directive 79/7, to AAW benefits under the same conditions as men in the same situation, that is to say, without having to satisfy the income requirement. Next, it should be noted that belatedly adopted implementing measures must fully respect the rights which Article 4(1) has

conferred on individuals in a Member State as from the expiry of the period allowed to the Member States for complying therewith (see *inter alia* judgment of 13 March 1991, *Cotter and McDermott,* Case C-377/89, [1991] ECR I-1155, paragraph 25). It follows that a Member State may not impose, in national legislation intended to implement Article 4(1) of Directive 79/7 and adopted after the expiry of the time limit set by the directive, a condition which deprives married women of the rights which they derive, as from the expiry of that period, from the direct effect of that provision of Community law.

Referring to the second question, the Court pointed out that Directive 79/7 leaves intact the powers conferred by Articles 117 and 118 of the Treaty on the Member States to define their social policy within the framework of close cooperation organised by the Commission and, consequently, the nature and extent of social protection measures, including those relating to social security, and the way in which they are implemented (see *inter alia* judgments of 9 July 1987, *Germany et al. v Commission*, Cases 281, 283, 284, 285 and 287/85, [1987] ECR 3203, and of 7 May 1991, *Commission* v *Belgium,* Case C-229/89, [1991] ECR I-2205). As previously held by the Court, Community law does not prevent Member States from taking measures, in order to control their social expenditure, which have the effect of withdrawing social security benefits from certain categories of persons, provided that those measures are compatible with the principle of equal treatment between men and women as defined in Article 4(1) of Directive 79/7 (see *inter alia* judgment of 11 June 1987, *Teuling* (Case 30/85, [1997] ECR 2497)).

The Court considered that the third question has no purpose in the case of a provision such as Article III of the Law of 3 May 1989, which deprives married women of rights which they derived, as from the end of the time allowed for transposing Directive 79/7, from the direct effect of Article 4(1) of the Directive, thereby reinforcing the direct discrimination which they suffered before the entry into force of the Law of 3 May 1989. Furthermore, the Court has consistently held that Article 4(1) of Directive 79/7 precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objectively justified factors unrelated to any discrimination on grounds of sex, that being the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so (see judgment of 19 November 1992, *Molenbroek,* Case C-226/91, [1992] ECR I-5943, paragraph 13). Nevertheless, although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes. In the Court's view, to concede that budgetary considerations may justify a difference in treatment as between men and women which would otherwise constitute indirect discrimination on grounds of sex, which is prohibited by Article 4(1) of Directive 79/7, would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.

With regard to the fourth question, the Court had already ruled, in its judgment of 27 June 1989, *Achterberg-te Riele and Others* (Joined Cases 48, 106 and 107/88, [1989] ECR 1963, paragraph 17), that persons not covered by Article 2 of Directive 79/7 may not rely on Article 4; in addition, it follows from the judgment of 11 July 1991, *Verholen and Others* (Joined Cases C-87, 88 and 89/90, [1991] ECR I-3757), that Article 4(1) of Directive 79/7 cannot be relied upon by persons not falling within its scope *ratione personae* even if they are covered by a national social security scheme such as the AAW which itself falls within the Directive's scope *ratione materiae*.

The Court (Sixth Chamber), hereby rules:

1) *Community law precludes the application of national legislation which, by making entitlement to benefits for incapacity for work dependent on a condition not previously applied to men, deprives married women of the rights conferred on them by virtue of the direct effect of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment between men and women in matters of social security.*

2) *Community law does not preclude the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4(1) of Directive 79/7/EEC.*

3) *Article 4(1) of Directive 79/7/EEC precludes the application of national legislation which makes the grant of benefits for incapacity for work subject to the condition of having received some income during the year preceding the commencement of the incapacity a condition which, although it does not distinguish on grounds of sex, affects far more women than men, even if the adoption of that national legislation is justified on budgetary grounds.*

4) *Only persons falling within the scope ratione personae of Directive 79/7/EEC as defined in Article 2 and those affected by discrimination in a national provision through another person who himself falls within the scope of the directive may, if that national legislation is incompatible with Article 4(1) of the directive, rely on that article before the national courts in order to prevent the application of the national legislation.*

Case C-421/92
GABRIELE HABERMANN-BELTERMANN v ARBEITERWOHLFAHRT, BEZIRKSVERBAND NDB./OPF. e.V.
Date of judgment:
5 May 1994
Reference:
[1994] ECR I-1657
Content:
Night-time work by pregnant women

1. Facts and procedure

Mrs Habermann-Beltermann, a nurse qualified in the care of the elderly, applied for a post as a night attendant in a home for the aged. For family reasons, she was able to work at night only. An employment contract between Mrs Habermann-Beltermann and the Arbeiterwohlfahrt (employees' social security organisation) was signed on 23 March 1992, with effect from 1 April 1992. The contract stipulated that Mrs Habermann-Beltermann was to be assigned night-time work only. She was absent from work because of illness from 29 April to 12 June 1992. A medical certificate dated 29 May 1992 stated that she was pregnant. The pregnancy is said to have begun on 11 March 1992. The Arbeiterwohlfahrt relied on Paragraph 8(1) of the Mutterschutzgesetz (Law on the protection of mothers) in order to terminate the employment contract. In its order for reference, the national court explained that in Germany, according to prevailing case-law and legal theory, contravention of a prohibition on night-time work as a rule renders the contract void. Again according to prevailing opinion, a contract entered into in the circumstances described above may likewise be avoided by the employer on account of a mistake on his part concerning an essential characteristic of the other party to the contract. However, the national court was uncertain whether the principle of equal treatment referred to in Articles 2(1), 3(1) and 5(1) of the directive precludes the national legislation from being applied in that way. For that reason, it decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling on two questions.

2. Questions referred to the Court

1) Are the principles laid down by the Court of Justice in its judgment of 8 November 1990 in Case C-177/88 concerning the interpretation of Council Directive 76/207/EEC of 9 February 1976 (OJ L 39, 14.2.1976, p. 40) and the principle of equal treatment laid down in Article 2(1) of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions to be interpreted in such a way that a contract of employment concluded between an employer and a pregnant employee, where both are unaware of the pregnancy, is not rendered invalid by the prohibition on certain work (night-time work) existing by virtue of the pregnancy?

2) In particular, is the principle of equal treatment contained in Articles 3(1) and 5(1) of Directive 76/207/EEC infringed in the event of:

   a) the contract of employment concluded with the pregnant employee being held to be void by reason of the infringement of the prohibition on certain work (night-time work) applying during pregnancy for the protection of pregnant employees;

   b) the employer being able, by reason of his mistake regarding the existence of pregnancy at the time when the contract was concluded, to avoid (anfechten) the contract of employment and thus bring it to an end?

3. Judgment of the Court

The defendant submitted that the Directive cannot have direct effect since the dispute is between two persons governed by private law and the

Court has not so far held that directives have direct horizontal effect. The Court rejected this argument, it being apparent that the national court was asking for a ruling on the interpretation of a directive that had already been transposed into national law, to assist it in interpreting and applying two provisions of the German Civil Code. In applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty (see judgment of 13 November 1990, *Marleasing,* Case C-106/89, [1990] ECR I-4135, paragraph 8).

In addressing the questions referred to it, the Court had to consider first of all whether the annulment or avoidance *(Anfechtung)* of an employment contract in a case such as this constitutes direct discrimination on grounds of sex for the purposes of the Directive. To that end, it must be established whether the fundamental reason for the annulment or avoidance of the contract applies without distinction to workers of both sexes or, on the contrary, to one sex only. It is clear that the termination of an employment contract on account of the employee's pregnancy, whether by annulment or avoidance, concerns women alone and constitutes, therefore, direct discrimination on grounds of sex, as the Court has held in cases where a pregnant woman was denied employment or dismissed (see judgments of 8 November 1990, *Dekker,* Case C-177/88, [1990] ECR I-3941, and *Handels- og Kontorfunktionaerernes Forbund i Danmark,* Case C-179/88, [1990] ECR I-3979). However, the unequal treatment in a case such as this, unlike the *Dekker* case, is not based directly on the woman's pregnancy but is the result of the statutory prohibition on night-time work during pregnancy. The question, therefore, is whether the Directive precludes compliance with the prohibition on night-time work by pregnant women, which is unquestionably compatible with Article 2(3), from rendering an employment contract invalid or allowing it to be avoided on the ground that the prohibition prevents the employee from doing the night-time work for which she was engaged. In its interpretation of Article 2(3) of the Directive, the Court observes that that provision recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see judgment of 12 July 1984, *Hofmann,* Case 184/83, [1984] ECR 3047, paragraph 25). In this case, the questions submitted for a ruling relate to a contract for an indefinite period and the prohibition on night-time work by pregnant women therefore takes effect only for a limited period in relation to the total length of the contract. In the circumstances, to acknowledge that the contract may be held to be invalid or may be avoided because of the temporary inability of the pregnant employee to perform the night-time work for which she has been engaged would be contrary to the objective of protecting such persons pursued by Article 2(3) of the Directive, and would deprive that provision of its effectiveness.

The Court (Sixth Chamber), hereby rules:

Article 2(1), read in conjunction with Articles 3(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, precludes an employment contract for an indefinite period for the performance of night-time work concluded between an employer and a pregnant employee, both of whom were unaware of the pregnancy, from being held to be void on account of the statutory prohibition on night-time work which applies, by virtue of national law, during pregnancy and breastfeeding, or from being avoided by the employer on account of a mistake on his part as to the essential personal characteristics of the woman at the time when the contract was concluded.

Case C-420/92
ELIZABETH BRAMHILL v CHIEF ADJUDICATION OFFICER
Date of judgment:
7 July 1994
Reference:
[1994] ECR I-3191
Content:
Social security — Increases in old-age benefits for dependent spouses

1. Facts and procedure

Mrs Bramhill, a United Kingdom national, ceased working on 1 June 1990, having reached the age of 60. Some months earlier, she had claimed a retirement pension payable from her 60th birthday, and later claimed an increase in that pension in respect of her dependent husband. Mrs Bramhill was awarded a retirement pension as from 4 June 1990, but her claim for an increase was disallowed on the ground that she did not satisfy the conditions of entitlement to such increase laid down by section 45A of the Social Security Act 1975, which was introduced by the Health and Social Security Act 1984. Before the legislative reform introduced in 1984, only male pensioners were entitled to increases in retirement pension for their dependent spouses. The possibility for women to obtain an increase in old-age benefit in respect of dependent spouses was introduced in order to prevent a sharp drop in income upon retirement for women when, after the 1984 legislative reform, they had been entitled to receive, before retirement, increases in sickness, unemployment and invalidity benefit in respect of dependent persons. However, Mrs Bramhill was not in such a situation.

The Social Security Appeal Tribunal, dealing with an appeal against the decision of the Adjudication Officer, acknowledged that section 45A of the Social Security Act 1975 discriminated against married women. Since, however, it was also undisputed that the Social Security Appeal Tribunal was bound by a previous decision of the Social Security Commissioner, according to which the legislation in question was compatible with the Directive owing to the possibility, provided by Article 7(1)(d) of the Directive, for Member States to make certain derogations from the principle of equal treatment laid down in Article 4(1) of the Directive, the Adjudication Officer's decision to reject the claim was confirmed by the Social Security Appeal Tribunal, which, however, gave leave for an appeal to the Social Security Commissioner. The latter decided to refer three questions to the Court of Justice for a preliminary ruling.

2. Questions referred to the Court

1) Where a Member State has enacted separate provisions for a male pensioner claiming in respect of a dependent wife and for a female pensioner claiming in respect of a dependent husband, is the derogation contained in Article 7(1)(d) of Directive 79/7 to be interpreted as permitting the Member State to impose more stringent conditions on a female claimant than on a male claimant?

2) In particular, may the Member State impose a condition such as that contained in section 45A of the Social Security Act 1975, by which immediately prior to the date upon which the female pensioner became entitled to retirement pension, she must have been entitled to an increase of unemployment benefit, sickness benefit or invalidity pension for her husband, when no such requirement is imposed on a man seeking an increase of retirement pension for his dependent wife?

3) If, in the light of the answers to questions (1) and (2), it is necessary for the national judge to determine whether or not national legislation satisfies the requirements of proportionality under Community law, so as to be capable of benefiting from the derogation contained in Article 7(1)(d) of Directive 79/7, what are the specific criteria that the national judge must apply?

3. Judgment of the Court

Rules such as those in force in the United Kingdom before the legislative amendment made by the Health and Social Security Act 1984, which allowed certain categories of married women to receive the increases in question, incontestably fell within the derogation provided for in Article 7(1)(d) of the Directive since, at that time, increases in retirement pension were provided for only in respect of a 'dependent wife'. As its title indicates and Article 1 explains, the purpose of the Directive is the progressive implementation of the principle of equal treatment for men and women in matters of social security (see, in particular, judgments of 24 February 1994, *Roks and Others,* Case C-343/92, [1994] ECR I-57, and of 7 July 1992, *Equal Opportunities Commission,* Case C-9/91, [1992] ECR I-4297). The Court therefore concluded that to interpret the Directive in the way which would mean that in the case of benefits which a Member State has excluded from the scope of the Directive pursuant to Article 7(1)(d) it could no longer rely on the derogation provided for by that provision if it adopted a measure which, like that in question in the main proceedings, has the effect of reducing the extent of unequal treatment based on sex, would be incompatible with the purpose of the directive and would be likely to jeopardise the implementation of the aforesaid principle of equal treatment.

The Court (Fifth Chamber), hereby rules:

Article 7(1)(d) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security does not preclude a Member State which provided for increases in long-term old-age benefits in respect of a dependent spouse to be granted only to men from abolishing that discrimination solely with regard to women who fulfil certain conditions.

Case C-32/93
CAROLE LOUISE WEBB v EMO AIR CARGO (UK) LTD
Date of judgment:
14 July 1994
Reference:
[1994] ECR I-3567
Content:
Directive 76/207 — Replacement of an employee on maternity leave — Replacement found to be pregnant — Dismissal

1. Facts and procedure

In 1987, EMO employed 16 persons. In June, one of the four employees working in the import operations department, Mrs Stewart, found that she was pregnant. EMO decided not to wait until her departure on maternity leave before engaging a replacement whom Mrs Stewart could train during the six months prior to her going on leave. Mrs Webb was recruited with a view, initially, to replacing Mrs Stewart following a probationary period. However, it was envisaged that Mrs Webb would continue to work for EMO following Mrs Stewart's return. The documents before the Court show that Mrs Webb did not know she was pregnant when the employment contract was entered into. Mrs Webb started work at EMO on 1 July 1987. Two weeks later, she thought that she might be pregnant. Her employer was informed of this indirectly. He then called her in to see him and informed her of his intention to dismiss her. Mrs Webb's pregnancy was confirmed a week later. On 30 July she received a letter dismissing her.

The relevant national legislation in this case is the Sex Discrimination Act 1975, insofar as Mrs Webb cannot rely either on section 54 of the Employment Protection (Consolidation) Act 1978, which prohibits unfair dismissal, or on section 60 of that statute, which provides that dismissal on the ground of pregnancy constitutes unfair dismissal. Under section 64, workers who have been employed for less than two years *are* not entitled to claim that protection. The industrial tribunal dismissed Mrs Webb's action. It held that she had not been directly discriminated against on grounds of sex. In its view, the real and significant reason for Mrs Webb's dismissal was her anticipated inability to carry out the primary task for which she had been recruited, namely to cover the job of Mrs Stewart during the latter's absence on maternity leave. According to the industrial tribunal, if a man recruited for the same purpose as Mrs Webb had told his employer that he would be absent for a period comparable to the likely absence of Mrs Webb, he would have been dismissed.

Appeals by Mrs Webb, first to the Employment Appeal Tribunal and then to the Court of Appeal, were unsuccessful. Mrs Webb was granted leave by the Court of Appeal to take the matter to the House of Lords, which referred a question to the Court of Justice for a preliminary ruling.

2. Question referred to the Court

Is it discrimination on grounds of sex contrary to Directive 76/207/EEC for an employer to dismiss a female employee (the appellant) whom he engaged for the specific purpose of replacing, after training, another female employee during the latter's maternity leave,

a) when, very shortly after appointment, the employer discovers that the appellant herself will be absent on maternity leave during the maternity leave of the other employee, and the employer dismisses her because he needs the job holder to be at work during that period;

b had the employer known of the pregnancy of the appellant at the date of appointment, she would not have been appointed; and

c) the employer would similarly have dismissed a male employee engaged for this purpose who required leave of absence at the relevant time for medical or other reasons?

3. Judgment of the Court

The Court referred firstly to its judgment of 8 November 1990, *Handels- og Kontorfunktionaerernes Forbund i Danmark* (Case C-179/88, [1990] ECR I-3979, paragraph 13, hereafter 'the *Hertz* judgment'), as confirmed in its judgment of 5 May 1994, *Habermann-Beltermann* (Case C-421/92, [1994] ECR I-1657, paragraph 15), whereby the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex. Furthermore, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth {*Habermann-Beltermann,* cited above, paragraph 21, and judgment of 12 July 1984, *Hoffmann,* Case 184/83, [1984] ECR 3047, paragraph 25).

Bearing in mind the general context, there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons. Pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex. Moreover, in the *Hertz* judgment, cited above, the Court drew a clear distinction between pregnancy and illness, even where the illness is attributable to pregnancy but manifests itself after the maternity leave. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the Directive. The fact that the main proceedings concern a woman who was initially recruited to replace another employee during the latter's maternity leave but who was herself found to be pregnant shortly after her recruitment cannot affect the answer to be given to the national court.

The Court (Fifth Chamber), hereby rules:

Article 2(1) read with Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment vocational training and promotion, and working conditions precludes dismissal of an employee who is recruited for an unlimited term with a view, initially, to replacing another employee during the latter's maternity leave and who cannot do so because, shortly after her recruitment, she is herself found to be pregnant.

Case C-200/91
COLOROLL PENSION TRUSTEES LIMITED v JAMES RICHARD RUSSELL, DANIEL MANGHAM, GERALD ROBERT PARKER, ROBERT SHARP, JOAN FULLER, JUDITH ANN BROUGHTON AND COLOROLL GROUP PLC.
Date of judgment:
28 September 1994
Reference:
[1994] ECR I-4389
Content:
Equal pay for men and women — Occupational pensions — Use of actuarial factors differing according to sex — Limitation of the effects in time of the judgment in Case C-262/88, *Barber*

1. Facts and procedure

In accordance with a number of trust deeds (a trust being the legal form in which occupational pension schemes are generally set up in the United Kingdom), Coloroll Pension Trustees Limited holds and manages as trustee the assets of the schemes created by the various companies in the Coloroll group for their employees with the specific aim of providing them with pensions and other benefits promised by the employer. As regards their principal benefits, the Coloroll pension schemes are defined benefit/final salary schemes which provide employees with a specific pension corresponding to 1/60th of their final salary for each year of service from the time when they reach normal retirement age, which is 65 years for men and 60 years for women. In certain circumstances, members may retire before that age and receive immediately a pension whose amount is reduced according to actuarial factors differing according to sex, women statistically having greater life expectancy than men. As regards their financing, the schemes in question are contributory in that they are financed by contributions paid not only by the employer but also by the employees. The employees' contributions correspond to a percentage of their salary, identical for all employees both male and female. Employees also have the right to pay additional voluntary contributions to secure additional benefits which are separately calculated and credited. However, the employer's contributions, which are calculated in the aggregate, vary over time so as to meet the balance of the cost of providing the pensions promised. They are also higher for female employees than for male employees owing to the fact that, under the system of financing by capitalisation, actuarial factors based on life expectancies varying according to sex are taken into account.

The Coloroll group's pension schemes are contracted out of the State Earnings-Related Pension Scheme ('SERPS'), a pension payable under the national scheme being supplementary to the basic statutory pension to which it is added in return for the payment of contributions to the national scheme. Following the financial collapse of the Coloroll group in 1990 and the appointment of administrative receivers for some of the companies belonging to the group, the trustees were to wind up the pension schemes and dispose of their assets. Faced with the task of having to decide the cases of hundreds of scheme members claiming a wide variety of pensions and benefits, the trustees were unsure whether the rules contained in the trust deeds were compatible with Article 119 of the Treaty as interpreted in the *Barber* judgment, with reference in particular to the application to the present case of the temporal limitation of the direct effect of Article 119 thereby laid down.

Against this background, the trustees decided to bring a representative action before the High Court in order to have the necessary directions from that court in the exercise of its general supervisory jurisdiction over trusts. To this end, the trustees, as plaintiffs in the proceedings, named as defendants a number of persons chosen as representative of the various interests involved. The High Court considered it expedient to stay proceedings and to refer various questions to the Court of Justice for a preliminary ruling.

2. Questions referred to the Court

I. 1) Can the direct effect of Article 119 of the Treaty establishing the European Economic Community be relied on (a) by employees and (b) by dependants of such employees, in relation to claims to benefits under a scheme where those claims are made not against the employer but against the trustees of the scheme?

2) Can the direct effect of Article 119 be relied on in relation to a scheme (a) by employees and (b) by dependants of such employees:

i) to require the trustees to administer the scheme as if the provisions of its rules had been altered (notwithstanding their actual terms) so as to reflect the principle of equal pay laid down by Article 119 by securing that the benefits payable under the scheme to such employees and/or dependants are equalised? or

ii) to require the employer (if still in existence) and/or the trustees to use such powers as they may have, whether by amendment of the rules of the scheme or otherwise, to secure that the benefits payable under the scheme reflect the principle of equal pay?

and, if the answer to (i) or (ii) is Yes,

iii) does the principle of equal pay require the benefits of the disadvantaged sex to be increased in all cases, or is it consistent with Article 119 for the benefits of the other sex to be reduced?

3) If the direct effect of Article 119 can be relied on both against the employer and against the trustees of the scheme, what is the relation between the liability of the scheme and that of the employer? In particular,

i) can the employer be required to pay further funds to the trustees of the scheme?

ii) where there are surplus assets in the scheme trust funds, can the employer require that any liability under Article 119 be discharged in the first instance wholly or in part as the case may be from the surplus assets?

iii) does any additional entitlement have to be provided for by the trustees out of the assets of the scheme where no claim has been made against the employer, or where no action has been taken by the employer to satisfy or provide for such a claim?

4) As the answers to parts (1), (2) and (3) of this question affected (and if so how) by whether:

i) the funds held by the trustees are insufficient to meet in full the cost of equalising benefits so as to reflect the principle of equal pay laid down by Article 119; or

ii) the employer is unable to provide any further funds to the trustees of the scheme; or

iii) the effect of equalising benefits will or may be to achieve equality for one class of beneficiary (for instance, persons in receipt of a pension) only if the benefits of another class (for instance, current employee members of the scheme) are reduced?

II. In relation to claims to benefits under a contracted-out scheme, what is the precise effect of point 5 of the operative part of the judgment delivered in Case C-262/88, *Barber* (judgment of 17 May 1990, OJ C 146, 15.6.1990, p. 8), according to which 'the direct effect of Article 119 of the Treaty may not be relied upon in or-

der to claim entitlement to a pension, with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law'? In particular (and subject to the exception in respect of proceedings initiated prior to the date of the *Barber* judgment):

1) Can the direct effect of Article 119 of the EEC Treaty be relied upon by employees in relation to such a claim:

   i) only in respect of service on or after 17 May 1990 (the date of the judgment)? Or

   ii) also in respect of service prior to 17 May 1990 and, if so, in respect of the whole period of such service or part thereof, and in the latter case, for what part of such service?

2) If the answer to (1) is (ii), can the direct effect of Article 119 of the EEC Treaty be relied upon in relation to such a claim:

   only be employees whose service under the scheme ended on or after 17 May 1990 or

   also by employees

   i) whose service under the scheme ended prior to 17 May 1990 and who were entitled under the rules of the scheme to payment of instalments of pension prior to 17 May 1990?

   ii) whose service under the scheme ended prior to 17 May 1990 but who were entitled under the rules of the scheme to payment of instalments of pension (a deferred pension) only on or after 17 May 1990?

3) If the answer to (2) is (b)(i), can the direct effect of Article 119 be relied upon by such employees only in relation to instalments of pension payable on or after 17 May 1990 or also in relation to instalments of pension payable prior to that date?

4) Do the principles laid down in answer to (1) to (3) apply equally in relation to claims to benefits by dependants of employees? In particular, to what extent and in respect of what period of service are widows and widowers (a) widowed on or after 17 May 1990, and (b) widowed prior to 17 May 1990, entitled to rely upon the direct effect of Article 119 in relation to claims to survivors' benefits?

5) Do the principles laid down in answers (1) to (4) apply, and if so how, to benefits which do not depend on the length of actual pensionable service?

III. Do the principles laid down in answer to the second question apply equally in respect of schemes and periods of service which are not contracted-out?

IV. Is it compatible with Article 119 to provide benefits or payments under a scheme calculated by reference to actuarial considerations (including, in particular, actuarial assumptions as to life expectancy) which produce differing results as between men and women? In particular:

   a) Can actuarial considerations be used in the calculation of the benefits payable to an employee

      i) in respect of the cash sum payable by way of commutation of part of the annual pension?

      ii) in respect of a reversionary pension payable to a dependant in exchange for the surrender of part of the annual pension?

      iii) by way of a reduced pension where the employee chooses to retire early and to

start receiving pension instalments before normal pension age?

b) Where the trustees of a scheme pay a capital sum to a third party in order to secure the payment of pension benefits by the third party to an employee or dependant in respect of whom the capital sum is paid, are the trustees entitled or required:

i) to pay a capital sum which is equal as between men and women but which will purchase pension benefits which are unequal as between men and women?

ii) to adopt some other (and if so, what) courses or course?

c) In the light of the answers given to (a) and (b), together with the answers given to the second question, are the trustees of a scheme required to review and recalculate determinations made by reference to such actuarial considerations in relation to events prior to 17 May 1990, and if so, in respect of what period?

V. 1) In circumstances where a scheme is not funded exclusively by the employer's contributions but is also funded by employees' contributions, being (i) contributions required of employees under the rules of the scheme and/or (ii) voluntary contributions additional to those required under the rules of the scheme, does the principle of equality laid down by Article 119 apply:

i) only to benefits payable out of those assets of the fund which are attributable to the employer's contributions? or

ii) also to benefits payable out of those assets of the fund which are attributable to (i) normal scheme contributions and/or (ii) additional voluntary contributions?

2) When an employee has transferred from one scheme to another (for example upon changing jobs) and liability has been accepted by the receiving scheme for the payment of benefits in return for a transfer payment from the trustees of the former scheme, does Article 119 apply so as to require those benefits to be increased by the scheme where necessary to reflect the principle of equality? If so, how do the principles laid down in answer to the second question apply in such circumstances?

VI. Does Article 119 apply to schemes which have at all times had members of only one sex so as to entitle a member to additional benefits to which that member would have been entitled, as a result of Article 119, had the scheme had a member or members of the other sex?

3. Judgment of the Court

As regards the first part of the first question, the Court referred to its judgment of 6 October 1993, *Ten Oever* (Case C-109/91, [1993] ECR I-4879) stating that, since the right to payment of a survivor's pension arises at the time of the death of the employee affiliated to the scheme, the survivor is the only person who can assert it. If the survivor were to be denied this possibility, Article 119 would be deprived of all its effectiveness as far as survivors' pensions are concerned. As regards the question whether Article 119 may be relied on against the trustees of an occupational pension scheme, the Court, having regard to the *Barber* judgment, found that the employer cannot therefore avoid the obligations incumbent on him under Article 119 by setting up the occupational pension scheme in the legal form of a trust and that the trustees themselves, although not party to the employment relationship, are required to pay benefits which do not thereby lose their character of pay within the meaning of Article 119. They are therefore bound, in so doing, to do everything within the scope of their powers to ensure compliance with the principle of equal treatment.

Addressing the second part of the first question, the Court pointed out, as regards the first part of the question, that the principle of equal pay is one of the foundations of the Community and that Article 119 creates rights for individuals which the national courts must safeguard. Since Article 119 of the Treaty is mandatory in nature, the prohibition of discrimination between men and women applies not only to the action of public authorities but also extends to contracts between individuals and to all agreements which are intended to regulate paid employment collectively (see judgment of 8 April 1976, *Defrenne,* Case 43/75, [1976] ECR 455, paragraphs 12 and 39). Employers and trustees cannot therefore be allowed to rely on the rules of their pension scheme or those contained in the trust deed in order to evade their obligation to ensure equal treatment in the matter of pay. As regards the second part of the question, concerning the method to be used to achieve equal treatment, the Court pointed to its judgment of 17 February 1991, *Nimz* (Case C-184/89, [1991] ECR I-297, paragraphs 18 to 20), in which it held that the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by collective bargaining or by any other constitutional procedure, and to apply to the members of the disadvantaged group the same arrangements as those enjoyed by the other employees, arrangements which, failing correct implementation of Article 119 in national law, remain the only valid point of reference. The situation is different as regards periods of service completed after the entry into force of rules designed to eliminate discrimination, since Article 119 does not then preclude measures to achieve equal treatment by reducing the advantages of the persons previously favoured. Article 119 merely requires that men and women should receive the same pay for the same work without, however, imposing any specific level of pay.

With regard to the third part of the first question, concerning the respective liabilities of employers and trustees, the Court found that although Article 119 imposes on employers an obligation of result whereby men and women must receive the same pay for the same work, neither that article nor any other provision of Community law regulates the way in which that obligation is to be implemented by employers or by the trustees of an occupational pension scheme acting within the limits of their powers. It follows that the national court, whose duty it is to ensure ultimate performance of the obligation of result, may, in order to do so, make use of all means available to it under domestic law.

Answering the fourth part of the first question, concerning the effect on the answers to the first three parts if the funds held by the trustees for the purposes of equalising benefits are insufficient, the Court stated that difficulties in applying the principle of equal pay because the funds held by the trustees are insufficient or because the employer cannot provide additional funds is a problem to be resolved in accordance with national law and such a problem cannot affect the answers given to the previous questions.

Addressing the first part of the second question, by which the Court was asked to state the precise scope of the *Barber* judgment, the Court referred to its judgment in the *Ten Oever* case.

Replying to the fourth part of the second question, on whether and how the *Barber* judgment applies to survivors' pensions, the Court ruled that the limitation thereby established is also applicable to survivors' pensions.

As regards the fifth part of the second question, by which the national court asked whether, and how, the limitation of the effects in time of the *Barber* judgment applies to benefits payable under occupational social security schemes which are not linked to the length of actual service, the Court observed that the limitation of the effects in time of the *Barber* judgment is applicable only where the operative event occurred before 17 May 1990.

Addressing the third question, which asked whether the *Barber* judgment, and more particu-

larly the limitation of its effects in time, concerns not only contracted-out occupational pension schemes but also non-contracted-out occupational schemes, the Court, referring to its judgment of 25 May 1971, *Defrenne* (Case 80/70, [1971] ECR 445, paragraphs 7 and 8) and its judgment of 13 May 1986, *Bilka* (Case 170/84, [1986] ECR 1607), concluded beyond doubt that the scheme in question falls within the scope of Article 119 of the Treaty.

In answering the fourth question, concerning the use of actuarial factors differing according to sex, the Court first of all had to consider whether transfer benefits and capital-sum benefits constitute pay within the meaning of Article 119. Having regard to the judgment of 22 December 1993, *Neath* (Case C-152/91, [1993] ECR I-6935), the Court's answer was in the negative.

With regard to the first part of the fifth question, on whether the principle of equal treatment applies to all pension benefits or only to some, the Court considered that Article 119 applies to all benefits payable to an employee by an occupational pension scheme, irrespective of whether the scheme is contributory or non-contributory. The Court pointed out, however, that the situation is different in the case of additional voluntary contributions paid by employees to secure additional benefits such as, for example, an additional fixed pension for the member or the member's dependants, an additional tax-free lump sum or additional lump-sum benefits on death.

With regard to the second part of the fifth question, the Court declared that the rights accruing to a worker under Article 119 cannot be affected by the fact that he changes his job and has to join a new pension scheme, with the acquired pension rights being transferred to the new scheme. The Court pointed, however, to the limitation of the direct effect of Article 119 deriving from the *Barber* judgment.

In answering the sixth question, which asked whether Article 119 is applicable to schemes which have at all times had members of only one sex, the Court referred to its judgment of 27 March 1980, *Macarthys* (Case 129/79, [1980] ECR 1275), in which it held that comparisons in cases of actual discrimination falling within the scope of the direct application of Article 119 are confined to parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service (paragraph 15). It follows that a worker cannot rely on Article 119 in order to claim pay to which he could be entitled if he belonged to the other sex in the absence, now or in the past, in the undertaking concerned of workers of the other sex who perform or performed comparable work. In such a case, the essential criterion for ascertaining that equal treatment exists in the matter of pay, namely the performance of the same work and receipt of the same pay, cannot be applied.

The Court, hereby rules:

1) *The direct effect of Article 119 of the EEC Treaty may be relied on by both employees and their dependants against the trustees of an occupational pension scheme who are bound, in the exercise of their powers and performance of their obligations as laid down in the trust deed, to observe the principle of equal treatment.*

2) *In so far as national law prohibits employers and trustees from acting beyond the scope of their respective powers or in disregard of the provisions of the trust deed, they are bound to use all the means available under domestic law, such as recourse to the national courts, in order to eliminate all discrimination in the matter of pay*

3) *As regards periods of service completed after the Court's finding of discrimination but before the entry into force of the measures designed to eliminate it, correct implementation of the principle of equal pay requires that the disadvantaged employees should be granted*

the same advantages as those previously enjoyed by the other employees. However, as regards periods of service subsequent to the entry into force of those measures, Article 119 does not preclude equal treatment from being achieved by reducing the advantages which the advantaged employees used to enjoy. Finally, as regards periods of service prior to 17 May 1990, the date on which the Barber judgment (Case C-262/88) was delivered, Community law imposed no obligation which would justify retroactive reduction of the advantages enjoyed by the favoured employees.

4) *The national court is bound to ensure correct implementation of Article 119, taking due account of the respective liabilities of the employers and trustees under the rules of domestic law.*

5) *Any problems arising because the funds held by the trustees are insufficient to equalise benefits must be resolved on the basis of national law in the light of the principle of equal pay and such problems cannot affect the answers to the previous questions.*

6) *By virtue of the Barber judgment the direct effect of Article 119 of the Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.*

7) *The limitation of the effects in time of the Barber-judgment applies to survivors' pensions and, consequently, equal treatment in this matter may be claimed only in relation to periods of service subsequent to 17 May 1990.*

8) *The limitation of the effects in time of the Barber judgment is applicable to benefits not linked to the length of actual service only where the operative event occurred before 17 May 1990.*

9) *The principles laid down in the Barber judgment, and more particularly the limitation of its effects in time, concern not only contracted-out occupational schemes but also non-contracted-out occupational schemes.*

10) *The use of actuarial factors varying according to sex in funded defined-benefit occupational pension schemes does not fall within the scope of Article 119 of the Treaty. Consequently inequalities in the amounts of capital benefits or substitute benefits whose value can be determined only on the basis of the arrangements chosen for funding the scheme are likewise not struck at by Article 119.*

11) *The principle of equal treatment laid down in Article 119 applies to all pension benefits paid by Article 119 of the Treaty is not applicable to schemes which have at all times had members of only one occupational schemes, without any need to distinguish according to the kind of contributions to which those benefits are attributed, namely employers' contributions or employees' contributions. However, in so far as an occupational pension scheme does no more than provide the membership with the necessary arrangements for management, additional benefits stemming from contributions paid by employees on a purely voluntary basis are not covered by Article 119.*

12) *In the event of the transfer of pension rights from one occupational scheme to another owing to a worker's change of job, the second scheme is obliged, on the worker reaching retirement age, to increase the benefits it undertook to pay him when accepting the transfer so as to eliminate the effects, contrary to Article 119, suffered by the worker in consequence of the inadequacy of the capital transferred, this being due in turn to the discriminatory treatment suffered under the first scheme,*

and it must do so in relation to benefits payable in respect of periods of service subsequent to 17 May 1990.

13) *Article 119 of the Treaty is not applicable to schemes which have at all times had members of only one sex.*

Case C-408/92
CONSTANCE CHRISTINA ELLEN SMITH AND OTHERS v AVDEL SYSTEMS LTD
Date of judgment:
28 September 1994
Reference:
[1994] ECR I-4435
Content:
Equal pay for men and women — Occupational pensions — Retirement ages differing according to sex — Equalisation

1. Facts and procedure

The applicants in the main proceedings were, or still are, members of the Avdel Pension & Life Assurance Plan, the occupational pension scheme run by their employer, Avdel Systems Limited. The scheme, which is contracted out of the State Earnings-Related Pension Scheme, is funded by contributions paid by both the employer and employees. It confers on members *inter alia* the right to receive an occupational pension when they reach retirement age. Until 30 June 1991 the retirement age was set at 65 years for men and 60 years for women. With effect from 1 July 1991, that age was set uniformly at 65 years for both sexes. According to the national court, the change relates to benefits payable in respect of periods of service both prior and subsequent to 1 July 1991.

The effect of raising the retirement age for women is that as from 1 July 1991:

a) if a woman retires at the age of 60, her pension will be subject to an actuarial reduction of 4 % per annum for each year by which her retirement precedes the age of 65, whereas under the old rule she would have received a pension at the full rate;

b) if a woman leaves the scheme before she is 65 years of age, the pension rights already accrued, which can be transferred to another scheme or applied towards the purchase of an insurance policy, will be calculated on the basis of a retirement age of 65;

c) if a woman retires at the age of 60, the pension benefits previously earned with another employer on the basis that she would retire at 60, the rights to which have been transferred to her present scheme, will be subject to an actuarial reduction equivalent to that mentioned in (a) above.

The Bedford Industrial Tribunal had to deal with 78 applications brought by women who, because their retirement age had been raised to that for men, were in a less favourable financial situation than they had come to expect under the old rule. The Tribunal considered it appropriate to stay proceedings and refer various questions to the Court of Justice for a preliminary ruling.

2. Questions referred to the Court

1) Where an occupational pension scheme has different normal pension ages for men and women (65 and 60 respectively), and where an employer seeks, in the light of the judgment delivered in the case involving *Barber* v *Guardian Royal Exchange Assurance Group,* to eliminate that discrimination, is it inconsistent with Article 119 of the EEC Treaty for the employer to adopt a common pension age of 65 for men and women

   i) in respect of occupational pension benefits received by employees which *are* based on years of service after the date of equalisation which was 1 July 1991;

   ii) in respect of occupational pension benefits received by employees which are based on years of service on or after 17 May 1990, but before the date of equalisation which was 1 July 1991;

   iii) in respect of occupational pension benefits received by employees which are

based on years of service prior to 17 May 1990, when the date of equalisation was 1 July 1991?

2) If the answer to all or part of question 1 above is in the negative, does Article 119 impose any obligation on the employer to minimise the adverse consequences to women whose benefits are affected by the employer's decision to eliminate the difference in pension ages?

3) If the answer to all or part of question 1 above is in the affirmative, may the employer, consistently with Article 119, rely on the principle of objective justification by reference to the needs of the undertaking or the needs of the occupational pension scheme as justifying any reduction in the benefits paid to women, and, if so, what factors are relevant in establishing whether such objective justification is established?

3. Judgment of the Court

As regards the first question, the Court pointed out that the barber judgment excluded application of Article 119 to pension benefits payable in respect of periods of service prior to 17 May 1990, so that employers and trustees are not required to ensure equal treatment as far as those benefits are concerned. For the period between 17 May 1990 (the date of the *Barber* judgment) and 1 July 1991 (the date on which the scheme adopted measures to achieve equality), the pension rights of men must be calculated on the basis of the same retirement age as that for women. As regards periods of service completed after the entry into force, in this case on 1 July 1991, of rules designed to eliminate discrimination, Article 119 of the Treaty does not preclude measures which achieve equal treatment by reducing the advantages of the persons previously favoured. Article 119 merely requires that men and women should receive the same pay for the same work, without, however, imposing any specific level of pay.

As to the second question, the Court found it sufficient to say that equal treatment between men and women in relation to pay is a fundamental principle of Community law and that, given the direct effect of Article 119, its application by employers must be immediate and full. It follows that achievement of equality cannot be made progressive on a basis that still maintains discrimination, even if only temporarily.

Regarding the third question, even assuming that it would be possible to take account of objectively justifiable considerations relating to the needs of the undertaking or of the occupational scheme concerned, the administrators of the occupational scheme could not reasonably plead, as justification for raising the retirement age for women during this period, financial difficulties as significant as those of which the Court took account in the *Barber* judgment, since the space of time involved is relatively short and attributable in any event to the conduct of the scheme administrators themselves.

The Court, hereby rules:

1) Article 119 of the EEC Treaty precludes an employer who adopts measures necessary to comply with the judgment of 17 May 1990, Barber (Case C-262/88) from raising the retirement age for women to that for men in relation to periods of service completed between 17 May 1990 and the date on which those measures come into force. On the other hand, as regards periods of service completed after the latter date, Article 119 does not prevent an employer from taking that step. As regards periods of service prior to 17 May 1990, Community law imposed no obligation which would justify retroactive reduction of the advantages which women enjoyed.

2) The step of raising the retirement age for women to that for men, which an employer decides to take following the Barber judgment in order to remove discrimination in relation to occupational pensions as regards benefits payable in respect of future periods of service, cannot be accompa-

nied by measures, even if only transitional, designed to limit the adverse consequences which such a step may have for women.

3) *Article 119 of the Treaty precludes an occupational scheme, relying on its own difficulties or on those of the undertaking concerned, from retrospectively raising the retirement age for women in relation to periods of service completed between 17 May 1990 and the date of entry into force of the measures by which equality is achieved in the scheme in question.*

Case C-7/93
BESTUUR VAN HET ALGEMEEN BURGERLIJK PENSIOENFONDS v G.A. BEUNE
Date of judgment:
28 September 1994
Reference:
[1994] ECR I-4471
Content:
Concept of pay — Pension scheme — Scope of Article 119 and Directive 79/7/EEC — Equal pay for men and women — Direct effect of Article 119 of the Treaty — Protocol No 2 annexed to the Treaty on European Union.

1. Facts and procedure

Civil servants in the Netherlands are covered by the general pension scheme established by the Algemene Ouderdomswet (General Law on Old-Age Insurance, hereafter 'the AOW') and by the pension scheme for civil servants governed by the Algemene Burgerlijke Pensioenwet (General Civil Pension Law, hereafter 'the ABPW'). Before 1 April 1985, a married man was entitled under the AOW to a general pension for a married couple equal to 100 % of the minimum wage in force in the Netherlands. Unmarried persons of either sex were entitled to a general pension equal to 70 % of the minimum wage. A married woman had no entitlement in her own right; she became entitled only upon the death of her husband. To obviate overlapping of the general pension and the civil service pension, the ABPW provides that the part of the general pension to which a civil servant was entitled under the AOW, and which corresponded to his rights in respect of his periods of employment in the public service, would be regarded as forming part of his civil service pension, that is to say as being 'incorporated' in the latter pension. For married female civil servants, who were not entitled to a general pension in their own right, the ABPW provided, before 1 April 1985, that the amount of general pension incorporated in their civil service pension would be calculated by reference to the amount of the general pension of an unmarried woman, namely a maximum of 80 % of 70 % of the minimum wage. As from 1 April 1985, married women became entitled in their own right to a general pension under the AOW. The effect of the national provisions on retirement applicable to Netherlands civil servants is that, since married women are treated in the same way as unmarried women for the purpose of calculating the general pension incorporated in the civil service pension, the married man's civil service pension is systematically lower than the civil service pension paid to a married woman who has reached the same grade in the civil service, as regards rights in respect of periods of service before 1 January 1986.

On 3 February 1988, Mr Beune reached the age of 65. On that date he was in receipt of an invalidity pension which was recalculated in accordance with the ABPW. Because his rights in respect of periods of service before 1 January 1986 were taken into account, the amount of general pension incorporated into Mr Beune's civil service pension was NLG 16 286.59 a year. However, for a female married civil servant, with the same number of years' public service as Mr Beune, only NLG 11 300 a year would be incorporated in her civil service pension.

2. Questions referred to the Court

1) Is a statutory scheme with regard to old age within the meaning of Article 3(1)(a) of Directive 79/7/EEC to be construed as covering, *inter alia,* a statutory pension scheme (chiefly) for civil servants of the kind laid down in the ABPW (Algemene Burgerlijke Pensioenwet — General Civil Pension Law)?

2) If so, is the principle of equal treatment laid down in Article 4(1) of that directive to be interpreted as conflicting with the existence of differing rules for the combination of the general pension (AOW — Algemene Ouderdomswet (General Law on Old Age Insurance)) and the civil service pension applying to (retired) married male civil servants, on the

one hand, and to (retired) married female civil servants, on the other?

3) If questions (1) and (2) are answered in the affirmative, is a retired male civil servant entitled, in the absence of a national rule abolishing the unequal treatment referred to above, to base a claim on the provisions of Directive 79/7/EEC to the effect that, as far as his entitlement to a civil service pension is concerned, he should be treated in the same way as a married female civil servant who is otherwise in the same circumstances as he?

4) Does the principle of equal treatment referred to in question (3) have the effect that the inequality of pension entitlements as between married male and female civil servants as is at issue in this case is annulled as from 23 December 1984 even in so far as the entitlement to pension is based on periods (that is to say, periods of service as a civil servant) prior to that date? Is a factor not considered in the judgments of 11 July 1991, *Verholen and Others* (Joined Cases C-87/90, C-88/90 and C-89/90), of 8 March 1988, *Dik and Others* (Case C-80/87), and of 24 June 1987, *Borrie Clarke* (Case 384/85), namely that the ABPW pension scheme is financed by capital cover *(kapitaaldekking),* also of relevance in this connection?

In the event that the Court of Justice should answer question (1) in the negative, the Centrale Raad van Beroep asks it to leave aside questions (2), (3) and (4) and to answer the following questions:

5) Is the term 'pay' in Article 119 of the EEC Treaty to be understood as covering *inter alia* an old-age pension (chiefly) for civil servants as provided for in the Netherlands ABPW?

6) If question (5) is answered in the affirmative and it must be inferred therefrom that the existence of differing rules applying to (retired) married male civil servants and (retired) married female civil servants as regards the combination of the general pension (AOW) and the civil service pension conflicts with the principle of equal pay for men and women enshrined in Article 119 of the Treaty, can a male civil servant rely on that principle so as to ensure that he is treated in the same way as a married female civil servant as regards his pension entitlement?

7) Are there points of reference to be found in Community law which, in the event that questions (5) and (6) are answered in the affirmative, enable the effects of the infringement of Community law to be limited both as regards the period as from when a claim to equal treatment can be asserted and as regards the periods during which the pension entitlement was built up? Is it relevant for the purpose of answering this question that the pension scheme at issue is financed by capital cover *(kapitaaldekking)*?

3. Judgment of the Court

With regard to the first and fifth questions, as the Court has held (see judgment of 13 May 1986, *Bilka,* Case 170/84, [1986] ECR 1607; *Barber* judgment, cited above, paragraph 12; judgment of 6 October 1993, *Ten Oever,* Case C-109/91, [1993] ECR I-4879, paragraph 8), the fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being 'pay'within the meaning of Article 119. The next point to consider was whether a pension scheme of the type set up by the ABPW falls within the scope of Directive 79/7 or of Article 119; on the basis of its earlier case law, the Court considered that social security schemes or benefits such as, for example, retirement pensions, directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned, which are obligatorily applicable to general categories of employees, are not included in the concept of pay as defined in Article 119. However, the fact that a scheme like the ABPW is directly governed by statute is not

sufficient to exclude it from the scope of Article 119. Since the judgment of 8 April 1976, *Defrenne II* (Case 43/75, [1976] ECR 455 paragraph 21), the Court has held that among the forms of direct discrimination which are identifiable solely by reference to the criteria laid down by Article 119 must in particular be included those of statutory origin. The principle of equal pay forms part of the foundations of the Community. The meaning and scope of that principle cannot therefore be determined by reference to a formal criterion, which is itself dependent upon the rules or practices followed in the Member States. The need to ensure uniform application of the Treaty throughout the Community requires Article 119 to be interpreted independently of those rules or practices. At all events, application of Article 119 is not conditional upon a pension being supplementary to a benefit provided by a statutory social security scheme. Benefits awarded under an occupational scheme which, partly or entirely, take the place of the benefits paid by a statutory social security scheme may fall within the scope of Article 119.

The Court's conclusion, from all that has been said above, is that the only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say the criterion of employment based on the wording of Article 119 itself. Admittedly, the employment criterion cannot be regarded as exclusive. Thus, as regards the inception and determination of pension rights, the pensions paid by statutory social security schemes may reflect, wholly or in part, pay in respect of work, but nevertheless fall outside the scope of Article 119. On the other hand, considerations of social policy, of State organisation, or of ethics or even budgetary preoccupations which influenced, or may have influenced, the establishment by the national legislature of a scheme such as the scheme at issue cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service and if its amount is calculated by reference to the civil servant's last salary. The pension paid by the public employer is therefore entirely comparable to that paid by a private employer to his former employees.

As regards the sixth question, the Court pointed out that Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality, and that that conclusion is not altered by the fact that only married men and not single men are placed at a disadvantage by that scheme. The Court has also held that the prohibition of discrimination between male and female employees is of general application and applies to the action of public authorities and to all agreements which are intended to regulate paid labour collectively (judgment of 27 June 1990, *Kowalska,* Case C-33/89, [1990] ECR I-2591, paragraph 12).

With regard to the seventh question, concerning Protocol No 2, it follows from the Court's answer to the first and fifth questions that the pension paid under the ABPW must be regarded as a benefit under an occupational scheme, within the meaning of the abovementioned protocol. Since it is in general terms, this protocol is applicable to the benefits under a scheme such as the scheme at issue. That conclusion must, however, be qualified.

It is clear that the protocol is linked to the *Barber* judgment, since it refers to the date of that judgment, 17 May 1990. Divergences in the interpretation of that judgment were removed by the *Ten Oever* judgment, cited above, which was delivered before the entry into force of the Treaty on European Union. While extending it to all benefits payable under occupational social security schemes and incorporating it in the Treaty, Protocol No 2 essentially adopted the same interpretation of the *Barber* judgment as did the *Ten Oever* judgment. It did not, on the other hand, any more than the *Barber* judgment, deal with, or make any provision for, the conditions of membership of such occupational schemes. The question of membership is thus still governed

by the *Bilka* judgment. Summing up, the Court considered that since the protocol on Article 119 is applicable to a scheme such as that governed by the ABPW and since a civil service pension of the kind at issue in the main proceedings is established on the basis of non-discriminatory arrangements regarding rights in respect of periods of service after 1 January 1986, Article 119 may, by virtue of the very terms of that protocol, be properly invoked for the purpose of requiring equal treatment under that scheme only by civil servants entitled to claim a pension under the ABPW or persons claiming under them who initiated legal proceedings or introduced a claim before 17 May 1990, in relation to periods of service before 1 January 1986.

The Court, hereby rules:

1) *A pension of the kind paid under the Algemene Burgerlijke Pensioenwet (ABPW) falls within the scope of Article 119 of the Treaty.*

2) *Article 119 precludes legislation such as the ABPW which, as regards entitlements in respect of periods of service before 1 January 1986, lays down a rule for calculating the amount of the civil service pension for male married former civil servants which is different from that applicable to female married former civil servants; Article 119 may be relied on directly before the national courts; married men placed at a disadvantage by discrimination must be treated in the same way and have the same rules applied to them as married women.*

3) *By virtue of Protocol No 2 on Article 119, the direct effect of Article 119 may be relied upon in order to require equal treatment as regards the payment of benefits under a pension scheme such as the ABPW corresponding to periods of employment falling between 8 April 1976 and 17 May 1990 only by civil servants or persons claiming under them who have initiated legal proceedings or introduced a claim before that date.*

Case C-28/93
MARIA NELLEKE GERDA VAN DEN AKKER AND OTHERS v STICHTING SHELL PENSIOENFONDS
Date of judgment:
28 September 1994
Reference:
[1994 ECR I-4527
Content:
Equal pay for men and women — Occupational pensions — Retirement ages differing according to sex — Equalisation

1. Facts and procedure

The applicants in the main proceedings are all employees of legal entities forming part of the Royal Shell Group and by virtue of that employment are members of the Stichting Shell Pensioenfonds, which is the occupational pension scheme run by that group. Until 31 December 1984 the rules of the scheme made a distinction between male and female employees, for whom the retirement ages were set at 60 years and 55 years respectively. That distinction was abolished with effect from 1 January 1985 after the normal retirement age had been set uniformly at 60 years. That change was accompanied by the following transitional arrangements. Female employees who were already members of the scheme on 1 January 1985 had the option of either accepting the raising of the pensionable age from 55 to 60 years or maintaining the pensionable age at 55 years. That election had to be made by 31 December 1986 at the latest and it was provided that, in the absence of an express election for raising the pensionable age to 60 years, the person concerned would be deemed to have opted to maintain the pensionable age at 55 years. All the applicants in the main proceedings had elected expressly or by implication to maintain the pensionable age of 55 years. As a result of the *Barber* judgment, in which the Court held that the setting of an age condition differing according to sex for pensions paid under an occupational pension scheme is contrary to Article 119 of the Treaty, the pension fund considered it necessary to amend the rules of its scheme by abolishing, with effect from 1 June 1991, the possibility for women to maintain a pensionable age of 55 years. The applicants in the main proceedings challenged this step, disputing the pension fund's contention that it was necessitated by the *Barber* judgment.

2. Questions referred to the Court

A) In a pension scheme adopted in the framework of a labour agreement in which, after 1 January 1985, the pensionable age for both male and female members is set at 60 years, is it contrary to Article 119 of the EEC Treaty for the pensionable age for a limited group of female members to remain fixed at 55 years after 17 May 1990, where:

   a) that results from transitional provisions adopted with effect from 1 January 1985 (when, as a result of an amendment to the rules, the pensionable age previously fixed for men at 60 years and for women at 55 years was changed to a uniform pensionable age of 60 years), and

   b) the transitional provisions are solely applicable to female members (or prospective members) who, on both 31 December 1984 and 1 January 1985, were employed by an employer affiliated to the defendant ('the persons aggrieved'), and

   c) the transitional provisions also provided that the persons aggrieved could elect for a pensionable age of either 55 or 60 years, which election had to be made during a period which had already expired by 31 December 1986?

B) Does it make any difference to the answer to question A whether the transitional provisions provide that in cases where no express election was made within the time allowed the original pensionable age of 55 years is

then applicable, or that the general pensionable age of 60 years is applicable?

3. Judgment of the Court

As regards the first question, having to do with interpretation of the *Barber* judement, the Court referred to its judgment of 6 October 1993, *Ten Oever* (Case C-109/91, [1993] ECR I-4879).

On the second question, the Court found it sufficient to say that since the obligation laid down in Article 119 to comply with the principle of equal treatment in the matter of pay is mandatory, an occupational scheme cannot evade that obligation simply because a discriminatory situation has arisen from an election made, expressly or by implication, by employees to whom such an option has been granted.

The Court hereby rules:

1) *Article 119 of the EEC Treaty does not allow an occupational pension scheme which, following the Barber judgment of 17 May 1990 (Case C-262/88) sets a uniform retirement age for all its members to maintain in favour of women, as regards benefits payable in respect of periods of service completed after the entry into force of the new rule, a retirement age lower than that for men, even if such a difference is due to an election made by women before the Barber judgment. As regards periods of service completed between 17 May 1990 and the date of entry into force of the rule by which the scheme imposes a uniform retirement age, Article 119 does not allow a situation of equality to be achieved otherwise than by applying to male employees the same arrangements as those enjoyed by female employees.*

2) *The reply to the first question is not affected by the fact that, in a case such as this, the female employees concerned were deemed, in the absence of an express election on their part, to have opted to maintain their retirement age at the level prior to equalisation.*

Case C-57/93
ANNA ADRIAANTJE VROEGE v NCIV INSTITUUT VOOR VOLKSHUISVESTING BV AND STICHTING PENSIOENFONDS NCIV
Date of judgment:
28 September 1994
Reference:
[1994] ECR I-4541
Content:
Equal pay for men and women — Right to join an occupational pension scheme — Limitation of the effects in time of the judgment in Case C-262/88, *Barber*

1. Facts and procedure

Since 1 May 1975 Mrs Vroege has worked on a part-time basis (25.9 hours a week) at NCIV Instituut voor Volkshuisvesting BV ('NCIV'). Article 20 of the collective labour agreement which applies within NCIV provides that workers in the service of that institution are to be members of an occupational pension scheme, the Stichting Pensioenfonds NCIV, which entitles them to a retirement pension, an invalidity pension and a widow's and orphan's pension. Before 1 January 1991, NCIV's pension scheme rules provided that only men and unmarried women employed for an indeterminate period and working at least 80 % of the normal full day could be members of the scheme. Since Mrs Vroege never worked more than 80 % of the full day, she was not allowed to pay contributions into the scheme and was therefore unable to acquire pension rights. On 1 January 1991, new pension scheme rules came into force, providing that employees of both sexes who have reached 25 years of age and who work at least 25 % of normal working hours can join the scheme. Article 23(5) of the pension scheme rules also provides that women who were not members before 1 January 1991 can purchase additional years of membership, provided, however, that they had reached the age of 50 on 31 December 1990. The maximum number of years to be purchased may not exceed the number of years between the date on which the member in question attained the age of 50 and 1 January 1991.

Since she had not reached the age of 50 on 31 December 1990, Mrs Vroege could not rely on that transitional provision and therefore could begin to accrue pension rights only as from 1 January 1991. Consequently, she challenged the new pension scheme rules on the ground that since they did not give her the right to be a member of the pension scheme in respect of periods of service prior to 1 January 1991 they involved discrimination incompatible with Article 119 of the Treaty. She claimed membership with retroactive effect from 8 April 1976, the date of the *Defrenne* judgment (Case 43/75, [1976] ECR 455), in which the Court held for the first time that Article 119 has direct effect.

2. Questions referred to the Court

1) Does the right to equal pay within the meaning of Article 119 of the EEC Treaty also include a right to join an occupational pension scheme?

2) If question (1) is answered in the affirmative, does the temporal limitation imposed by the Court in the *Barber* judgment with regard to a pension scheme of the kind at issue in that case ('contracted-out schemes') also apply to a claim to join an occupational pension scheme of the kind at issue in this case?

3) Are there grounds for making the possible applicability of the principle of equal pay set out in Article 119 of the EEC Treaty subject to a temporal limitation in respect of claims to participate in an occupational pension scheme of the kind at issue in this case and, if so, from which date?

4) Do the Protocol concerning Article 119 of the Treaty establishing the European Community appended to the Treaty of Maastricht ('the *Barber* Protocol') and (the draft law amending) transitional Article III of Draft Law 20890,

which is intended to implement the Fourth Directive, affect the assessment of this case, which was lodged at the registry of the Kantongerecht by application of 11 November 1991, having regard in particular to the date on which the proceedings were instituted?

3. Judgment of the Court

For the first question, the Court referred to the judgment of 6 October 1993, *Ten Oever* (Case C-109/91, [1993] ECR I-4879). It pointed out also that, in line with the judgment of 13 May 1986, *Bilka* (Case 170/84, [1986] ECR 1607), Article 119 covers not only entitlement to benefits paid by an occupational pension scheme but also the right to be a member of such a scheme.

For the second and third questions, the Court concluded that the limitation of the effects in time of the *Barber* judgment concerns only those kinds of discrimination which employers and pension schemes could reasonably have considered to be permissible, owing to the transitional derogations for which Community law provided and which were capable of being applied to occupational pensions. It must be noted that, as far as the right to join an occupational scheme is concerned, there is no reason to suppose that the professional groups concerned could have been mistaken about the applicability of Article 119. It has indeed been clear since the judgment in the *Bilka* case that a breach of the rule of equal treatment committed through not recognising such a right is caught by Article 119.

Finally, as regards specifically the last part of the question, the Court has consistently held that a limitation of the effects in time of an interpretative preliminary ruling can only be in the actual judgment ruling upon the interpretation sought (see, in particular, judgment of 16 July 1992, *Legros and Others,* Case C-163/80, [1992] ECR I-4625, paragraph 30). Consequently, if the Court had considered it necessary to impose a. limit in time on the rule that the right to be a member of an occupational pension scheme is covered by Article 119, it would have done so in the *Bilka* judgment.

As regards the fourth question, concerning the draft national Law, the Court has consistently held that in proceedings under Article 177 of the Treaty it is not for the Court to interpret national law and assess its effects (see, in particular, judgment of 3 February 1977, *Benedetti v Munari,* Case 52/76, [1977] ECR 163, paragraph 25).

On the question of Protocol No 2, the file and the pleadings show that the crucial point is whether the Protocol is intended only to clarify the limitation of the effects in time of the *Barber* judgment, as set out above, or whether it has wider scope. In answering this question, the Court reiterated the arguments put forward in Case C-7/93, *Beune.*

The Court, hereby rules:

1) *The right to join an occupational pension scheme falls within the scope of Article 119 of the EEC Treaty and is therefore covered by the prohibition of discrimination laid down by that article.*

2) *The limitation of the effects in time of the judgment of 17 May 1990, Barber (Case C-262/88) does not apply to the right to join an occupational pension scheme and in this context there is no scope for any analogous limitation.*

3) *Protocol No 2 concerning Article 119 of the Treaty establishing the European Community annexed to the Treaty on European Union, does not affect the right to join an occupational pension scheme, which continues to be governed by the judgment of 13 May 1986, Bilka (Case 170/84).*

Case C-128/93
GEERTRUIDA CATHARINA FISSCHER v VOORHUIS HENGELO B.V. AND STICHTING BEDRIJFSPENSIOENFONDS VOOR DE DETAILHANDEL
Date of judgment:
28 September 1994
Reference:
[1994] ECR I-4583
Content:
Equal pay for men and women — Right to join an occupational pension scheme — Limitation of the effects in time of the judgment in Case C-262/88, *Barber*

1. Facts and procedure

Mrs Fisscher was employed by Voorhuis Hengelo B.V. ('Voorhuis') from 1 January 1978 to 10 April 1992, working 30 hours a week. Voorhuis' employees are members of the occupational pension scheme administered by the Stichting Bedrijfspensioenfonds voor de Detailhandel. However, until 31 December 1990 Mrs Fisscher was not admitted to the scheme since the rules of the scheme excluded married women. On 1 January 1991 the scheme was extended to married women so that Mrs Fisscher was able to join it with effect from 1 January 1988. Mrs Fisscher then challenged the old rules on the ground that they were incompatible with Article 119 of the Treaty. She considered that, as from 8 April 1976, the date of the *Defrenne* judgment (Case 43/75, [1976] ECR 455), in which the Court held for the first time that Article 119 has direct effect, the scheme should have been open to married women as well. She therefore claimed retroactive membership as from 1 January 1978, the date when she entered Voorhuis' service.

2. Questions referred to the Court

1) Does the right to equal pay laid down in Article 119 of the EEC Treaty include the right to join an occupational pension scheme such as that at issue in this case which is made compulsory by the authorities?

2) If the answer to question (1) is in the affirmative, does the temporal limitation imposed by the Court in the *Barber* judgment for pension schemes such as those considered in that case ('contracted-out schemes') apply to the right to join an occupational pension scheme such as that at issue in this case, from which the plaintiff was excluded because she was a married woman?

3) Where membership of a pension scheme applied in an undertaking is made compulsory by law, are the administrators of the scheme (the occupational pension fund) bound to apply the principle of equal treatment laid down in Article 119 of the EEC Treaty, and may an employee who has been prejudiced by failure to apply that rule sue the pension fund directly as if it were the employer?

   In considering this question it may be relevant that the Cantonal Court has no jurisdiction to hear a claim based on unlawful conduct, since the extent of the claim exceeds the limits of its jurisdiction. In this case, therefore, it is relevant to know whether the plaintiff may claim against the pension fund (the second defendant) on the basis of her contract of employment.

4) If, under Article 119 of the EEC Treaty, the plaintiff is entitled to be a member of the occupational pension scheme from a date prior to 1 January 1991, does that mean that she is not bound to pay the premiums which she would have had to pay had she been admitted earlier to the pension scheme?

5) Is it relevant that the plaintiff did not act earlier to enforce the rights which she now claims to have?

6) Do the Protocol concerning Article 119 of the EEC Treaty appended to the Treaty of Maastricht ('the *Barber* Protocol') and the (draft law amending) the transitional Article III of Draft Law 20890, which is intended to imple-

ment the Fourth Directive, affect the assessment of this case which was brought before the Cantonal Court by writ of summons issued on 16 July 1992?

3. Judgment of the Court

For the first and second questions, the Court took the same line of argument as in the *Vroege* judgment.

As regards the third question, the Court stated that the effectiveness of Article 119 would be considerably diminished and the legal protection required to achieve real equality would be impaired if an employee could rely on that provision only as against the employer and not against the administrators of the scheme who are expressly charged with performing the employer's obligations.

Referring to the fourth question, the Court pointed out that as far as the right to be a member of an occupational scheme is concerned, Article 119 requires that a worker should not suffer discrimination based on sex by being excluded from such a scheme. This means that, where such discrimination has been suffered, equal treatment is to be achieved by placing the worker discriminated against in the same situation as that of workers of the other sex. It follows that the worker cannot claim more favourable treatment, particularly in financial terms, than he would have had if he had been duly accepted as a member.

As regards the fifth question, the Court has consistently held that, in the absence of Community rules on the matter, the national rules relating to time limits for bringing actions are also applicable to actions based on Community law, provided that they are no less favourable for such actions than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice (see, in particular, judgment of 16 December 1976, *Rewe,* Case 33/76, [1976] ECR 1989, paragraphs 5 and 6).

For the sixth question, concerned mainly with the scope of Protocol No 2 annexed to the Treaty on European Union, the Court applied the same reasoning as in the *Vroege* judgment.

The Court hereby rules:

1) *The right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination laid down by that article.*

2) *The limitation of the effects in time of the judgment of 17 May 1990, Barber (Case C-262/88) does not apply to the right to join an occupational pension scheme.*

3) *The administrators of an occupational pension scheme must, like the employer, comply with the provisions of Article 119 of the Treaty and a worker who is discriminated against may assert his rights directly against those administrators.*

4) *The fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.*

5) *The national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.*

6) *Protocol No 2 concerning Article 119 of the Treaty establishing the European Community, annexed to the Treaty on European Union, does not affect the right to join an occupational pension scheme, which is governed by the judgment of 13 May 1986, Bilka (Case 170/84).*

Case C-165/91
SIMON J.M. VAN MUNSTER v RIJKSDIENST VOOR PENSIOENEN
Date of judgment:
5 October 1994
Reference:
[1994] ECR I-4661
Content:
Social security — Freedom of movement for workers — Equal treatment for men and women — Old-age pension — Increase for dependent spouse

1. Facts and procedure

Mr van Munster, a Dutch national, was employed in the Netherlands for 37 years and in Belgium for eight years. In each of those two Member States he obtained a retirement pension calculated solely in accordance with the rules of the State concerned. His spouse was never employed during those two periods. In the Netherlands, the Sociale Verzekeringsbank (hereafter 'the Netherlands Social Insurance Bank') awarded Mr van Munster an old-age pension under the provisions of the Algemene Ouderdomswet (the General Law on Old-age Benefits, hereafter 'the AOW). Under the AOW, in the version entering into force on 1 April 1985, every married person, on reaching the age of 65, becomes entitled to a personal pension equivalent to 50 % of net minimum salary. If his or her spouse is not in work and has not yet reached the age of 65, the pension is increased by a supplement which may likewise amount to 50 % of net minimum salary. Where a person has no spouse, the pension amounts to 70 % of net minimum salary. The person entitled may not waive those benefits. The Netherlands Social Insurance Bank accordingly awarded Mr van Munster an old-age pension on the basis of 100 % of his net minimum salary, 50 % on account of his being a married person and 50 % on account of the fact that his spouse had not, at the date when the decision was taken, reached the age of 65. In Belgium, the National Pensions Office ('the RVP') also awarded Mr van Munster a retirement pension, with effect from 1 November 1985. Since Mrs van Munster herself was not in receipt of any benefit, the amount of Mr van Munster's Belgian pension was calculated at the 'household rate', taking into account the period of eight years during which he had been employed in Belgium. On 10 October 1987, the day on which Mrs van Munster attained the age of 65, the Netherlands Social Insurance Bank awarded her, pursuant to the provisions of the AOW, an independent old-age pension, calculated on the basis of 50 % of net minimum salary. As a necessary consequence, the Netherlands institution withdrew the pension supplement which Mr van Munster had received until then. The total income of the couple was not, therefore, increased by the pension awarded to Mrs van Munster. However, when the RVP learned that the Netherlands Social Insurance Bank had awarded Mrs van Munster a personal old-age pension, it reduced, by decision of 2 February 1988 and as from 1 October 1987, the amount of the retirement pension granted to her husband, by applying the 'single rate' rather than the 'household rate'. It did so on the ground that, according to the Belgian legislation, Mrs van Munster was in receipt of a 'retirement pension or an equivalent benefit'.

2. Questions referred to the Court

1) Is a national provision (such as Article 10(1) of Royal Decree No 50 of 24 October 1967 on retirement and survivor's pensions for workers) compatible with Community law, in particular the Treaty of 25 March 1957 establishing the European Economic Community, the principle of freedom of movement for workers, in particular Article 3(c), Article 48(1) *et seq.* and Article 51 of the Treaty, the principle of equal treatment for men and women, and specifically Council Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in particular Article 4(1) thereof, where the national provision attaches different conse-

quences to pension benefits related to the situation of the inactive spouse according to whether the benefit is granted in the form of an increase in the pension of the active spouse or in the form of a separate pension granted to the inactive spouse (as granted to married women under the AOW since 1 April 1985)?

2) Does a pension granted to the inactive spouse (as under the AOW, namely since 1 April 1985) have such specific characteristics that under Community law, in particular the rules mentioned in question 1, there is justification for treating it differently from the benefit granted in the form of an increase in pension on account of a dependent spouse (household rate pension as provided for in the Belgian pension legislation for workers)?

3. Judgment of the Court

As regards the compatibility of Belgian law with Directive 79/7, the Court noted that Article 4(1) of the directive lays down the principle of equal treatment for men and women in relation to calculation of social security benefits, including increases due in respect of a spouse. It was to comply with that provision and to apply the principle of equal treatment as widely as possible that the AOW was amended. The Belgian legislation, on the other hand, has not been amended to that effect. It is important to note, however, that Directive 79/7 did not require the AOW to be amended. It is apparent from the wording of Article 7(1)(c) that the Member States are authorised to exclude from the scope of the Directive the granting of entitlement to old-age benefits by virtue of the derived entitlements of a spouse. It follows that the principle of equal treatment for men and women, as expressed in Directive 79/7, does not preclude a Member State from not applying to a retired worker's pension the 'household rate' which its legislation provides for persons with dependent spouses, where the spouse is entitled in his or her own right to a retirement pension.

The Court, hereby rules:

1) Community law, in particular Articles 48 and 51 of the EEC Treaty, and also Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, does not preclude national legislation which provides for the right to a pension at the 'household rate' where the worker's spouse has ceased all gainful employment and is not in receipt of a retirement pension or equivalent benefit, but which applies only the less favourable 'single rate' where the worker's spouse is in receipt of a retirement pension or equivalent benefit such as the pension awarded to Mrs van Munster by the Algemene Ouderdomswet.

2) When, for the purpose of applying a provision of its domestic law, a national court has to characterize a social security benefit awarded under the statutory scheme of another Member State, it should interpret its own legislation in the light of the aims of Articles 48 to 51 of the EEC Treaty and, as far as is at all possible, prevent its interpretation from being such as to discourage a migrant worker from actually exercising his right to freedom of movement.

Case C-410/92
ELSIE RITA JOHNSON v CHIEF ADJUDICATION OFFICER
Date of judgment:
6 December 1994
Reference:
[1994] ECR I-5483
Content:
Equal treatment for men and women in matters of social security — National procedural time limits

1. Facts and procedure

Mrs Johnson, the appellant in the main proceedings, gave up work in or about 1970 in order to look after her daughter, who was then six years old. She sought to resume employment in 1980 but was unable to do so because of a back complaint. For that reason she was granted Non-Contributory Invalidity Benefit ('NCIB') in 1981, when she was living alone. The Health and Social Security Act 1984 abolished the NCIB and introduced the Severe Disablement Allowance ('SDA'), which may be granted to persons of either sex under identical conditions. However, section 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984 allowed persons entitled to the old NCIB to qualify automatically for the new SDA without being required to prove that they satisfied the new conditions. On 17 August 1987 Mrs Johnson applied through the Citizens Advice Bureau for SDA.

Her application was turned down on the basis of section 165A of the Social Security Act 1975, as amended, the effect of that provision being that a person who has not claimed payment of NCIB before the abolition of that benefit may not claim automatic entitlement to SDA (see judgment of 11 July 1991, *Johnson,* Case C-31/90, [1991] ECR I-3723, paragraph 29). The Social Security Commissioners, before whom the case came on appeal, referred questions to the Court of Justice by decision of 25 January 1990 asking in particular whether such a rule was compatible with Directive 79/7. In its judgment in *Johnson,* cited above, the Court answered that question by ruling that it had been possible since 23 December 1984 to rely on Article 4 of Directive 79/7 in order to have set aside national legislation which made entitlement to a benefit subject to the previous submission of a claim in respect of a different benefit which had since been abolished and which had entailed a condition discriminating against female workers. In the absence of appropriate measures for implementing Article 4 of Directive 79/7, women placed at a disadvantage by the maintenance of the discrimination were entitled to be treated in the same manner and to have the same rules applied to them as men who were in the same situation, since, where the directive had not been implemented correctly, those rules remained the only valid point of reference. Following the Court's judgment in that case, the Social Security Commissioners, by decision of 16 December 1991, granted SDA to Mrs Johnson with effect from 16 August 1986, that is to say, 12 months prior to her claim, but refused to grant payments in respect of any period prior to that date. The refusal was based on the rule contained in subsection 3 of section 165A of the Social Security Act 1975, according to which 'Notwithstanding any regulations made under this section, no person shall be entitled: ... (c) to any other benefit (except disablement benefit or reduced earnings allowance or industrial death benefit) in respect of any period more than 12 months before the date on which the claim is made.'

2. Questions referred to the Court

1) Is the decision of the European Court of Justice in *Emmott* (Case C-208/90, [1991] ECR I-4269), to the effect that a Member State may not rely on national procedural rules relating to the time-limits for bringing proceedings so long as that Member State has not properly transposed Directive 79/7 into its legal system, to be interpreted as applying to national rules on claims for benefit for past periods in cases where a Member State

has implemented measures to comply with that directive before the relevant deadline but has left in force a transitional provision such as that considered by the European Court of Justice in Case 384/85, *Jean Borrie Clarke*?

2) In particular in circumstances where:

   i) a Member State has adopted and implemented legislation to fulfil its obligations under Council Directive 79/7 ('the Directive') prior to the deadline laid down in the directive;

   ii) the Member State introduces ancillary transitional arrangements in order to safeguard the position of existing social security beneficiaries;

   iii) it subsequently transpires as a result of a preliminary ruling by the Court of Justice that the transitional arrangements breach the Directive;

   iv) an individual brings a subsequent claim for benefit shortly after the preliminary ruling referred to above, relying on the transitional arrangements and the directive, before a national court pursuant to which that individual is awarded the benefit for the future and for 12 months prior to the bringing of the claim in accordance with the relevant national rules on payments for the period prior to the making of the claim, must that national court disapply the national rules on arrears of payment from the date that the deadline for implementation of the Directive has expired, that is, 23 December 1984?

3. Judgment of the Court

The Court observed firstly that the wording of the contested rule shows that it is of general application and that actions based on Community law are therefore not subject to less favourable conditions than those applying to similar domestic actions. Nor does that rule, which merely limits the period prior to the bringing of a claim in respect of which arrears of benefit are payable, make it virtually impossible for an action to be brought by an individual relying on Community law.

As regards the scope of the *Emmott* judgment, it is clear from the judgment in *Steenhorst-Neerings* that the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which a time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under the Directive. The Court concluded that Community law did not preclude the application of a national rule of law whereby benefits for incapacity for work were payable not earlier than one year before the date of claim, in the case where an individual sought to rely on rights conferred directly by Article 4(1) of Directive 79/7 with effect from 23 December 1984 and where, on the date the claim for benefit was made, the Member State concerned had not yet properly transposed that provision into national law. In the light of the foregoing, the national rule which adversely affects Mrs Johnson's action before the Court of Appeal is similar to that at issue in *Steenhorst-Neerings*. Neither rule constitutes a bar to proceedings; they merely limit the period prior to the bringing of the claim in respect of which arrears of benefit are payable.

The Court, hereby rules:

Community law does not preclude the application, to a claim based on the direct effect of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, of a rule of national law which merely limits the period prior to the bringing of the claim in respect of which arrears of benefit are payable, even where that directive has not been properly transposed within the prescribed period in the Member State concerned.

Case C-297/93
RITA GRAU-HUPKA v STADTGEMEINDE BREMEN
Date of judgment:
13 December 1994
Reference:
[1994] ECR I-5535
Content:
Equal treatment for men and women — Secondary part-time activity — Different pay — Indirect discrimination

1. Facts and procedure

Mrs Grau-Hupka worked full-time from 1956 to 1991 as a music teacher at the Bremen Academy of Music. Since 1991 she has been drawing a statutory retirement pension together with a monthly supplement from the Civil Servants' Supplementary Pension Fund. Although she receives those benefits she continues to teach, but only part-time. When she was in full-time employment she was paid by the hour as provided for by the Bundes-Angestellten-Tarifvertrag (Collective Wage Agreement for Federal Employees, hereafter referred to as 'the collective agreement') for persons pursuing their main occupation either half-time or full-time. Since taking up part-time work, Mrs Grau-Hupka's pay has been lower; she therefore wrote to her employer, asking to be paid by the hour as before. The Municipality of Bremen rejected her request on the basis of clause 3(n) of the collective agreement, which states that the agreement does not cover employees pursuing a secondary activity. It was considered that drawing a pension must be treated in the same way as pursuing a main occupation, that Mrs Grau-Hupka was therefore employed part-time in a secondary activity and that she was therefore not covered by the collective agreement.

2. Questions referred to the Court

1) Does the principle of equal treatment for men and women as regards access to employment under Article 1(1) and Article 3 of Council Directive 76/207/EEC of 9 February 1976 require a national law which prohibits discrimination without objective reason against part-time employees to be interpreted as meaning that the fact that such an employee also has a main occupation affording him social security does not constitute an objective reason for paying him less in respect of the part-time employment?

2) If question 1 is answered in the negative: does the principle of equal pay for men and women laid down in Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 prohibit drawing a pension from being treated in the same way as a main occupation affording social security if that pension is reduced by loss of earnings as a result of bringing up children?

3. Judgment of the Court

Referring to the first question, the Court observed that the discrimination alluded to by the court making the reference lies in the difference in pay as between employees pursuing a secondary activity and those pursuing a main occupation, rather than between part-time and full-time employees. There is therefore discrimination between part-time and full-time employees only to the extent that, for instance, persons who work part-time more frequently pursue a main occupation in addition to that than do full-time employees. The case file indicates that the subject matter of the main action is the claim by that part-time employee to pay higher than that which she receives as a result of her being entitled, in addition to her wages, to old-age pensions guaranteeing her social security; it is not a dispute concerning discrimination against her as regards access to employment. The interpretation of the equal access directive is therefore not relevant to the outcome of the main action. Accordingly, it is not necessary to rule on the first question.

As regards the second question, the Court found only that since Community law on equal treatment in matters of social security does not oblige

Member States to take into account in calculating the statutory pension years spent bringing up children, it is not possible to regard as incompatible with the principle of equal pay for men and women, which is laid down in Article 119 of the Treaty and in the equal pay directive, the possibility of giving pay lower than the normal rate to a person who is in receipt of a pension and who thus enjoys social security, but whose pension has been reduced by loss of earnings as a result of time spent bringing up a child.

The Court (Fifth Chamber), hereby rules:

1) *It is not necessary to rule on the first question.*

2) *It is not incompatible with the principle of equal pay for men and women laid down in Article 119 of the EEC Treaty and in Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women to assimilate receipt of a retirement pension to pursuit of a main occupation affording social security when that pension is reduced by loss of earnings as a result of time spent bringing up a child.*

Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93
STADT LENGERICH AND OTHERS v ANGELIKA HELMIG AND OTHERS
Date of judgment:
15 December 1994
Reference:
[1994] ECR I-5727
Content:
Equal pay — Overtime pay for part-time employees

1. Facts and procedure

The applicants in the main proceedings claimed entitlement to overtime supplements for hours worked in addition to their individual working hours at the same rate as that applicable for overtime worked by full-time employees in addition to normal working hours. Under the relevant collective agreements, full-time or part-time employees are entitled to overtime supplements only for time worked in addition to the ordinary working hours laid down by those agreements, but part-time employees are not entitled to the supplements for hours they work over and above their individual working hours. The applicants in the main proceedings consider that the relevant provisions of the collective agreements discriminate against them in breach of Article 119 of the EEC Treaty and the directive by restricting overtime supplements to overtime worked in excess of the normal working hours.

2. Questions referred to the Court

In Case C-399/92:

1) Is there 'indirect discrimination', and thus an infringement of Article 119 of the EEC Treaty, where a collective wage agreement for the public service in the Federal Republic of Germany ('the BAT') provides for the payment of overtime supplements only for hours worked in excess of the normal working hours laid down in the collective agreement, thus excluding from any payment of overtime supplements persons employed under individual agreements for fewer than the normal working hours laid down in the collective agreement, and where such exclusion affects disproportionately more women than men?

2) If so:

   Is the exclusion by collective agreement of overtime supplements for part-time employees objectively justified on the ground that

   a) the purpose of the collectively agreed overtime supplements is to compensate employees for the extra demands made on them, and to prevent excessive demands being made, experience justifying the assumption that overtime is more demanding for full-time employees than for part-time employees;

   b) it may be assumed without examining each individual case that the restriction on leisure affects employees working full-time under the collective agreement who are required to work more than the normal working hours agreed therein to a greater extent than part-time employees?

3) If not:

   Does Article 119 of the EEC Treaty require that part-time employees must also be paid the full amount of the collectively agreed overtime supplements payable in the case of overtime worked by full-time employees under a collective agreement, for each hour worked in addition to the individually agreed working hours, or are part-time employees entitled only to a percentage of the overtime payable to full-time employees in such proportion as their individual working hours bear to the normal collectively agreed working hours?

In Case C-409/92:

Is it consistent with Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women for a collective agreement to provide for the payment by an employer of overtime supplements only for overtime worked in excess of the collectively agreed normal working hours, but not for hours worked by part-time employees in excess of their individual working hours but within the collectively agreed working hours, notwithstanding that the proportion of women working part-time is appreciably greater than that of men?

In Case C-425/92:

1) Is it consistent with Community law (Article 119 of the EEC Treaty) for a rule contained in a collective agreement (paragraph 34 of the BAT), applying to an individual employment relationship by virtue of a business practice or an actual collectively agreed obligation, to provide that the pay of employees not engaged on a full-time basis who work longer hours than those contractually agreed in respect of part-time work is to amount only to the corresponding proportion of the pay of an equivalent employee engaged on a full-time basis (without overtime supplement), where the rule affects more women than men?

2) Is the different treatment of those two categories of employee justified by objective factors unrelated to sex discrimination?

3) Can the different treatment of the sexes be justified on the ground that such different treatment meets a real need of the undertaking, is appropriate for the achievement of its goals and is necessary in accordance with the principle of proportionality, where it is claimed in support of such arguments that the different treatment is justified on the ground that overtime supplements are intended to compensate for an increased physical burden and to prevent the imposition of excessive demands upon employees, but that no comparable burden is imposed upon a part-time employee where the latter merely exceeds the contractually agreed working hours without working the normal weekly hours (on average 38.5 hours) worked by a full-time employee (see paragraphs 17(1) and 15(1) of the BAT)?

In Case C-34/93:

1) Do Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 (OJ L 45 of 19 February 1975), in particular Articles 1 and 4 thereof, preclude a provision in a collective wage agreement for a corporation governed by public law, the Bundesknappschaft (Federal Insurance Fund for Miners), which provides for the payment of overtime supplements only for hours worked in excess of the normal working hours laid down in the collective agreement, thus excluding from any payment of overtime supplements up to that limit persons employed under contract for fewer than the normal working hours laid down in the collective agreement, where that exclusion affects considerably more women than men, in so far as that provision is not justified by objective factors unrelated to sex discrimination?

2) If so:

   Do the considerations set out below constitute objective factors unrelated to sex discrimination and are they capable of justifying the provision referred to in question 1:

   a) The provision is intended to compensate for increased physical strain and to prevent excessive demands being made of employees in so far as the increased strain resulting from overtime is higher a priori, in the case of full-time employees than it is in the case of part-time employees?

b) It may generally be assumed that the restriction on leisure time affects employees employed for normal working hours under the collective agreement more than part-time employees?

3) If not:

Does Article 119 of the EEC Treaty require that part-time employees be paid for each hour worked in addition to the working hours agreed in the individual contract of employment the full amount of the collectively-agreed overtime supplement payable in the case of overtime in excess of the full normal weekly working hours under the collective agreement?

In Case C-50/93:

Is there an infringement of Article 119 of the EEC Treaty and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women where a collective wage agreement provides for the payment of overtime supplements only for hours worked in excess of the normal hours laid down in the collective agreement, thus excluding as a rule part-time employees from any payment of overtime supplements, although many more women than men are affected by that provision?

In Case C-78/93:

1) Is there 'indirect discrimination', and thus an infringement of Article 119 of the EEC Treaty, where a collective wage agreement for the public service in the Federal Republic of Germany ('the BAT') provides for the payment of overtime supplements only for hours worked in excess of the normal working hours laid down in the collective agreement, thus excluding from any payment of overtime supplements persons employed under individual agreements for fewer than the normal working hours, and where such exclusion affects disproportionately more women than men?

2) If so:

Is the exclusion by the collective agreement of overtime supplements for part-time employees objectively justified on the grounds that:

a) the purpose of the collectively agreed overtime supplements is to compensate employees for the extra demands made on them, and to prevent excessive demands being made, experience justifying the assumption that overtime is more demanding for full-time employees than for part-time employees;

b) it may be assumed without examining each individual case that the restriction on leisure affects employees working full-time under the collective agreement who are required to work more than the normal working hours agreed therein to a greater extent than part-time employees?

3. Judgment of the Court

The defendant in the main proceedings in Case C-78/93 argued that the reference for a preliminary ruling was inadmissible because, even if the provisions at issue were incompatible with Article 119 of the EEC Treaty, the plaintiff in the main proceedings could not obtain payment of the overtime supplements sought. Were the national court to annul the contested provisions, the result would be a legal vacuum that could not be filled by the Court of Justice, which would be unable to ascertain how the parties would have settled the matter had they been aware of the alleged breach of Community law. The Court responded by stating that the prohibition on discrimination between men and women at work is mandatory and therefore applies not only to public authorities but also to any agreement which seeks to govern employment in a collective fashion as well as to

contracts between individuals (see judgment of 8 April 1976, *Defrenne,* Case 43/75, [1976] ECR 455). Moreover, Article 119 is sufficiently precise to be relied upon before the national courts by individuals seeking to have set aside any provision of national law including, if necessary, a collective agreement which proves to be incompatible with that article (see *Defrenne* judgment, cited above). If the national courts set aside the provisions of a collective agreement because they are incompatible with Article 119 of the Treaty, the persons discriminated against are entitled to enjoy thenceforth the benefit of the provisions applicable to other workers, in proportion to their working hours. Consequently, the annulment of such provisions by the national courts would not create a legal vacuum.

The Court pointed out that the principle of equal pay excludes not only the application of provisions leading to direct sex discrimination but also the application of provisions which maintain different treatment between men and women at work as a result of the application of criteria not based on sex where those differences of treatment are not attributable to objective factors unrelated to sex discrimination.

The Court went on to consider whether the national provisions at issue were incompatible with Article 119. To this end, it alluded to the nature of the review exercised by it in this area (see *inter alia Kowalska* judgment, cited above, and judgment of 13 May 1986, *Bilka,* Case 170/84, [1986] ECR 1607), that is to say it must be determined whether they establish different treatment for full-time and part-time employees, and whether that difference affects considerably more women than men. Only if those two questions are answered in the affirmative does the question arise of the existence of objective factors unrelated to discrimination which may justify such a difference in treatment.

In the circumstances considered in these proceedings, the Court found that part-time employees do receive the same overall pay as full-time employees for the same number of hours worked. A part-time employee whose contractual working hours are 18 receives, if he works 19 hours, the same overall pay as a full-time employee who works 19 hours. Part-time employees also receive the same overall pay as full-time employees if they work more than the normal working hours fixed by the collective agreements because on doing so they become entitled to overtime supplements. Consequently, the provisions at issue do not give rise to different treatment as between part-time and full-time employees and there is therefore no discrimination incompatible with Article 119 of the Treaty and Article 1 of the Directive.

In the light of the reply to the first question, the Court did not find it necessary to reply to the other questions.

The Court (Sixth Chamber), hereby rules:

Article 119 of the EEC Treaty and Article 1 of Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women does not prevent collective agreements from restricting payment of overtime supplements to cases where the normal working hours fixed by them for full-time employees are exceeded.

Case C-400/93
SPECIALARBJDERFORBUNDET I DANMARK v DANSK INDUSTRI, FORMERLY INDUSTRIENS ARBEJDSGIVERE, ACTING FOR ROYAL COPENHAGEN A/S
Date of judgment:
31 May1995
Reference:
[1995] ECR I-1275
Content:
Equal pay for men and women — Procedure for comparing pay — Burden of proof

1. Facts and procedure

Royal Copenhagen is a ceramics producer employing some 1 150 workers, 40 % men and 60 % women in the manufacture of such products. Its employees may be divided into three groups: turners, who use a variety of techniques to mould the porcelain clay mass; painters, who decorate the products; and unskilled workers, who are engaged in operating the kilns, sorting and polishing, transport within the factory and so forth. All these employees are covered by the same collective agreement, under which they are in principle paid on a piece-work basis, that is to say, the level of their pay is wholly or partially dependent on their output. They may, however, opt to be paid a fixed hourly rate which is the same for all the groups. In practice, approximately 70 % of the turners and 70 % of the painters are paid by the piece: their pay consists of a fixed element, paid as a basic hourly wage, and a variable element, paid by reference to the number of items produced. The group of automatic-machine operators paid by the piece comprises 26 persons, all men, and accounts for approximately 18 % of all turners paid by the piece. The group of blue-pattern painters paid by the piece comprises 156 persons, 155 women and 1 man, and accounts for approximately 49 %of the group of painters paid by the piece. The group of ornamental-plate decorators paid by the piece comprises 51 persons, all women, and accounts for approximately 16 % of the group of painters paid by the piece.

In April 1990, the average hourly pay of the automatic-machine operators paid by the piece was DKK 103.93, including a fixed element of DKK 71.69, with the highest earner receiving DKK 118 per hour and the lowest earner DKK 86 per hour. During the same period, the average hourly pay of the blue-pattern painters paid by the piece was DKK 91, including a fixed element of DKK 57, with the highest earner receiving DDK 125 per hour and the lowest DKK 72 per hour, and the average hourly pay of the ornamental-plate decorators paid by the piece was DKK 116.20, including a fixed element of DKK 35.85, with the highest earner receiving DKK 159 per hour and the lowest DKK 86 per hour.

In the belief that Royal Copenhagen was infringing the requirement of equal pay because the average hourly piece-work pay of the group of blue-pattern painters, all but one of whom were women, was less than that of the group of automatic-machine operators, all of whom were men, the Specialarbejderforbundet brought proceedings before the Faglige Voldgiftsret of Copenhagen.

2. Questions referred to the Court

1) Do Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 on equal pay for men and women apply to systems of pay in which earnings depend either entirely or in large measure on the results of the work of individual employees (piecework pay schemes)?

   If question 1 is answered in the affirmative, answers *are* requested to the following additional questions:

2) Are the rules on equal pay contained in Article 119 of the EEC Treaty and in Directive 75/117 of 10 February 1975 applicable in the case of the comparison of two groups of

wage earners in so far as the average hourly earnings for one group of piece-workers, consisting predominantly of women and performing one type of work, are appreciably lower than the average hourly earnings for the second group of piece-workers, consisting predominantly of men and performing a different type of work, in so far as it can be assumed that the work performed by the men and women is of equal value?

3) On the basis that one group consists predominantly of women and the other predominantly of men, can requirements be imposed as to the composition of the groups, for example with regard to the number of persons in the groups or the proportion which they represent among the total workforce of the undertaking?

   Can the directive be applied, if necessary, to procure for two groups of — for instance — female employees the same pay by means of an intervening comparison with a group of male employees? One way in which the problem may be illustrated is as follows: a group of predominantly male workers (Group A) and two groups of predominantly female workers (Groups B and C) perform work of the same value; the average piecework earnings are highest in the case of Group C, second highest in the case of Group A and lowest in the case of Group B. Can Group B compare itself with Group A and demand that its pay be raised to the level of that of Group A; can Group A thereupon demand that its pay be aligned with that of Group C; finally, can Group B thereupon demand that its pay be readjusted to the (new) level enjoyed by Group A — which is that of Group C?

4) In determining whether the principle of equal pay has been infringed, does any significance attach to the facts that:

   a) one group is involved in predominantly mechanised production, whereas the second group is engaged in working exclusively by hand;

   b) the piece-work rates are determined by negotiation between both sides of industry or by negotiation at local level;

   c) it can be established that there are differences in the employee's choice of work rate. If this fact is relevant, who bears the burden of proving that such differences exist?

   d) there are appreciable pay variations within one or both of the groups compared;

   e) the fixed portion of the piece-work pay is not the same for both of the groups compared;

   f) differences between the two groups exist with regard to paid breaks and freedom to organise one's work;

   g) it is not possible to ascertain the factors which have determined the level of the piece-work rate;

   h) the work of one of the groups compared involves a particular requirement of physical strength, while the work of the other group has a particular requirement of dexterity;

   i) it can be established that differences exist with regard to inconveniences at work such as noise, temperature, and intensive, repetitive or monotonous work?

3. *Judgment of the Court*

Addressing the first question, the Court noted that Article 119, by stating expressly in subparagraph (a) of its third paragraph that equal pay without discrimination based on sex means that pay for the same work at piece rates is to be calculated on the basis of the same unit of measure-

ment, itself provides that the principle of equal pay applies to piece-work pay schemes.

Before turning to consider the other questions, the Court stressed that the pay at issue in the main proceedings does not depend exclusively on the individual work of each worker but includes a fixed element consisting of a basic hourly wage which is not the same for the different groups of workers concerned.

Referring to the second question and paragraphs (c), (d), (e) and (g) of the fourth question, the Court asserted that in a piece-work pay scheme the principle of equal pay requires that the pay of two groups of workers, one consisting predominantly of men and the other predominantly of women, is to be calculated on the basis of the same unit of measurement. Where the unit of measurement is the same for two groups of workers carrying out the same work or is objectively capable of ensuring that the total individual pay of workers in the two groups is the same for work which, although different, is considered to be of equal value, the principle of equal pay does not prohibit workers belonging to one or the other group from receiving different total pay if that is due to their different individual output. It follows that in a piece-work pay scheme the mere finding that there is a difference in the average pay of two groups of workers, calculated on the basis of the total individual pay of all the workers belonging to one or the other group, does not suffice to establish that there is discrimination with regard to pay. It is for the national court to ascertain whether a pay differential relied on by a worker belonging to a group consisting predominantly of women as evidence of sex discrimination against that worker compared with a worker belonging to a group consisting predominantly of men is due to a difference between the units of measurement applicable to the two groups or to a difference in individual output.

The Court has, however, held (judgment of 27 October 1993, *Enderby,* Case C-127/92, [1993] ECR I-5535, paragraphs 13 and 14) that the burden of proof, which is normally on the worker bringing legal proceedings against his employer with a view to removing the discrimination of which he believes himself to be the victim, may be shifted when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Thus, in particular, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (judgment of 17 October 1989, '*Danfoss', Handels- og Kontorfunktionaerernes Forbund i Danmark,* Case 109/88, [1989] ECR 3199, paragraph 16). Similarly, where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, so that there is a *prima facie* case of sex discrimination, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex *(Enderby* judgment, cited above, paragraphs 16 and 19).

Concerning the third question, the Court pointed out that consideration of whether the principle of equal pay has been observed requires a comparison between the pay of workers of different sexes for the same work or for work to which equal value is attributed. Where such a comparison involves the average pay of two groups of workers paid by the piece, it must, in order to be relevant, encompass groups each comprising all the workers who, taking account of a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered to be in a comparable situation. The comparison must, moreover, cover a relatively large number of workers in order to ensure that the differences found are not due to purely fortuitous or short-term factors or to differences in the individual output of the workers con-

cerned. The final point made by the Court was that it is for the national court to make the necessary assessments of the facts in the light of the abovementioned criteria.

With regard to the fourth question, paragraphs (a), (f), (h) and (i), the Court emphasised that a pay differential between two groups of workers does not constitute discrimination contrary to Article 119 of the Treaty and to the Directive if it may be explained by objectively justified factors unrelated to any discrimination on grounds of sex (see, in particular, judgment of 13 May 1986, *Bilka,* Case 170/84, [1986] ECR 1607, paragraph 30). The national court, which is alone competent to assess the facts, must consequently ascertain whether, in the light of the facts relating to the nature of the work carried out and the conditions in which it is carried out, equal value may be attributed to it or whether those facts may be considered to be objective factors unrelated to any discrimination on grounds of sex which are such as to justify any pay differentials.

As regards the fourth question, paragraph (b), the Court stressed that since Article 119 of the Treaty is mandatory in nature, the prohibition on discrimination between men and women not only applies to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals (see, in particular, judgment of 8 April 1976, *Defrenne,* Case 43/75, [1976] ECR 455, paragraph 39). Nonetheless, the fact that the rates of pay have been determined by collective bargaining or by negotiation at local level may be taken into account by the national court as a factor in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex.

The Court, hereby rules:

1) *Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women apply to piecework pay schemes in which pay depends entirely or in large measure on the individual output of each worker.*

2) *The principle of equal pay set out in Article 119 of the Treaty and Article 1 of Directive 75/117 means that the mere finding that in a piecework pay scheme the average pay of a group of workers consisting predominantly of women carrying out one type of work is appreciably lower than the average pay of a group of workers consisting predominantly of men carrying out another type of work to which equal value is attributed does not suffice to establish that there is discrimination with regard to pay. However, where in a piece-work pay scheme in which individual pay consists of a variable element depending on each worker's output and a fixed element differing according to the group of workers concerned it is not possible to identify the factors which determined the rates or units of measurement used to calculate the variable element in the pay the employer may have to bear the burden of proving that the differences found are not due to sex discrimination.*

3) *For the purposes of the comparison to be made between the average pay of two groups of workers paid by the piece, the national court must satisfy itself that the two groups each encompass all the workers who, taking account of a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered to be in a comparable situation and that they cover a relatively large number of workers ensuring that the differences are not due to purely fortuitous or short-term factors or to differences in the individual output of the workers concerned.*

4) *When ascertaining whether the principle of equal pay has been observed, it is for the national court to decide whether, in the light of circumstances such as, first, the fact that the*

work done by one of the groups of workers in question involves machinery and requires in particular muscular strength whereas that done by the other group is manual work requiring in particular dexterity and, secondly, the fact that there are differences between the work of the two groups with regard to paid breaks, freedom to organise one's own work and work-related inconveniences, the two types of work are of equal value or whether those circumstances may be considered to be objective factors unrelated to any discrimination on grounds of sex which are such as to justify any pay differentials.

5) *The principle of equal pay for men and women also applies where the elements of the pay are determined by collective bargaining or by negotiation at local level. However, the national court may take that fact into account in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex.*

Case C-116/94
JENNIFER MEYERS v ADJUDICATION OFFICER
Date of judgment:
13 July 1995
Reference:
[1995] ECR I-2131
Content:
Directive 76/207 — Conditions governing access to employment — Working conditions — Family credit

1. Facts and procedure

Family credit is an income-related benefit which is awarded in order to supplement the income of low-paid workers who are responsible for a child. Ms Meyers, a single parent, made an application for family credit in respect of herself and her daughter, then aged three. The application was rejected by the Adjudication Officer on the ground that her income, as calculated for the purposes of that benefit, was greater than the level conferring entitlement. In her appeal against that decision to the Social Security Appeal Tribunal, Ms Meyers submitted that the non-deduction of childcare costs for the purposes of calculating her net income discriminated against single parents, since it is much easier for couples to arrange their working hours so that any children can be looked after by one of them. As most single parents are women, it also constitutes indirect discrimination against women. The Social Security Appeal Tribunal accepted Ms Meyers' argument. In the appeal proceedings before the Social Security Commissioner, however, the parties did not contend that the first tribunal incorrectly applied a provision of national law. The Social Security Commissioner observed that Ms Meyers would be able to rely on the direct effect of Article 2(1) of the Directive if family credit falls within its scope.

2. Question referred to the Court

Does a benefit having the characteristics and purpose of family credit fall within the scope of Council Directive 76/207/EEC?

3. Judgment of the Court

The Court has consistently held that, in view of the fundamental importance of the principle of equal treatment, the exclusion of social security matters from the scope of the directive provided for in Article 1(2) must be interpreted strictly (see judgments of 26 February 1986, *Roberts,* Case 151/84, [1986] ECR 703, paragraph 35, and *Marshall,* Case 152/84, [1986] ECR 723, paragraph 36). Thus, the Court has held that a scheme of benefits cannot be excluded from the scope of the directive solely because, formally, it is part of a national social security system. Such a scheme may come within the scope of the directive if its subject-matter is access to employment, including vocational training and promotion, or working conditions. However, the Directive is not rendered applicable simply because the conditions of entitlement for receipt of benefits may be such as to affect the ability of a single parent to take up employment (see judgment of 16 July 1992, *Jackson and Cresswell,* Joined Cases C-63/91 and C-64/91, [1992] ECR I-4737, paragraphs 27, 28 and 31).

According to the *Jackson and Cresswell* judgment, the fact that a scheme of benefits is part of a national social security system, which makes national remedies in the field of social security applicable in the main proceedings, cannot exclude it from the scope of the directive. It is not disputed that one of the conditions for the award of family credit is that the claimant should be engaged in remunerative work. The aim of the benefit is to ensure that families do not find themselves worse off in work than they would be if they were not working. It is therefore intended to keep poorly-paid workers in employment. That being so, the Court concluded that family credit is concerned with access to employment, as referred to in Article 3 of the Directive.

Furthermore, it is not only the conditions obtaining before an employment relationship comes into being which are involved in the concept of access to employment. The prospect of receiving family credit if he accepts low-paid work encour-

ages an unemployed worker to accept such work, with the result that the benefit is related to considerations governing access to employment. Furthermore, compliance with the fundamental principle of equal treatment presupposes that a benefit such as family credit, which is necessarily linked to an employment relationship, constitutes a working condition within the meaning of Article 5 of the Directive. To confine the latter concept solely to those working conditions which *are* set out in the contract of employment or applied by the employer in respect of a worker's employment would remove situations directly covered by an employment relationship from the scope of the Directive.

The Court (Fourth Chamber), hereby rules:

A benefit with the characteristics and purpose of family credit is concerned with both access to employment and working conditions and falls, therefore, within the scope of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

Case C-92/94
SECRETARY OF STATE FOR SOCIAL SECURITY AND CHIEF ADJUDICATION OFFICER v ROSE GRAHAM, MARY CONNELL AND MARGARET NICHOLAS
Date of judgment:
11 August 1995
Reference:
[1995] ECR I-2521
Content:
Directive 79/7/EEC — Social security —Invalidity benefits — Link with pensionable age

1. Facts and procedure

Mrs Graham, Mrs Connell and Mrs Nicholas were all obliged, because of ill health, to cease working before reaching pensionable age. They initially received sickness benefit, and thereafter invalidity pension at the full retirement pension rate. Upon reaching pensionable age, they all opted to continue receiving their invalidity pension rather than a retirement pension, which, unlike an invalidity pension, is taxable. As none of them fulfilled the contribution conditions for the grant of a full retirement pension, the amount of their invalidity pensions was reduced to the rate of the retirement pension which would have been paid to them but for their election not to receive it. Mrs Graham, who was aged over 55 when she became incapacitated for work, was in fact refused invalidity allowance on that ground.

2. Questions referred to the Court

Under the relevant provisions of the Social Security Contributions and Benefits Act 1992:

a) Invalidity pension and invalidity allowance are long-term social security benefits for the disabled.

b) They are contributory social security benefits paid only to those who have satisfied the relevant contribution conditions.

c) Invalidity pension is paid to men and women under pensionable age (65 for men and 60 for women) and to men and women not more than 5 years over that age who have deferred their State pension or elected not to receive it.

d) For those under pensionable age, the rate of invalidity pension is the same rate as the basic rate of retirement pension. Entitlement to invalidity pension in most cases follows on from entitlement or deemed entitlement to sickness benefit, a short-term benefit. However, the contribution conditions for sickness benefit and retirement pension are different.

e) For those over pensionable age, but not more than 5 years over, who receive invalidity pension, the amount of that benefit is limited to the amount of the State pension which they would have received (by reason of their contributions) but for the deferral or election.

f) Invalidity allowance is paid only to those who were more than 5 years below pensionable age (that is under 60 if male, and under 55 if female) on the qualifying date, that is when their period of incapacitation began.

1) In those circumstances, what criteria should the national court adopt in order to decide whether the differences in treatment of men and women outlined above are lawful pursuant to Article 7(1)(a) of Directive 79/7/EEC?

2) In the circumstances of the present case, are the relevant criteria satisfied in the case of:

a) the difference in the rate of invalidity pension payable to men and women aged between 60 and 65; and

b) the difference in the qualifying dates for invalidity allowance?

3. Judgment of the Court

Firstly, Article 7(1)(a) of Directive 79/7 allows Member States to exclude from its scope not only the setting of pensionable age for the purposes of granting old-age and retirement pensions, but also the possible consequences thereof for other benefits. In its judgment of 30 March 1993, *Thomas and Others* (Case C-328/91, [1993] ECR I-1247), the Court ruled that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a), is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in pensionable age.

As regards the forms of discrimination at issue in the main proceedings, the Court found them to be objectively linked to the setting of different pensionable ages for women and men, inasmuch as they arise directly from the fact that that age is fixed at 60 for women and 65 for men. As to the question of whether the forms of discrimination are also necessarily linked to the difference in pensionable age for men and women, it should be noted, first, that since invalidity benefit is designed to replace income from occupational activity, there is nothing to prevent a Member State from providing for its cessation and replacement by a retirement pension at the time when the recipients would in any case stop working because they have reached pensionable age. Further, to prohibit a Member State which has set different pensionable ages from limiting, in the case of persons becoming incapacitated for work before reaching pensionable age, the rate of invalidity benefit payable to them from that age to the actual rate of the retirement pension to which they are entitled under the retirement pension scheme would mean restricting to that extent the very right which a Member State has under Article 7(1)(a) of Directive 79/7 to set different pensionable ages. Such a prohibition would also undermine the coherence between the retirement pension scheme and the invalidity benefit scheme.

The Court (Sixth Chamber), hereby rules:

Where, pursuant to Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, a Member State has set the pensionable age for women at 60 and that for men at 65, that provision also allows it, first, to provide that the rate of invalidity pension payable to persons becoming incapacitated for work before they reach pensionable age is to be limited to the actual rate of retirement pension from the age of 60 in the case of women and from the age of 65 in the case of men and, second, to reserve entitlement to invalidity allowance, paid in addition to invalidity pension, to those persons who are aged under 55, in the case of women, and under 60, in the case of men, at the time when they first become incapacitated for work.

Case C-450/93
ECKHARD KALANKE v FREIE HANSESTADT BREMEN
Date of judgment:
17 October 1995
Reference:
[1995] ECR I-3051
Content:
Directive 76/207/EEC — Article 2(4) — Promotion — Equally qualified candidates of different sexes — Priority given to women

1. Facts and procedure

At the final stage of recruitment to a post of Section Manager in the Bremen Parks Department, two candidates, both in BAT pay bracket III, were shortlisted: Mr Kalanke, the plaintiff in the main proceedings, holder of a diploma in horticulture and landscape gardening, who had worked since 1973 as a horticulturist in the Parks Department and acted as permanent assistant to the Section Manager, and Ms Glissmann, holder of a diploma in landscape gardening since 1983 and also employed, since 1975, as a horticulturist. The Staff Committee refused to give its consent to Mr Kalanke's promotion, proposed by the Parks Department management. Reference to arbitration resulted in a recommendation in favour of Mr Kalanke. The Staff Committee then stated that the arbitration had failed and appealed to the Conciliation Board, which, in a decision binding on the employer, considered that the two candidates were equally qualified and that, in accordance with the Landesgleichstellungsgesetz of 20 November 1990 (Bremen Law on Equal Treatment for Men and Women in the Public Service, hereafter 'the LGG'), priority should therefore be given to the woman.

The First Chamber of the Federal Labour Court, hearing the plaintiff's application for review on a point of law, considered that resolution of the dispute depended essentially on the applicability of the LGG. It pointed out that if the Conciliation Board was wrong in applying that Law, its decision would be unlawful because it gave an advantage, solely on the ground of sex, to an equally qualified female candidate. The finding of the Regional Labour Court, to the effect that the two applicants were equally qualified for the post, was accepted. Considering itself also bound by the finding that women are under-represented in the Parks Department, the Federal Labour Court held that the Conciliation Board was obliged, under paragraph 4(2) of the LGG, to refuse to agree to the plaintiff's appointment to the vacant post. It was pointed out that the case in question does not involve a system of strict quotas reserving a certain proportion of posts for women, regardless of their qualifications, but rather a system of quotas dependent on candidates' abilities. Women enjoy no priority unless the candidates of both sexes are equally qualified.

2. Questions referred to the Court

1) Must Article 2(4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions be interpreted as also covering statutory provisions under which, when a position in a higher pay bracket is being assigned, women with the same qualifications as men applying for the same position are to be given priority if women are under-represented, there being deemed to be under-representation if women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group within a department, which also applies to the function levels provided for in the organisation chart?

2) If question 1 is answered in the negative:

   Must Article 2(1) of Council Directive 76/207/EEC be interpreted, having regard to the principle of proportionality, as meaning that it is not permissible to apply statutory provi-

sions under which, when a position in a higher pay bracket is being assigned, women with the same qualifications as men are to be given priority if women are under-represented, there being deemed to be under-representation if women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group within a department, which also applies to the function levels provided for in the organisation chart?

3. Judgment of the Court

The Court observed firstly that a national rule which provides that where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented, involves discrimination on grounds of sex. It must, however, be considered whether such a national rule is permissible under Article 2(4), which provides that the Directive 'shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities'.

Article 2(4) is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life (see judgment of 25 October 1988, *Commission* v *France,* Case 312/86, [1988] ECR 6315, paragraph 15). Nevertheless, as a derogation from an individual right laid down in the directive, Article 2(4) must be interpreted strictly (see judgment of 15 May 1986, *Johnston,* Case 222/84, [1986] ECR 1651, paragraph 36). National rules which guarantee absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive. Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.

The Court, hereby rules:

Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organisation chart.

Case C-137/94
THE QUEEN v SECRETARY OF STATE FOR HEALTH, EX PARTE CYRIL RICHARDSON
Date of judgment:
19 October 1995
Reference:
[1995] ECR I-3407
Content:
Directive 79/7/EEC — Scope — Exemption from prescription charges — Link with pensionable age — Temporal effects of judgment

1. Facts and procedure

Mr Richardson, a retired man of 64 years of age, considered that he suffered discrimination on the ground of sex in that, under regulation 6(1)(c) of the National Health Service (Charges for Drugs and Appliances) Regulations 1989 (hereafter 'the 1989 Regulations'), women between 60 and 64 years of age, unlike men in the same age bracket, are exempted from paying charges for the supply of drugs, medicines and appliances (hereafter 'prescription charges').

2. Questions referred to the Court

1) Is the exemption from prescription charges for various categories of persons under regulation 6(1) of the National Health Service (Charges for Drugs and Appliances) Regulations 1989, Statutory Instrument No 419/1989, or for particular old people under regulation 6(1)(c), within the scope of Article 3 of Directive 79/7/EEC?

2) If the answer to question 1 is yes, does Article 7(1)(a) of Directive 79/7 apply in the circumstances of this case?

3) If there has been a breach of Directive 79/7, can the direct effect of that directive be relied on to support a claim for damages for periods prior to the date of the Court's judgment by persons who have not prior to that date brought legal proceedings or made an equivalent claim?

3. Judgment of the Court

With regard to the first question, as the Court has already held, in order to fall within the scope of Directive 79/7 a benefit must constitute the whole or part of a statutory scheme providing protection against one of the specified risks, or a form of social assistance having the same objective (see judgments of 24 June 1986, *Drake,* Case 150/85, [1986] ECR 1995, paragraph 21; of 4 February 1992, *Smithson,* Case C-243/ 90, [1992] ECR I-467, paragraph 12; and of 16 July 1992, *Jackson and Cresswell,* Joined Cases C-63/91 and C-64/91, [1992] ECR I-4737, paragraph 15). The Court has also stated that, although the way in which a benefit is granted is not decisive for the purposes of Directive 79/7, the benefit must, in order to fall within its scope, be directly and effectively linked to the protection provided against one of the risks specified in Article 3(1) of the directive *(Smithson,* cited above, paragraph 14, and *Jackson and Cresswell,* cited above, paragraph 16). In the light of this case law, the Court observed that a benefit such as that at issue in the main proceedings fulfils those conditions. Lastly, in view of the fundamental importance of the principle of equal treatment and the aim of Directive 79/7, which is the progressive implementation of that principle in matters of social security, a system of benefits cannot be excluded from the scope of the Directive simply because it does not strictly form part of national social security rules.

Before replying to the second question, the Court noted, firstly, that it is not disputed that a national rule such as regulation 6(1)(c) of the 1989 Regulations involves direct discrimination on the ground of sex, inasmuch as women are exempt from prescription charges at 60 years of age whereas men *are* only exempt at 65 years of age and, secondly, that those age limits correspond to the statutory pensionable ages for men and women laid down in the United Kingdom for the grant of old-age and retirement pensions. In its judgment of 30 March

1993 in Case C-328/91, *Thomas and Others* ([1993] ECR I-1247), the Court held that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different retirement ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits' contained in Article 7(1)(a), is limited to forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in retirement age. As regards the requirement of maintaining financial equilibrium between the old-age pension scheme and other benefit schemes, the Court pointed, in the present case, to an inverse relationship between entitlement to the benefit constituted by exemption from prescription charges as provided for in regulation 6(1)(c) of the 1989 Regulations and the payment of National Insurance contributions, inasmuch as it is only once a person has reached pensionable age and is no longer liable to pay National Insurance contributions that he or she is exempt from prescription charges under that provision. That being so, it must be accepted that the removal of the discrimination would not affect the financial equilibrium of the pension system. Therefore, the discrimination at issue in the main proceedings is not objectively necessary to ensure coherence between the retirement pension system and a system such as the one in question.

With reference to the third question, it has been consistently held that the interpretation which the Court of Justice gives to a rule of Community law in exercising its jurisdiction under Article 177 of the Treaty clarifies and defines where necessary the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. It follows that the rule as so interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied (see judgment of 27 March 1980, *Denkavit Italiana,* Case 61/79, [1980] ECR 1205, paragraph 16). It is only exceptionally that the Court may, in application of a general principle of legal certainty inherent in the Community legal order, be moved to restrict the possibility for any person of relying upon the provision thus interpreted with a view to calling in question legal relationships established in good faith (judgment of 16 July 1992, *Legros and Others,* Case C-163/90, [1992] ECR I-4625, paragraph 30). In the light of those principles, the Court concluded that, in this case, there is no factor to justify a derogation from the principle that a ruling on the interpretation of Community law takes effect from the date on which the rule interpreted entered into force. In requesting that the effect of this judgment should be limited in time, the United Kingdom cannot rely on the financial consequences which it is liable to entail or on the consideration that the facts on which any claims would be based would often be difficult, if not impossible, to establish. The financial consequences which might ensue for a Member State from a preliminary ruling have never in themselves justified limiting the temporal effect of such a ruling (see, in particular, judgment of 11 August 1995, *Roders and Others,* Joined Cases C-367/93 to C-377/93, [1995] ECR I-2229, paragraph 48). Furthermore, the burden of proof normally lies on the person relying on the facts alleged, so that any difficulties which a claimant might have in this regard would in any event be prejudicial to his case.

The Court (Sixth Chamber), hereby rules:

1) *Article 3(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is to be interpreted as meaning that a system such as that established by regulation 6(1) of the National Health Service (Charges for Drugs and Appliances) Regulations 1989, exempting various categories of persons, in particular certain old people, from prescription charges falls within the scope of the Directive.*

2) *Article 7(1)(a) of Directive 79/7 does not allow a Member State which, pursuant to that provision, has set the pensionable age for women at 60 years and for men at 65 years also to provide that women are to be exempt from prescription charges at the age of 60 and men only at the age of 65.*

3) *There is no reason to limit the temporal effect of this judgment, so that the direct effect of Article 4(1) of Directive 79/7 may also be relied on to support claims for damages in respect of periods prior to the date of the judgment by persons who have not brought legal proceedings or made an equivalent claim prior to that date*

Case C-317/93
INGE NOLTE v LANDESVERSICHERUNGS-ANSTALT HANNOVER
Date of judgment:
14 December 1995
Reference:
[1995] ECR I-4625
Content:
Equal treatment for men and women in matters of social security — Article 4(1) of Directive 79/7/EEC — Exclusion of minor employment from compulsory invalidity and old-age insurance

1. Facts and procedure

According to German law on social insurance, an insured person suffering from incapacity to work is entitled to the grant of an invalidity pension if he can show that he paid at least three years' contributions in the five years preceding the onset of invalidity in respect of employment or an activity subject to compulsory insurance. Those conditions have been repealed but remain applicable to claims submitted before 31 March 1992. Moreover, under the terms of the Reichsversicherungsordnung (Social Insurance Code), minor employment is not subject to the statutory old-age insurance scheme. Employment is regarded as being minor where it is regularly engaged in for fewer than 15 hours a week and the monthly remuneration does not regularly exceed one-seventh of the average monthly salary of persons insured under the statutory old-age insurance scheme during the preceding calendar year. That ceiling is adjusted annually. In 1993 it was DEM 530 a month in the original *Länder* and DEM 390 in the new *Länder.*

Mrs Nolte, who was born on 14 May 1930, worked until 1965 and paid compulsory insurance contributions. On account of having to bring up her children and subsequently having been in minor employment, she ceased paying compulsory contributions. Between 1977 and March 1987, when she stopped working, Mrs Nolte continued to be in minor employment (as a cleaner). Since June 1988 she has been afflicted by a severe illness, with the result that she is no longer able to undertake regular paid work. Mrs Nolte applied to the Landesversicherungsanstalt Hanover (hereafter 'the LVA) for retirement and an invalidity pension. The LVA rejected her application on the ground that, out of the 60 calendar months preceding the onset of invalidity, Mrs Nolte could not show that she had paid 36 months' contributions in respect of employment subject to compulsory insurance.

2. Questions referred to the Court

1) Does a national provision which excludes employment normally involving less than 15 hours per week and remuneration of up to one-seventh of the monthly reference amount from the statutory old-age insurance scheme — paragraph 8(1)(1) of SGB (Code of Social Law) IV, paragraph 5(2)(1)(1) of SGB VI — entail discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7/EEC if considerably more women than men are thereby affected?

2) If the answer to question 1 is in the affirmative, is Article 4(1) of Directive 79/7/EEC to be interpreted as meaning that entitlement to a pension on account of incapacity for work (paragraph 44(1)(2) of SGB VI) exists even in the absence of compulsory contribution periods if, in the five years prior to the occurrence of the incapacity for work, employment of up to 15 hours a week, not subject to social insurance under national law, has been engaged in for at least three years, in the course of which the stipulated earnings thresholds have not been exceeded, and the exclusion from benefits associated with this form of part-time work affects considerably more women than men?

3. Judgment of the Court

The Court looked first of all at the question of whether Mrs Nolte was covered by Directive 79/7.

It pointed out that, under Article 2 of the Directive, the definition of the working population is very broad, since it covers any worker, including persons who are merely seeking employment. In contrast, according to the Court's case law, the Directive does not apply to persons who have never been available for employment or who have ceased to be available for a reason other than the materialisation of one of the risks referred to by the directive (see judgment of 27 June 1989, *Achterberg-te Riele and Others,* Joined Cases 48/88, 106/88 and 107/88, [1989] ECR 1963, paragraph 11). The fact that a worker's earnings do not cover all his needs cannot prevent him from being a member of the working population. It appears from the Court's case law that the fact that his employment yields an income lower than the minimum required for subsistence (see judgment of 23 March 1982, *Levin,* Case 53/81, [1982] ECR 1035, paragraphs 15 and 16) or normally does not exceed 18 hours a week (see judgment of 13 December 1989, *Ruzius-Wilbrink,* Case C-102/88, [1989] ECR 4311, paragraphs 7 and 17) or 12 hours a week (see judgment of 3 June 1986, *Kempt* Case 139/85, [1986] ECR 1741, paragraphs 2 and 16) or even 10 hours a week (see judgment of 13 July 1989, *Rinner-Kuehn,* Case 171/88, [1989] ECR 2743, paragraph 16) does not prevent the person in such employment from being regarded as a worker within the meaning of Article 48 *(Levin* and *Kempf* judgments) or Article 119 of the EEC Treaty (*Rinner-Kuehn* judgment) or for the purposes of Directive 79/7 *(Ruzius-Wilbrink* judgment). Consequently, the fact that the *Levin, Kempf* and *Rinner-Kuehn* judgments do not relate to social security law and are not concerned with the interpretation of Article 2 of Directive 79/7 cannot call in question the finding made in paragraph 19, since those judgments define the concept of a worker in the light of the principle of equal treatment.

With regard to the first question, the Court pointed out that the national provisions at issue are not directly discriminatory, since they do not exclude persons in minor employment from the statutory scheme in question on the ground of their sex and that it must therefore be considered whether such provisions may constitute indirect discrimination. In this connection, it should be recalled that the Court has consistently held that Article 4(1) of the Directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of a much higher percentage of women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex. That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so (see judgment of 24 February 1994, *De Weerd, née Roks, and Others,* Case C-343/92, [1994] ECR I-571, paragraphs 33 and 34). In this case, the German Government argued that the exclusion of persons in minor employment from compulsory insurance corresponds to a structural principle of the German social security scheme, that there is a social demand for minor employment, that the Government considers that it should respond to that demand in the context of its social policy by fostering the existence and supply of such employment, and that the only means of doing this within the structural framework of the German social security scheme is to exclude minor employment from compulsory insurance. In addition, the German Government maintained that the jobs lost would not be replaced by full-time or part-time jobs subject to compulsory insurance.

The Court observed that, in the current state of Community law, social policy is a matter for the Member States (see judgment of 7 May 1991, *Commission* v *Belgium,* Case C-229/89, [1991] ECR I-2205, paragraph 22). Consequently, it is for the Member States to choose the measures capable of achieving the aim of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion. It should be noted that the social and employment policy aim relied on by the German Government is objectively unrelated to any discrimination on grounds of sex and that, in exercising its

competence, the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim.

The Court, hereby rules:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as not precluding national provisions under which employment regularly consisting of fewer than 15 hours' work a week and regularly attracting remuneration of up to one-seventh of the average monthly salary is excluded from the statutory old-age insurance scheme, even where they affect considerably more women than men, since the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve a social policy aim unrelated to any discrimination on grounds of sex.

Case C-444/93
URSULA MEGNER AND HILDEGAARD SCHEFFEL v INNUNGSKRANKENKASSE VORDERPFALZ, NOW RHEINHESSEN-PFALZ
Date of judgment:
14 December 1995
Reference:
[1995] ECR I-4741
Content:
Equal treatment for men and women in matters of social security — Article 4(1) of Directive 79/7/EEC — Minor and short-term employment — Exclusion from compulsory old-age insurance and sickness insurance and from the obligation to pay unemployment insurance contributions

See Nolte judgment

The Court, hereby rules:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that national provisions under which employment regularly consisting of fewer than 15 hours a week and regularly attracting remuneration of up to one-seventh of the monthly reference amount is excluded from compulsory insurance under the statutory sickness and old-age insurance schemes, and national provisions under which employment which tends by its nature to be regularly limited to fewer than 18 hours a week or is so limited in advance by a contract of employment is excluded from the obligation to contribute to the statutory unemployment insurance scheme, do not constitute discrimination on grounds of sex, even where the relevant provisions affect considerably more women than men, since the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve a social policy aim unrelated to any discrimination on grounds of sex.

Case C-280/94
Y. M. POSTHUMA-VAN DAMME v BESTUUR VAN DE BEDRIJFSVERENIGING VOOR DETAILHANDEL, AMBACHTEN EN HUISVROUWEN AND N. OZTÜRK v BESTUUR VAN DE NIEUWE ALGEMENE BEDRIJFSVERENIGING
Date of judgment:
1 February 1996
Reference:
[1996] ECR I-179
Content:
Equal treatment for men and women — Social security — Directive 79/7/EEC — Interpretation of the judgment in Case C-343/92, *Roks*

1. Facts and procedure

Mrs Posthuma-van Damme, who worked as a self-employed person together with her husband in a service station, stopped working towards the end of 1974 on health grounds and was recognised as suffering from incapacity for work as from 1 October 1976. Mr Oztürk worked in various capacities for different employers until 1988. He then received a pension until 17 April 1990 under the Rijksgroepregeling Werkloze Werknemers (National Unemployment Rules, 'the RWW'). He was subsequently found to have been unfit for work since 1 April 1989.

The legislation in question is the same as that at issue in the Court's judgment of 24 February 1994, *Roks and Others* (*Case* C-343/92, [1994] ECR I-571, paragraphs 3 to 8). The salient points of the legislation are as follows:

The Algemene Arbeidsongeschiktheidswet (Netherlands General Law on Incapacity for Work, hereafter 'the AAW'), which came into force on 1 October 1976, originally conferred on men and on unmarried women, at the end of one year's incapacity for work, entitlement to benefits for incapacity for work the amount of which did not depend on either the other income or the loss of income of the beneficiary. Entitlement to benefits under the AAW was extended to married women by the Wet Invoewig Gelijke Uitkeringsrechten Voor Mannen en Vrouwen (Law introducing equal treatment for men and women as regards entitlement to benefits) of 20 December 1979. At the same time, that Law made entitlement to benefits subject, for all those insured, to the condition that during the year preceding the commencement of his incapacity for work the beneficiary received from his employment or in connection therewith a certain income. This income requirement applied to all persons whose incapacity for work had commenced after 1 January 1979. By virtue of the transitional provisions contained in the above-mentioned Law of 20 December 1979, men and unmarried women whose incapacity for work had commenced before 1 January 1979 continued to be entitled to benefits without having to satisfy the income requirement. Married women whose incapacity had commenced before 1 October 1975 were not entitled to benefits even if they satisfied the income requirement. As for those whose incapacity had begun between 1 October 1975 and 1 January 1979, they were entitled to benefits only if they satisfied the income requirement.

By several judgments of 5 January 1988, the Centrale Raad van Beroep (Higher Social Security Court) held that those transitional provisions constituted discrimination on the ground of sex, contrary to Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966. The transitional provisions held to discriminate against married women were repealed by a Law of 3 May 1989. Article III of that Law, however, provided that persons whose incapacity for work arose before 1 January 1979 and who applied for AAW benefits after 3 May 1989 had to satisfy the income requirement, and Article IV provided that AAW benefits were to be withdrawn from persons whose incapacity for work arose before 1 January 1979 if they did not satisfy the income requirement. By a judgment of 23 June 1992 the Centrale Raad van Beroep ruled that the amount of income required, which in 1988 was NLG 4 403.52 a year, constituted indirect discrimination against wom-

en, contrary to Article 26 of the International Covenant referred to above, and to Article 4(1) of Directive 79/7, and that the income requirement must be regarded as being satisfied if, during the year preceding the commencement of his incapacity for work, the beneficiary had received 'some income'.

2. Questions referred to the Court

If it is established that an income requirement imposed by legislation on incapacity for work affects more women than men:

1) (as regards the first case) Is the applicable Community law to be interpreted as meaning that it prohibits termination of benefits for incapacity for work under the AAW, acquired by virtue of incapacity for work which commenced before 1 January 1979, as a result of the application of Article IV of the Law of 3 May 1989, which makes retention of entitlement to benefits after 1 July 1991 subject to the requirement that, prior to the commencement of the incapacity for work, income from or in connection with work has been received?

2) (as regards the second case) Is the applicable Community law to be interpreted as meaning that it prohibits refusal to grant benefits for incapacity for work under the AAW on the basis of Article 6 of the AAW (as that provision reads following the entry into force of the Law of 20 December 1979 and taking into account the decision of the Centrale Raad van Beroep of 23 June 1992), according to which the grant of benefits is subject to the requirement that in the year prior to the commencement of the incapacity for work, in this case 1 April 1989, income from or in connection with work was received?

3. Judgment of the Court

In the order for reference, the national court stated that by its questions it sought to establish whether an income requirement laid down in legislation on insurance against incapacity for work is compatible with Community law and to ascertain the exact scope of the answers given by the Court in the judgment in *De Weerd, née Roks, and Others*. It considered that, in view of parts of its wording, that judgment may give rise to several interpretations, and asked in particular whether the reply to the third question does not go beyond the question referred, namely whether a provision such as Article IV of the Law of 3 May 1989, which makes continuance of entitlement to benefits dependent on a supplementary condition relating to the loss of income from employment in the year preceding the onset of incapacity, can be justified on budgetary grounds.

Referring to the *Roks* judgment, the Court stated that when it examined whether Community law precluded the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4(1) of Directive 79/7, it expressly reserved consideration of the question whether, as such, an income requirement of the kind at issue in the main proceedings complied with the principle of equal treatment between men and women (judgment in *De Weerd, née Roks, and Others,* paragraph 29 *in fine*). The Court observed also that the third question in *De Weerd, née Roks, and Others* was concerned solely with the point as to whether indirect discrimination on grounds of sex resulting from the application of an income requirement of the kind at issue in the main proceedings, which the national court described as proven, could be justified on budgetary grounds, and hence the Court's reply in the negative to that question cannot prejudge how other possible justifications should be assessed.

As the Court has consistently held, Article 4(1) of the Directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far

more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex. That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so (see, most recently, the judgments in *Nolte,* paragraph 28, and *Megner and Scheffel,* paragraph 24).

To justify the difference in treatment, the defendants essentially argued that, by introducing the income requirement in the AAW, the Law of 20 December 1979 caused the Netherlands scheme relating to incapacity for work to shift from being pure national insurance to insurance against loss of income guaranteeing a minimum income to insured persons and that, by providing that the income requirement was henceforward to apply to all insured persons, whether male or female, married or unmarried, who became unfit for work before or after 1 January 1979, the Law of 3 May 1989 accentuated the nature of that scheme as one providing insurance against loss of income. They considered that, in so doing, the Netherlands legislature pursued a legitimate social policy aim, inherent in numerous social security schemes, of restricting eligibility for a given benefit to persons who have lost income following the materialisation of the risk which the benefit is intended to cover.

The Court's reply was that, as laid down in the *Roks* judgment, Directive 79/7 leaves intact the powers reserved by Articles 117 and 118 of the EC Treaty to the Member States to define their social policy within the framework of close cooperation organised by the Commission, and consequently the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented. In exercising that competence, the Member States have a broad margin of discretion (see *Nolte* judgment, paragraph 33, and *Megner and Scheffel* judgment, paragraph 29). In this context, the Court held that guaranteeing the benefit of a minimum income to persons who were in receipt of income from or in connection with work which they had to abandon owing to incapacity for work satisfies a legitimate aim of social policy and that to make the benefit of that minimum income subject to the requirement that the person concerned must have been in receipt of such an income in the year prior to the commencement of incapacity for work constitutes a measure appropriate to achieve that aim which the national legislature, in the exercise of its competence, was reasonably entitled to consider necessary in order to do so. It appears from the case law of the Court (*De Weerd, née Roks, and Others,* at paragraph 29, confirmed in the judgment of 19 October 1995, *Richardson,* Case C-137/94, [1995] ECR I-3407, paragraph 24) that Community law does not prevent Member States from taking measures which have the effect of withdrawing social security benefits from certain categories of persons, provided that those measures are compatible with the principle of equal treatment between men and women as defined in Article 4(1) of Directive 79/7. Subject to that proviso, Member States are also free to lay down, as part of their social policy, new rules which have the effect of reducing the number of persons eligible for a social security benefit.

The Court (Sixth Chamber), hereby rules:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security does not preclude the application of national legislation which makes receipt of a benefit for incapacity for work subject to the requirement of having received a certain income from or in connection with work in the year preceding the commencement of incapacity, even if it is established that that requirement affects more women than men.

Case C-457/93
KURATORIUM FÜR DIALYSE UND NIERENTRANSPLANTATION E.V. v JOHANNA LEWARK
Date of judgment:
6 February 1996
Reference:
[1996] ECR I-243
Content:
Concept of pay — Indirect discrimination — Compensation for attendance at training courses providing staff council members with the necessary knowledge for performing their functions

1. Facts and procedure

Mrs Lewark is employed for 30.8 hours a week in the care unit of the defendant's dialysis centre. She is also on the local staff council, which consists of three members. Her working hours are spread over four days a week and she works for 7.7 hours a day. The dialysis centre employs 21 employees in the care unit, seven men and 14 women. Of the men, six work full-time and one part-time. Of the women, four work full-time and ten part-time. The plaintiff is the only member of the staff council to work part-time. From 12 to 16 November 1990 the plaintiff, on the basis of a decision of the staff council and with the defendant's consent, attended a full-time training course in order to obtain the knowledge that was necessary for performing her staff council functions. The training course on 13 November 1990 lasted for 7.5 hours. If she had not been on the course, the plaintiff would not have worked on that day, because of her being employed part-time. However, the defendant paid her on the basis of her contractual working hours of 30.8 hours a week, with no compensation for the time she had spent on the training course. Under paragraph 37(2) in conjunction with paragraph 37(6) of the Betriebsverfassungsgesetz (Industrial Relations Law, 'the BetrVG'), staff council members attending such courses are to be released by their employer from the obligations arising from their employment, without loss of pay. The plaintiff seeks compensation for the 7.5 hours she spent on the course on 13 November 1990. In her opinion, staff council members who work part-time cannot be required to make special sacrifices compared with those who work full-time. She considers that the defendant's refusal constitutes discrimination incompatible with both Article 119 of the Treaty and the Directive.

The Bundesarbeitsgericht (Federal Labour Court), referring the matter to the Court of Justice, considers that, contrary to the Court's ruling in its judgment of 4 June 1992, *Boetel* (Case C-360/90, [1992] ECR I-3589), Paragraph 37(6) of the BetrVG does not cause indirect discrimination contrary to Article 119 of the Treaty and to the Directive. It considers that the judgment of the Court of Justice in the *Boetel* case could be based on a misunderstanding of the legal position of staff council members under German legislation.

2. Question referred to the Court

Does the prohibition of indirect discrimination in connection with pay (Article 119 of the EEC Treaty and Council Directive 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women) preclude a national legislature from making membership of a staff council an honorary office to be performed without payment and protecting staff council members only against loss of income which they would otherwise suffer as a result of missing working hours because of staff council duties?

3. Judgment of the Court

It must be observed first of all that legal concepts and definitions established or laid down by national law cannot affect the interpretation or binding force of Community law, or, consequently, the scope of the principle of equal pay for men and women laid down in Article 119 of the Treaty and in the Directive and developed by the Court's case law (see judgment in *Boetel,* cited above, and judgment of 19 March 1964, *Unger,* Case 75/63, [1964] ECR 177).

Secondly, as the Court has consistently held, the concept of pay within the meaning of Article 119 of the Treaty comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer, and irrespective of whether the worker receives it under a contract of employment, by virtue of legislative provisions or on a voluntary basis (see the judgment in *Boetel,* cited above, paragraph 12, and the judgment of 17 May 1990, *Barber,* Case C-262/88, [1990] ECR I-1889, paragraph 12). Although compensation such as that at issue in the main proceedings does not derive as such from the contract of employment, it is nevertheless paid by the employer by virtue of legislative provisions and under a contract of employment. Staff council members must necessarily be employees of the undertaking, to be able to serve on that undertaking's staff council.

With regard to the difference in treatment between staff council members working part-time and those working full-time, the Court has held, in its judgment of 15 December 1994, *Helmig and Others* (Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, [1994] ECR I-5727, paragraph 26), that there is unequal treatment whenever the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked on the basis of an employment relationship. In the present case, it is indisputable that where training courses necessary for performing staff council functions are organised during the full-time working hours in force in the undertaking but outside the individual working hours of part-time workers serving on those councils, the overall pay received by the latter is, for the same number of hours worked, lower than that received by the full-time workers serving on the same staff councils. Since a difference in treatment has been found to exist, it follows from settled case law that, if it were the case that a much lower proportion of women than men work full-time, the exclusion of part-time workers from certain benefits would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by female workers in working full-time, that measure could not be explained by factors excluding any discrimination on grounds of sex (judgments of 31 March 1981, *Jenkins,* Case 96/80, [1981] ECR 911, and of 13 May 1986, *Bilka,* Case 170/84, [1986] ECR 1607). According to the order for reference, the official employment and social statistics show that at the end of June 1991, 93.4 % of all part-time workers were women and 6.6 % were men. The Landesarbeitsgericht considered that in view of that very great difference between the numbers of men and women working part-time, it was to be supposed that the proportion of men and women working part-time among staff council members was at least similar. The Court concluded that the application of legislative provisions such as those at issue in principle causes indirect discrimination against female workers, contrary to Article 119 of the Treaty and to the Directive, and that it would be otherwise only if the difference of treatment found to exist was justified by objective factors unrelated to any discrimination based on sex. On this point, the Court held in *Boetel,* cited above, that it remained open to the Member State to prove that the legislation was justified by such factors.

The Court pointed out that, if a Member State is able to show that the measures chosen reflect a legitimate aim of its social policy, are appropriate to achieve that aim and are necessary in order to do so, the mere fact that the legislative provision affects far more women workers than men cannot be regarded as a breach of Article 119 (see judgments of 24 February 1994, *Roks and Others,* Case C-343/92, [1994] ECR I-571, and of 14 December 1995, *Megner and Scheffel,* Case C-44/93, [1995] ECR I-4741). However, it should be borne in mind that legislation such as that at issue is likely to deter workers in the part-time category, in which the proportion of women is undeniably preponderant, from performing staff council functions or from acquiring the knowledge necessary for performing them, thus making it more difficult for that category of worker to be represented by qualified staff council members. The Court there-

fore found, in the light of all those considerations and taking into account the possibility of achieving the social policy aim in question by other means, the difference in treatment could be justified from the point of view of Article 119 of the Treaty and of the Directive only if it appeared to be suitable and necessary for achieving that aim. It is for the national court to ascertain whether that is so in the present case.

The Court, hereby rules:

Where the category of part-time workers includes a much higher number of women than men, the prohibition of indirect discrimination in the matter of pay as set out in Article 119 of the EEC Treaty and in Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, precludes national legislation which, not being suitable and necessary for achieving a legitimate social policy aim, has the effect of limiting to their individual working hours the compensation which staff council members employed on a part-time basis are to receive from their employer for attending training courses which impart the knowledge necessary for serving on staff councils and are held during the full-time working hours applicable in the undertaking but which exceed their individual part-time working hours, when staff council members employed on a full-time basis receive compensation for attendance at the same courses on the basis of their full-time working hours.

Case C-8/94
C. B. LAPERRE v BESTUURSCOMMISSIE BEROEPSZAKEN IN DE PROVINCIE ZUID-HOLLAND
Date of judgment:
8 February 1996
Reference:
[1996] ECR I-273
Content:
Equal treatment for men and women in matters of social security — Article 4(1) of Directive 79/7/EEC — Statutory scheme of social assistance for older and/or partially incapacitated workers who are long-term unemployed — Conditions relating to previous employment and age

1. Facts and procedure

The questions relate to two social-assistance schemes in the Netherlands which guarantee unemployed persons an income at the minimum social level. The first — general — scheme is that established by the Rijksgroepsregeling Werklose Werknemers (National Group Scheme for Unemployed Workers, 'the RWW'). The RWW, which was adopted pursuant to the Algemene Bijstandswet (General Law on Social Assistance), provides for the grant of benefits to unemployed workers without sufficient resources to ensure their subsistence. Entitlement and continuing entitlement to benefit under the RWW are conditional, *inter alia,* on the person concerned not having resources in excess of the 'modest assets' stipulated by the Netherlands legislation. The second — specific — scheme was introduced by the Wet Inkomensvoorziening Oudere en Gedeeltelijk Arbeidsongeschikte Werkloze Werknemers (Law on income support for older and partially incapacitated unemployed workers, 'the IOAW'), providing for the grant of benefit to older or partially incapacitated long-term unemployed persons. The grant of such benefit is subject to various conditions relating to the previous employment of the person concerned and his age or — where applicable — his incapacity for work. Unlike the RWW, the IOAW does not make the grant of benefit subject to any condition relating to the resources of the person concerned.

Until 31 May 1989, Mrs Laperre received unemployment benefit under the RWW. As of 1 June 1989, the competent authority — the municipality of The Hague — ceased to pay her that benefit on the ground that her resources exceeded the 'modest assets' referred to in the legislation. On 20 June 1989, Mrs Laperre applied to that municipality for benefit under the IOAW. It is undisputed that at that date she was 52 years of age and suffered from no incapacity for work. The application for benefit was refused on the ground that Mrs Laperre could not be regarded as being an unemployed worker within the meaning of Article 2(1)(a)of the IOAW.

In its order for reference, the Raad van State referred to statistics of the Centraal Bureau voor de Statistiek (Central Statistical Office) showing that in 1989 much more men than women were in receipt of IOAW benefit. It also observed that, in the Netherlands, much more men than women are in employment.

2. Questions referred to the Court

1) Must Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 be interpreted as meaning that that article in principle precludes a provision of national legislation, such as that contained in the IOAW, from offering an income supplement at the level of the social minimum whereby, in so far as is relevant, for the purposes of the grant of the benefit resources are not taken into account and entitlement to the benefit is dependent, briefly, on previous employment and age, whilst under other national legislation, such as that contained in the social assistance provisions of the RWW, which also affords provision at the level of the social minimum, account is taken of resources, where it is common ground that a significantly greater

number of men than women are eligible for the more favourable benefit under the IOAW?

2) Can the application of the scheme referred to in question 1, under which a far greater number of men than women are exempted from the means test in the social assistance legislation, be justified on the ground that the target group of that legislation has little chance on the labour market and therefore is not or is rarely in a position to rebuild resources once they have been depleted?

3. Judgment of the Court

As the Court has consistently held, Article 4(1) of the Directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex. That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so (see judgment of 24 February 1994, *Roks and Others,* Case C-343/92, [1994] ECR I-571, paragraphs 33 and 34).

The Court first observed that, in the current state of Community law, social policy is a matter for the Member States (see judgment of 7 May 1991, *Commission* v *Belgium,* Case C-229/89, [1991] ECR I-2205, paragraph 22). Consequently, it is for the Member States to choose the measures capable of achieving their social policy aim. In exercising that competence, the Member States have a broad margin of discretion. The Court next noted that the aim relied on by the Netherlands Government (reintegration of unemployed persons into the labour market) comes under that State's social policy and is objectively unrelated to any discrimination on grounds of sex and that, in exercising its competence, the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim. In those circumstances, the legislation in question cannot be described as entailing indirect discrimination within the meaning of Article 4(1) of the Directive.

The Court (Fourth Chamber), hereby rules:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that a national statutory scheme, such as that established by the IOAW, which provides for a benefit designed to guarantee income at the level of the social minimum, irrespective as to whether the claimant has any resources but subject to conditions relating to his previous employment and age, does not involve discrimination on grounds of sex even if it is established that a much greater number of men than women find in that scheme a way of avoiding the means test which, in contrast, has to be satisfied in the case of another scheme, such as that established by the RWW, which, albeit providing for a benefit of the same type, is less favourable, since the national legislature was reasonably entitled to consider that the scheme in question was necessary in order to attain a social policy aim unrelated to any discrimination on grounds of sex.

Case C-342/93
JOAN GILLESPIE AND OTHERS v NORTHERN HEALTH AND SOCIAL SERVICES BOARDS, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, EASTERN HEALTH AND SOCIAL SERVICES BOARD AND SOUTHERN HEALTH AND SOCIAL SERVICES BOARD
Date of judgment:
13 February 1996
Reference:
[1996] ECR I-475
Content:
Equal treatment for men and women — Maternity pay

1. Facts and procedure

During 1988, the plaintiffs took maternity leave. Under a collective agreement — paragraph 9 of section 6 of the General Council Handbook adopted by the Joint Councils for the Health and Personal Social Services (Northern Ireland) — they received during that period the following benefits: full weekly pay for the first four weeks, nine-tenths of full weekly pay for two weeks thereafter and one-half of full weekly pay for 12 weeks. These conditions were more favourable than those laid down by the relevant general legislation. In November 1988, negotiations within the health services resulted in pay increases backdated to 1 April 1988. However, the plaintiffs in the main proceedings were unable to receive that increase because of the method of calculating the benefit payable during maternity leave, as laid down in the General Council Handbook. The cash benefit payable during maternity leave is determined on the basis of average weekly pay calculated, pursuant to Article 21 of the Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987, from the last two pay cheques received by the women concerned for the two months preceding the reference week ('reference pay'). The reference week is defined as the 15th week before the beginning of the expected week of confinement. No provision was made for an increase in reference pay in the event of a subsequent pay rise.

2. Questions referred to the Court

1) Do the following provisions, or any of them, namely, (i) Article 119 of the Treaty of Rome, (ii) the Equal Pay Directive (75/117/EEC), or (iii) the Equal Treatment Directive (76/207/EEC) ('the relevant provisions') require that, while a woman is absent from work on the maternity leave provided for by the relevant national legislation or by her contract of service, she be paid the full pay to which she would have been entitled if at the time she had been working normally for her employer?

2) If the answer to question 1 is 'No', do the relevant provisions require that while a woman is on such leave the amount of her pay be determined by reference to certain particular criteria?

3) If the answer to question 2 is 'Yes', what are those criteria?

4) If the answer to each of questions 1 and 2 is 'No', is it the position that none of the relevant provisions has any application or effect as regards the amount of pay to which a woman on maternity leave is entitled?

3. Judgment of the Court

The Court pointed out firstly that the definition in the second paragraph of Article 119 provides that the concept of pay used in the abovementioned provisions includes all consideration which workers receive directly or indirectly from their employers in respect of their employment. The legal nature of such consideration is not important for the purposes of the application of Article 119 provided that it is granted in respect of employment (judgment of 9 February 1982, *Garland,* Case 12/81, [1982] ECR 359, paragraph 10). Consideration classified as pay includes, *inter alia,* consideration paid by the employer by virtue of legislative

provisions and under a contract of employment whose purpose is to ensure that workers receive income even where, in certain cases specified by the legislature, they are not performing any work provided for in their contracts of employment (judgment of 4 June 1992, *Boetel,* Case C-360/90, [1992] ECR I-3589, paragraphs 14 and 15; see, also, judgments of 27 June 1990, *Kowaiska,* Case C-33/89, [1990] ECR I-2591, paragraph 11, and of 17 May 1990, *Barber,* Case C-262/88, [1990] ECR I-1889, paragraph 12). It follows that, since the benefit paid by an employer under legislation or collective agreements to a woman on maternity leave is based on the employment relationship, it constitutes pay within the meaning of Article 119 of the Treaty and Directive 75/117.

The Court noted, however, that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, judgment of 14 February 1995, *Schumacker,* Case C-279/93, [1995] ECR I-225, paragraph 30). The present case is concerned with women taking maternity leave provided for by national legislation. They are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work. The Court observed also that Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ L 348, p. 1) does not apply *ratione temporis* to the facts of the present case. It was therefore for the national legislature to set the amount of the benefit to be paid during maternity leave, having regard to the duration of such leave and the existence of any other social advantages.

As to the question of whether a woman on maternity leave should receive a pay rise awarded before or during that period, the Court ruled that the benefit paid during maternity leave is equivalent to a weekly payment calculated on the basis of the average pay received by the worker at the time when she was actually working and which was paid to her week by week, just like any other worker. The principle of non-discrimination therefore requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.

As to the applicability of Directive 76/207, the Court pointed out that the benefit paid during maternity leave constitutes pay and therefore falls within the scope of Article 119 of the Treaty and Directive 75/117. It cannot therefore be covered by Directive 76/207 as well. That Directive, as is clear from its second recital in the preamble, does not apply to pay within the meaning of the abovementioned provisions.

The Court, hereby rules:

The principle of equal pay laid down in Article 119 of the EEC Treaty and set out in detail in Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women neither requires that women should continue to receive full pay during maternity leave nor lays down specific criteria for determining the amount of benefit payable to them during that period, provided that the amount is not set so low as to jeopardise the purpose of maternity leave. However, to the extent that it is calculated on the basis of pay received by a woman before the commencement of maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by reference pay and the end of maternity leave, as from the date on which they take effect.

Case C-278/93
EDITH FREERS AND HANNELORE SPECKMANN v DEUTSCHE BUNDESPOST
Date of judgment:
7 March 1996
Reference:
[1996] ECR I-1165
Content:
Concept of pay — Indirect discrimination against women workers — Compensation for attendance at training courses providing members of staff committees with the knowledge necessary for performing their functions

1. Facts and procedure

The plaintiffs are employed part-time by the defendant for 18 hours a week. As members of the staff committee, they attended a training course from 9 to 14 February 1992 which lasted for approximately 38.5 hours, which are the weekly working hours laid down for full-time employees in the collective agreement. During the training course the defendant continued to pay the plaintiffs their normal wages calculated on the basis of their part-time work. Relying on the German legislation, it did not, however, give them any additional pay, nor did it offer them paid leave in respect of the time spent on the course outside their normal working hours.

In its judgment of 4 June 1992, *Boetel* (Case C-360/90, [1992] ECR I-3589), the Court ruled that Article 119 of the Treaty and the Directive preclude national legislation applicable to a much greater number of women than men from limiting to their individual working hours the compensation, in the form of paid leave or overtime pay, which staff council members employed on a part-time basis are to receive from their employer for attending training courses which impart the knowledge necessary for working on staff councils and are held during the full-time working hours applicable in the undertaking but which exceed their own part-time working hours, when staff council members employed on a full-time basis are compensated for attendance of the same courses on the basis of full-time working hours. The Court stated, however, that it remains open to the Member State to prove that such legislation is justified by objective factors unrelated to any discrimination on grounds of sex. The national court considers that the judgment in *Boetel* does not take account of the special features of the system of staff committees in German law and calls into question the principle of unpaid honorary office, which is intended to guarantee the independence of staff committee members.

2. Questions referred to the Court

1) Does the economic compensation accorded to a male or female employee in respect of work on a statutorily established employee representation body constitute pay within the meaning of the European provisions on equal pay for men and women (Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975)?

2) If the answer to question 1 is yes: does the fact that, under national law, work on an employee representation body is unpaid, being governed essentially by the loss-of-pay principle *(Lohnausfallprinzip),* constitute an objective ground for unequal treatment which is in no way connected with discrimination against women?

3) If the answer to question 2 is no: is it an objective ground for unequal treatment of this kind that whereas part-time employees continue to receive pay in respect of their attendance at an all-day training course only in accordance with their part-time working hours, employees who normally work overtime are paid for that overtime even if the duration of the training course corresponds to that of the normal working day?

3. Judgment of the Court

As regards the first question, the Court referred to its *Lewark* judgment.

As regards the second and third questions, the Court pointed also to its *Boetel* and Lewark judgments, in which it held that the national provisions at issue in principle caused discrimination against women workers contrary to Article 119, but that it remained open to the Member State to prove that the legislation was justified by objective factors unrelated to any discrimination on grounds of sex. Moreover, it is also apparent from the *Lewark* judgment that the Bundesarbeitsgericht considered, with respect to similar provisions on staff councils, that the German legislature's wish to place the independence of staff council members above financial inducements for performing staff council functions, as expressed in the provisions at issue, was an aim of social policy. Such an aim appears in itself to be unrelated to any discrimination on grounds of sex. It cannot be disputed that the work of staff committees does indeed promote harmonious labour relations within undertakings, in particular by ensuring that the workers' interests are represented. The concern to ensure the independence of the members of those councils thus likewise reflects a legitimate aim of social policy. The Court stated that, if a Member State is able to show that the measures chosen reflect a necessary aim of its social policy and are suitable and necessary for achieving that aim, the mere fact that the legislative provision affects far more women workers than men cannot be regarded as a breach of Article 119 and the Directive (see judgment of 24 February 1994, *Roks and Others,* Case C-343/92, [1994] ECR I-571). It is for the national court to ascertain, in the light of all the relevant factors and taking into account the possibility of achieving the social policy aim in question by other means, whether the difference of treatment in question is suitable and necessary for achieving that aim.

The Court (Sixth Chamber), hereby rules:

1) *The compensation paid to a male or female worker for taking part in statutorily established staff representation constitutes pay within the meaning of Article 119 of the EEC Treaty and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.*

2) *Where the category of part-time workers includes a much higher number of women than men, the prohibition of indirect discrimination in the matter of pay, as set out in Article 119 of the Treaty and in Directive 75/117, precludes national legislation which, not being suitable and necessary for achieving a legitimate social policy aim, has the effect of limiting to their individual working hours the compensation which staff committee members employed on a part-time basis are to receive from their employer for attending training courses which impart the knowledge necessary for serving on staff committees and are held during the full-time working hours applicable in the undertaking but which exceed their individual part-time working hours, when staff committee members employed on a full-time basis receive compensation for attendance at the same courses on the basis of their full-time working hours.*

Case C-13/94
P v S AND CORNWALL COUNTY COUNCIL
Date of judgment:
30 April 1996
Reference:
[1996] ECR I-2143
Content:
Equal treatment for men and women — Dismissal of a transsexual

1. Facts and procedure

P used to work as a manager in an educational establishment operated at the material time by Cornwall County Council, the competent administrative authority for the area. In early April 1992, a year after being taken on, P informed S, the Director of Studies, Chief Executive and Financial Director of the establishment, of the intention to undergo gender reassignment. This began with a 'life test', a period during which P dressed and behaved as a woman, followed by surgery to give P the physical attributes of a woman. At the beginning of September 1992, after undergoing minor surgical operations, P was given three months' notice expiring on 31 December 1992. The final surgical operation was performed before the dismissal took effect, but after P had been given notice. P brought an action against S and Cornwall County Council before the Industrial Tribunal on the ground that she had been the victim of sex discrimination. S and the County Council maintained that the reason for her dismissal was redundancy.

It appears from the order for reference that the true reason for the dismissal was P's proposal to undergo gender reassignment, although there actually was redundancy within the establishment.

2. Questions referred to the Court

1) Having regard to the purpose of Directive 76/207/ EEC which, as stated in Article 1, is to put into effect the principle of equal treatment for men and women as regards access to employment, etc., does the dismissal of a transsexual for a reason related to a gender reassignment constitute a breach of the Directive?

2) Whether Article 3 of the Directive, which refers to discrimination on grounds of sex, prohibits treatment of an employee on the grounds of the employee's transsexual state?

3. Judgment of the Court

Article 3 of the Directive, to which the Industrial Tribunal refers, is concerned with application of the principle of equal treatment for men and women in respect of access to employment. A dismissal, such as is at issue in the main proceedings, must be considered in the light of Article 5(1) of the Directive.

The European Court of Human Rights has held that the term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group (Rees judgment of 17 October 1986, Series A, No 106, paragraph 38). The principle of equal treatment 'for men and women' to which the directive refers in its title, preamble and provisions means, as Articles 2(1) and 3(1) in particular indicate, that there should be 'no discrimination whatsoever on grounds of sex'. Thus, the Directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law. Moreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure (see, to

that effect, judgments of 15 June 1978, *Defrenne,* Case 149/77, [1978] ECR 1365, paragraphs 26 and 27, and of 20 March 1984, *Razzouk and Beydoun* v *Commission,* Joined Cases 75/82 and 117/82, [1984] ECR 1509, paragraph 16).

Accordingly, the Court concluded that the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.

The Court, hereby rules:

In view of the objective pursued by Council Directive 761 207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment.

Case C-228/94
STANLEY CHARLES ATKINS v WREKIN DISTRICT COUNCIL AND DEPARTMENT OF TRANSPORT
Date of judgment:
11 July 1996
Reference:
[1996] ECR I-3633
Content:
Scope of Directive 79/7/EEC — Concessionary fares on public passenger transport services — Link with retirement age

1. Facts and procedure

Mr Atkins considers that he has been discriminated against on the ground of his sex because, at the age of 63, he was refused public transport travel concessions under the scheme operated by Wrekin District Council, whereas a woman of the same age would have been entitled to such concessions. The scheme implemented by Wrekin District Council applies to people with disabilities and to men over the age of 65 and women over the age of 60, those ages corresponding to the statutory retirement ages set in the United Kingdom for the purposes of entitlement to old-age and retirement pensions.

2. Questions referred to the Court

1) Is the concessionary travel scheme operated by the first defendant within the scope of Article 3 of Directive 79/7/EEC?

2) If the answer to question 1 is yes, does Article 7(1)(a) of Directive 79/7/EEC apply in the circumstances of this case?

3) If there has been a breach of Directive 79/7/EEC, can the direct effect of that Directive be relied on to support a claim for damages for periods prior to the date of the Court's judgment by persons who have not prior to that date brought legal proceedings or made an equivalent claim?

3. Judgment of the Court

The Court pointed out firstly that, according to Article 3(1)(a), Directive 79/7 is to apply to statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment. According to Article 3(1)(b), it is also to apply to social assistance, in so far as such assistance is intended to supplement or replace the schemes referred to in Article 3(1)(a). Thus, in order to fall within the scope of Directive 79/7, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the specified risks, or a form of social assistance having the same objective (see, in particular, judgment of 19 October 1995, *Richardson,* Case C-137/94, [1995] ECR I-3407, paragraph 8). Also, although the way in which a benefit is granted is not decisive for the purposes of Directive 79/ 7, the benefit must, in order to fall within its scope, be directly and effectively linked to the protection provided against one of the risks specified in Article 3(1) (*Richardson* judgment, cited above, paragraph 9).

However, a benefit consisting of concessionary fares on public passenger transport services which may be granted to various classes of persons, including persons who have reached statutory retirement age, certain young or disabled persons and any other class of persons to be determined by ministerial order, does not afford direct and effective protection against one of the risks listed in Article 3(1) of Directive 79/7. The Court explained that the purpose of such a benefit is to facilitate access to public transport for certain classes of persons who, for various reasons, are recognised as having a particular need for public transport and who are, for the same reasons, less well off financially and materially. Moreover, the fact that the recipient of a benefit is, as a matter of fact, in one of the situations envisaged by Article 3(1) of Directive 79/7 does not suffice to bring that benefit as such within the scope of the Directive (see judgment of 16 July 1992, *Jackson and Cresswell,* Joined Cases C-63/91 and C-64/91, [1992] ECR I-4737, paragraphs 18 and 19).

In view of the unequivocal terms of the title of Directive 79/7, the various recitals in its preamble and Article 1 thereof, which all state that the Directive is intended to ensure the progressive implementation of the principle of equal treatment for men and women in matters of social security, the reference to other elements of social protection provided for in Article 3 cannot be interpreted otherwise than as referring to provisions concerning social assistance, which generally fall outside the area of social security (in this connection, see, for instance, Article 4(4) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ L 230, p. 6)). Furthermore, even the provisions regarding social assistance, to which the scope of Directive 79/7 has expressly been extended, do not fall within its scope where such assistance is provided to persons who are in one of the situations referred to in Article 3(1)(a), but only where it is intended to supplement or replace the schemes referred to in that provision.

The Court, hereby rules:

On a proper interpretation of Article 3(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, a scheme such as that provided for in section 93(7) of the Transport Act 1985 and implemented and operated by Wrekin District Council, under which concessionary fares on public passenger transport services are granted to certain classes of persons, including certain elderly persons, does not fall within the scope of the Directive.

Case C-435/93
FRANCINA JOHANNA DIETZ v STICHTING THUISZORG ROTTERDAM
Date of judgment:
24 October 1996
Reference:
[1996] ECR I-5223
Content:
Article 119 of the Treaty — Concept of pay — Right to join an occupational pension scheme — Right to payment of a retirement pension — Part-time workers — Limitation of the effects in time of the judgment in Case C-262/88, *Barber*

1. Facts and procedure

In the Netherlands, participation in an occupational pension scheme is in principle voluntary for employers and employees in the sector concerned. Article 3(1) of the Wet Betreffende Verplichte Deelneming in een Bedrijfspensioensfonds (Law on compulsory affiliation to an occupational pension scheme, hereafter 'the Occupational Pensions Law') provides that the Minister of Social Affairs and Employment ('the Minister') may, on application by an occupational or trade association which he deems to be sufficiently representative, make affiliation to the occupational pension scheme compulsory for all employees or certain categories of employees in the relevant sector.

Mrs Dietz was employed part-time for seven hours a week by Thuiszorg and its predecessor in law, the Stichting Katholieke Maatschappelijke Gezinszorg, as a helper for the aged from 11 December 1972 to 6 November 1990, when she reached the age of 61 and took voluntary early retirement by agreement with Thuiszorg made on 18 July 1990. Affiliation to the pension scheme was made compulsory for Thuiszorg's employees under the Occupational Pensions Law.

Initially, however, part-time workers employed for 40 % or less of the ordinary working hours were excluded from the pension scheme, a restriction which was lifted with effect from 1 January 1991 in order to bring the scheme into line with the requirements of Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ L 225, 12.8.1986, p. 40). At the same time, transitional arrangements were introduced whereby notional insurance periods could be attributed to employees previously excluded from the pension scheme in order to build up pension rights. On 2 December 1992, Mrs Dietz initiated proceedings before the Rotterdam Kantongerecht, claiming that when she made the agreement with Thuiszorg for voluntary retirement she was not aware of the forthcoming changes to the pension scheme and that, had she been so, she would have postponed early retirement in order to be entitled to a pension under the transitional arrangements. Thuiszorg, which had been aware of the forthcoming changes, ought to have informed her of them. She also claimed that under Article 119 of the Treaty she should be entitled to a pension based on her periods of employment after 8 April 1976, the date of the *Defrenne* judgment (Case 43/75, [1976] ECR 455) or, alternatively, after 17 May 1990, the date of the *Barber* judgment (Case C-262/88, [1990] ECR I-1889).

The Rotterdam Kantongerecht decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling the same questions as those which had been put by the Utrecht Kantongerecht in Case C-128/93 *Fisscher* v *Voorhuis Hengelo and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583, with certain additions.

2. Questions referred to the Court

1) Does the right to equal pay laid down in Article 119 of the EEC Treaty include the right to join an occupational pension scheme such as that at issue in this case which is made compulsory by the authorities?

I. 1) Is the answer to the first question the same:

a) if the adoption of the Netherlands Occupational Pensions Law was based not only on considerations of social policy (when a pension scheme is set up for a particular sector the costs are borne jointly by all undertakings in that sector) but also by the desire to prevent unfair competition in that sector?

b) if an automatic obligation to provide cover was provided for in the original draft Law but not in the Law as finally adopted (Tweede Kamer 1948-1949 785, No 6)?

c) if Thuiszorg lodged no objection to the order making the cover compulsory, or did so but the Minister did not take it up?

d) whether or not Thuiszorg made an investigation among its employees which might have justified seeking an exemption or the employees were informed of the possibility of having an exemption?

II. If the answer to question (1) is in the affirmative, does the temporal limitation imposed by the Court in the *Barber* judgment for pension schemes such as those considered in that case ('contracted-out schemes') apply to the right to join an occupational pension scheme such as that at issue in this case, from which the plaintiff was excluded?

2a) If the answer to question (1) is in the affirmative, does the temporal limitation imposed by the Court in the *Barber* judgment for pension schemes such as those considered in that case ('contracted-out schemes') apply to the payment of a retirement pension?

III. Where membership of a pension scheme applied in an undertaking is made compulsory by law, are the administrators of the scheme (the occupational pension fund) bound to apply the principle of equal treatment laid down in Article 119 of the EEC Treaty, and may an employee who has been prejudiced by failure to apply that rule sue the pension fund directly as if it were the employer? Inconsidering this question, it may be relevant that the Cantonal Court has no jurisdiction to hear a claim based on unlawful conduct, since the extent of the claim exceeds the limits of its jurisdiction. In this case, therefore, it is relevant to know whether the plaintiff may claim against the pension fund on the basis of her contract of employment.

IV. If, under Article 119 of the EEC Treaty, the plaintiff is entitled to be a member of the occupational pension scheme from a date prior to 1 January 1991, does that mean that she is not bound to pay the premiums which she would have had to pay had she been admitted earlier to the pension scheme?

V. Is it relevant that the plaintiff did not act earlier to enforce the rights which she now claims to have?

VI. Do the Protocol concerning Article 119 of the EEC Treaty appended to the Treaty of Maastricht ('the *Barber* Protocol') and the (draft law amending the) transitional Article III of Draft Law 20890, which is intended to implement the Fourth Directive, affect the assessment of this case which was brought before the Cantonal Court by writ of summons issued on 2 December 1992?

3. Judgment of the Court

In its replies to the above questions, the Court largely reiterated the arguments put forward in the *Fisscher* case.

The Court (Sixth Chamber), hereby rules:

1) The right to join an occupational pension scheme falls within the scope of Article 119 of the EEC Treaty and is therefore covered by the prohibition of discrimination laid down therein. That interpretation does not depend on the

purposes of the national legislation enabling membership to be made compulsory or on the fact that the employer lodged an objection to the decision to make such membership compulsory or on his having conducted an enquiry among his employees with a view to seeking exemption from compulsory membership.

2) *The limitation of the effects in time of the Barber judgment (Case C-262/88) does not apply to the right to join an occupational pension scheme, such as that at issue in the main proceedings, or to the right to payment of a retirement pension where the worker was excluded from membership of the scheme in breach of Article 119 of the Treaty.*

3) *The administrators of an occupational pension scheme must, like the employer, comply with Article 119 of the Treaty and workers who are discriminated against may assert their rights directly against those administrators.*

4) *The fact that a worker can claim retroactive membership of an occupational pension scheme does not enable him to avoid paying contributions for the period of membership concerned.*

5) *The national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme or to payment of a retirement pension, provided that they are not less favourable for such actions than for similar domestic actions and that they do not render the exercise of rights conferred by Community law excessively difficult or impossible in practice.*

6) *Protocol No 2 on Article 119 of the Treaty establishing the European Community, annexed to the Treaty on European Union, does not affect the right to join an occupational pension scheme or the right to draw a retirement pension where the worker was excluded from membership of the occupational scheme in breach of Article 119 of the Treaty, those rights being governed by the judgment of 13 May 1986, Bilka (Case 170/84).*

Case C-77/95
BRUNA-ALESSANDRA ZÜCHNER V HANDELS-KRANKENKASSE (Ersatzkasse) Bremen
Date of judgment:
7 November 1996
Reference:
[1996] ECR I-5689
Content:
Directive 79/7/EEC — Article 2 — Working population

1. Facts and procedure

Mr Züchner, who had previously been engaged in an occupational activity, became paraplegic following an accident. As a result of his condition, he requires assistance from another person in the form both of therapeutic treatment and of general care and home nursing, as defined by the Sozialgesetzbuch V (SGB V — Code of Social Law, Book V). His wife provides that care in its entirety. Mr Züchner's sickness insurance fund provides financial assistance for the general care and home nursing. However, as far as the therapeutic treatment is concerned, it relies on Paragraph 37(3) of the SGB V, according to which: 'Entitlement to home nursing shall arise only where there is no person living in the household who can assist and care for the patient to the extent necessary.' Mrs Züchner considers that provision to be contrary to the Directive.

2. Questions referred to the Court

1) Does the plaintiff, as the wife of an insured person who is in need of care, belong to the working population within the meaning of Article 2 of the Directive?

2) Although Paragraph 37(3) of the SGB, Book V, is formulated in neutral terms with regard to sex, does it discriminate, within the meaning of the Directive, against the plaintiff as a woman?

3) Does the plaintiff, who is not insured by the defendant, have direct entitlement, or does her husband, as the insured person, alone have direct entitlement?

4) Is the defendant itself liable, as an organ of the State (substitute sickness insurance fund)? If not, who is liable in its stead?

5) Does a claim for breach of official duty, irrespective of fault, exist under the law of the European Communities, or can a claim for breach of official duty arise only from Paragraph 839 of the Buergerliches Gesetzbuch (Civil Code) in conjunction with Article 34 of the Grundgesetz (Basic Law)?

3. Judgment of the Court

Replying to the first question, the Court pointed out that the concept of working population within the meaning of Article 2 of the Directive is very wide and includes people who are working, those who are seeking employment and those whose work or efforts to find work have been interrupted by materialisation of any of the risks mentioned in Article 3 of the Directive. The Court has further held that a person is still a member of the working population even if it is in relation to an ascendant that one of the risks mentioned in Article 3 materialises, forcing him or her to interrupt their occupational activity (judgment of 24 June 1986, *Drake,* Case 150/85, [1986] ECR 1995), or where the risk materialises while the person concerned is seeking employment immediately after a period without occupational activity (judgment of 11 July 1991, *Johnson,* Case C-31/90, [1991] ECR I-3723), or where the employment in question is regarded as minor since it consists of less than 15 hours' work a week and attracts remuneration of less than one-seventh of the average monthly salary (judgments of 14 December 1995, *Nolte,* Case C-317/93, [1995] ECR I-4625, and *Megner and Scheffel,* Case C-444/93, [1995] ECR I-4741). On the other hand, the Directive does not apply to people who are not working and are not seeking work or to persons whose occupation or efforts to find work were not interrupted by one of the risks referred to in Article 3 of the directive

(see judgments of 27 June 1989, *Achterberg-te Riele and Others,* Joined Cases 48/88, 106/88 and 107/88, [1989] ECR 1963, paragraph 13, and *Johnson,* cited above, paragraph 20). The Court has also held that a person who has given up his or her occupational activity in order to attend to the upbringing of his or her children does not fall within the scope of the Directive *(Johnson* judgment, paragraph 19).

The Court concluded that the term 'activity' referred to in relation to the expression 'working population' in Article 2 of the Directive can be construed only as referring at the very least to an economic activity, that is to say an activity undertaken in return for remuneration in the broad sense. It follows that an interpretation purporting to include within the concept of working population a member of a family who, without payment, undertakes an activity for the benefit of another member of the family on the ground that such activity calls for a degree of competence, is of a particular nature or scope or would have to be provided by an outsider in return for remuneration if the member of the family in question did not provide it would have the effect of infinitely extending the scope of the directive, whereas the purpose of Article 2 of the Directive is precisely to delimit that scope.

In view of the answer given to the first question, the Court considered it unnecessary to answer the other questions submitted by the national court.

The Court (Fifth Chamber), hereby rules:

Article 2 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as not covering a person who undertakes, as an unremunerated activity, the care of his or her handicapped spouse, whatever the extent of that activity and the competence required in order to perform it, where the person in question did not, in order to do so, abandon an occupational activity or interrupt efforts to find employment.

Case C-139/95
LIVIA BALESTRA v ISTITUTO NAZIONALE DELLA PREVIDENZA SOCIALE (INPS)
Date of judgment:
30 January 1997
Reference:
[1997] ECR I-549
Content:
Directive 79/7/EEC — Scope — Calculation of credit for supplemental retirement contributions

1. Facts and procedure

Mrs Balestra is a former employee of an undertaking declared to be in critical difficulty by the Interminsterial Committee for Industrial Policy Coordination ('CIPI'). She tendered her resignation and entered into retirement under the early-retirement scheme available to women aged between 50 and 55. Since she was aged 54 years and seven months when she resigned, she received from the National Institute of Social Security ('INPS'), pursuant to Article 16 of Law No 155/1981, credit equal to five months of contributions, corresponding to the period by which she fell short of the age of 55, the age at which a female worker was entitled to retire in Italy. On 13 April 1993, Mrs Balestra brought proceedings before the Pretura Circondariale di Genova for an order requiring the INPS to credit her with supplemental contributions up to the maximum provided for under Law No 155/1981, namely five years. The INPS opposed Mrs Balestra's claim on the ground that she had terminated her contract of employment by voluntarily tendering her resignation and that Article 16 of Law No 155/1981 provided for the crediting of equal contributions for men and women, the only difference being that attributable to the different ages at which men and women were entitled to retire.

2. Questions referred to the Court

1) Is it contrary to Articles 1, 2, 3, 4 and 5 of Council Directive 79/7/EEC and Articles 1, 2 and 5 of Council Directive 76/207/EEC to establish different age limits for the working lives of men and women for the purposes of entitlement to early retirement pursuant to Article 16 of Law No 155/81, termination of the employment relationship and calculation of pension benefits in the event of early retirement?

2) Does the different treatment, with respect to the employment relationship and social security benefits, which results from the establishment of different age limits under a legal system, such as the Italian system, under which the retirement age — the only age limit of significance for the purposes of early retirement — is 60 years of age for men and women alike, infringe the above-mentioned provisions of those Directives?

3. Judgment of the Court

The Court has consistently held that social security benefits governed by statute and applying compulsorily to general categories of workers do not come within the definition of pay within the meaning of the second paragraph of Article 119 of the Treaty (judgments of 25 May 1971, *Defrenne,* Case 80/70, [1971] ECR 445, paragraphs 7 and 8; of 17 May 1990, *Barber,* Case C-262/88, [1990] ECR I-1889, paragraphs 22 and 23; and of 17 February 1993, *Commission* v *Belgium,* Case C-173/91, [1993] ECR I-673, paragraph 14). On the other hand, statutory social security benefits are covered by Directive 79/7. In this case, however, the national court is asking whether, since Article 16 of Law No 155/1981 applies to employment relations within undertakings declared to be in critical difficulty, early retirement is less a choice than a sole course for a worker who might otherwise lose both his pension entitlement and his job. In such circumstances, early retirement may be treated as constituting dismissal, with the applicable directive then being Directive 76/207/EEC.

The Court replied to this question in the negative. Even if early retirement is the direct result of the

critical situation facing the undertaking within which the worker in question was last employed, the early-retirement benefits granted are nonetheless directly governed by statute and are compulsory for certain general categories of workers. Furthermore, those benefits are directly and effectively linked to protection against the risk of old age, as referred to in Article 3(1) of Directive 79/7, since their grant ensues from entry into early retirement (see, in this regard, judgment of 16 February 1982, *Burton,* Case 19/81, [1982] ECR 555, paragraphs 12 to 15). In any event, it is clear that in the present case Mrs Balestra's employment came to an end not as a result of her dismissal but as a result of her voluntary resignation, just five months before she reached the age at which she would have been entitled to retire in any event. The Court thus concluded that Directive 79/7 is applicable.

The Court has consistently held that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a), is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to the difference in pensionable age (see, in particular, judgments of 30 March 1993, *Thomas and Others,* Case C-328/91, [1993] ECR I-1247, paragraph 20, and of 11 August 1995, *Graham and Others,* Case C-92/94, [1995] ECR I-2521, paragraph 11). It is for that reason that where, pursuant to that provision, a Member State has set the pensionable age at 55 for women and at 60 for men, it is necessary to examine whether discrimination existing against men or women under a benefits scheme other than that of retirement is objectively and necessarily linked to the difference in retirement ages. In the present case, the discrimination lies in the fact that, because conditions as to pensionable ages which differ according to sex *are* taken into account in calculating the supplemental retirement contributions, the retirement pension received by a woman may, in some cases, be lower than that received by a man where the contributions actually paid are the same. A woman who retires at the age of 55 is not entitled to be credited with any contributions. Consequently, where a man and a woman, both aged 55, have actually paid the same contributions, the benefit which will be paid to the man taking early retirement will be higher than that granted to the woman who is retiring. In other words, if the contributions actually paid are the same, the woman will have to work some five extra years (until the age of 60) in order to be entitled to a pension whose amount equals that of the man taking early retirement at the age of 55.

The Court observed, however, that the discrimination at issue in the main proceedings is objectively linked to the setting of pensionable ages which differ for women and men in so far as it ensues directly from the fact that those pensionable ages *are* set at 55 for women and at 60 for men. As to the question of whether this discrimination is also necessarily linked to the difference in pensionable ages for men and women, the Court pointed out that if women taking early retirement at an age between 50 and 55 were credited with five years' contributions, without account being taken of the ordinary retirement age, the closer their entry into early retirement to the ordinary pensionable age, the clearer it would become that those women would be receiving a definitive pension higher than that of women who had paid contributions until the age of 55 and then retired without being able to claim a credit of contributions. Consequently, even though women *are* entitled to work until they reach the age of 60, denying them a credit of contributions in respect of the period after the date on which they reach the age of 55, the age at which they are entitled to a retirement pension, is necessary in order to preserve the coherence between the retirement pensions scheme and the early-retirement scheme in question.

The Court (Fifth Chamber), hereby rules:

Where, pursuant to Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, a Member State has set pensionable ages which differ according to sex, that provision also allows it to provide that employees of an undertaking declared to be in critical difficulty may be credited with a maximum of five years' supplemental retirement contributions starting from their entry into early retirement until the date on which they reach the age at which they are entitled to a retirement pension, that is to say 55 years in the case of women and 60 years in the case of men, since the difference relating to sex in the method of calculating early-retirement benefits is objectively and necessarily linked to the setting of pensionable ages which differ for men and women.

Case C-197/96
COMMISSION OF THE EUROPEAN COMMUNITIES v FRENCH REPUBLIC
Date of judgment:
13 March 1997
Reference:
[1997] ECR I-1489
Content:
Failure of a Member State to fulfil its obligations — Directive 76/207/EEC — Prohibition of night work

1. Facts and procedure

By application lodged at the Court Registry on 10 June 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that by maintaining in force Article L 213-1 of the Code du Travail (Employment Code) prohibiting night work by women in industry whereas no such prohibition exists in relation to men, the French Republic had failed to fulfil its obligations under Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40). Article L 213-1 of the French Code du Travail provides that women may not be employed for any night work, *inter alia,* in plants, factories and workshops, of any kind whatsoever. It does provide, however, for a number of exceptions in respect, for example, of women holding responsible positions of a managerial or technical character and in respect of serious circumstances where the national interest demands that the prohibition on night work be suspended in the case of shift workers on the terms and in accordance with the procedure laid down by the Code. The provisions in question were adopted in order to implement Convention No 89 of the International Labour Organisation ('ILO') of 9 July 1948 concerning Night Work of Women Employed in Industry.

The Court ruled in its judgment of 25 July 1991, *Stoeckel* (Case C-345/89, [1991] ECR I-4047) that Article 5 of the Directive is sufficiently precise to impose on Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that is subject to exceptions, where night work by men is not prohibited. Furthermore, it has repeatedly held that Article 5 is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision not conforming to Article 5(1), which lays down the principle of equal treatment with regard to working conditions (*Stoeckel* judgment, paragraph 12; judgment of 26 February 1986, *Marshall,* Case 152/84, [1986] ECR 723, paragraph 55).

Following the *Stoeckel* judgment, the French Government denounced ILO Convention No 89 on 26 February 1992, with effect from 26 February 1993. In view of the *Stoeckel* judgment and the French Republic's denunciation of ILO Convention No 89, the Commission took the view that the French legislation was incompatible with Article 5 of the Directive and that the French Government was therefore bound to remedy that incompatibility.

By letter dated 2 March 1994, the Commission put the French Government on notice to submit observations within two months pursuant to the first paragraph of Article 169 of the Treaty. Not being satisfied with the French Government's response given on 10 May 1994, the Commission sent it a reasoned opinion on 8 November 1994 in which it requested the Government to take the necessary measures to make its legislation consistent with Article 5 of the Directive within two months. Since the French Government failed to comply with the reasoned opinion within the prescribed period, the Commission brought these proceedings.

2. Judgment of the Court

It is undisputed that, following the French Government's denunciation of ILO Convention No 89,

the French legislation is incompatible with Article 5 of the Directive. The Court has consistently held that the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty (see judgment of 7 March 1996, *Commission* v *France,* Case C-334/94, [1996] ECR I-1307, paragraph 30). The provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty, under which, in the case of a directive intended to confer rights on individuals, persons concerned must be enabled to ascertain the full extent of their rights (judgment of 30 May 1991, *Commission* v *Germany* Case C-361/88, [1991] ECR I-2567, paragraphs 15 and 24). It should be noted in this case that, because Article L 213-1 of the Code du Travail has been retained, individuals are in a position of uncertainty as to their legal situation and exposed to unwarranted criminal proceedings. Neither the ministerial answer to the parliamentary question nor the obligation for national courts to secure the full effect of Article 5 of the Directive by not applying any contrary national provision can have the effect of amending a statutory provision.

The Court (Fifth Chamber), hereby:

Declares that by maintaining in force Article L 213-1 of the Code du Travail prohibiting night work by women in industry whereas no such prohibition exists in relation to men, the French Republic has failed to fulfil its obligations under Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

Orders the French Republic to pay the costs.

Case C-147/95
DIMOSSIA EPICHEIRISSI ILEKTRISMOU (DEI) v EFTHIMIOS EVRENOPOULOS
Date of judgment:
17 April 1997
Reference:
[1997] ECR I-2057
Content:
Applicability of Article 119 — Insurance scheme of a State electricity company — Survivor's pension — Direct discrimination — Protocol No 2 annexed to the Treaty on European Union — Meaning of 'legal proceedings'

1. Facts and procedure

The DEI is a State body *sui generis,* having legal personality and being governed for most purposes, including in its capacity as employer, by private law. The DEI insurance scheme, covering pensions, health and welfare assistance, was directly created, and is exclusively regulated, by Law No 4491/1966 (hereafter 'the Law'). Under Article 2 of the Law, all persons connected to the DEI by an employment relationship, together with members of their families, are compulsorily subject to that insurance scheme. Article 9(1)(a) of the Law (hereafter 'the provision at issue') provides that 'in the event of the death of the pensioner or person insured ... the widow, or, where the person insured was a woman, the widower — if he is without means and totally unfit for work and was maintained by the deceased throughout the five years preceding her death — is entitled to a pension'.

Mr Evrenopoulos' wife worked for the DEI. On her death, he applied by letter of 20 January 1989 to the Director of DEI Staff Insurance for a survivor's pension. The claim was rejected on the ground that Mr Evrenopoulos did not meet the requirements laid down.

By judgment of 16 April 1992, the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens) declared that the provision at issue was unlawful and could not be applied, on the ground that it contravened the prohibition on sex discrimination embodied in Articles 4 and 116 of the Greek Constitution and in Community law. The court accordingly annulled the DEI Insurance Board's decision. The DEI appealed to the Diikitiko Efetio Athinon, which decided to stay the proceedings and to refer various questions to the Court of Justice.

2. Questions referred to the Court

1) Is the DEI insurance scheme. an occupational or a statutory scheme?

2) Does Article 119 of the EC Treaty or Directive 79/7/EEC apply to the scheme, in particular to the survivors' benefits for which it provides?

3) Is Article 9(1)(a) of Law No 4491/1966 contrary to Article 119 of the Treaty?

4) Is its maintenance in force permitted by any other Community provision?

5) Does Article 119 of the Treaty apply to the case in point in the light of Protocol No 2 to the Treaty on European Union and the fact that the respondent brought his original action before 17 May 1990, that is to say, on 12 June 1989, but that action was, however, dismissed by Decision No 8361/1990 of the Diikitiko Protodikio Athinon, because no objection had been lodged (quasi-judicial action) against the decision of the Director of Staff Insurance, and in the decision a period of three months was granted for lodging such an objection?

6) If the answers to Questions (3) and (5) are in the affirmative, is a widower who does not receive a pension or other survivor's benefits on the basis of that provision (Article 9(1)(a) of Law No 4491/1966) entitled to a pension and survivor's benefits under the same conditions as those laid down for widows?

3. Judgment of the Court

As regards the first and second questions, the Court pointed out that the only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment based on the wording of Article 119 itself (judgment of 28 September 1994, *Beune,* Case C-7/93, [1994] ECR I-4471, paragraph 43). Furthermore, a survivor's pension provided for by an occupational pension scheme is an advantage deriving from the survivor's spouse's membership of the scheme and accordingly falls within the scope of Article 119 (judgment of 6 October 1993, *Ten Oever,* Case C-109/91, [1993] ECR I-4879, paragraphs 13 and 14, and of 28 September 1994, *Coloroll Pension Trustees,* Case C-200/91, [1994] ECR I-4389, paragraph 18).

With regard to the third and fourth questions, the Court noted that Article 119 prohibits any discrimination in matters of pay as between men and women, whatever the system which gives rise to such inequality (judgment of 17 May 1990, *Barber,* Case C-262/88, [1990] ECR I-1889, paragraph 32). It is clear from the documents before the court in the main proceedings that the provision at issue directly discriminates against men in that the award to a widower of a pension falling within the meaning of 'pay' as used in Article 119 is subject to specific conditions which are not applied to widows. Clearly, there is no rule of Community law under which the maintenance in force of such a discriminatory provision could be justified.

As to the fifth question, it is clear that the proceedings or equivalent claims on account of which, by virtue of the *Barber* judgment and Protocol No 2, the temporal limitation laid down therein may not apply must be initiated in accordance with the procedural rules applicable in the Member State concerned. As regards the main action in this case, although the first action brought by Mr Evrenopoulos challenged the implied rejection of his pension claim and was dismissed by the national court of first instance in so far as the scope of that action had been extended to cover the Director's express refusal, the court granted Mr Evrenopoulos a period of three months in which to lodge an objection against that decision with the Insurance Board, which he did, and Mr Evrenopoulos subsequently brought a second action challenging the Board's rejection of that objection. It is the decision of the national court of first instance in respect of the second action which was appealed against to the Diikitiko Efetio Athinon. It follows that the judicial proceedings between Mr Evrenopoulos and the DEI commenced with the original action, which was brought before the Diikitiko Protodikioon 12 June 1989, and hence before 17 May 1990, the date of the *Barber* judgment.

As regards the sixth question, the Court referred to its *Coloroll Pension Trustees* judgment, in which it stated that once it has found that discrimination in relation to pay exists and so long as measures for bringing about equal treatment have not been adopted by the scheme, the only proper way of complying with Article 119 is to grant the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class. Consequently, a widower in the same situation as Mr Evrenopoulos must be awarded benefits under the same conditions as those laid down for widows.

The Court (Sixth Chamber), hereby rules:

1) *The benefits granted under a pension scheme such as the insurance scheme of the Dimosia Epicheirisi llectrismou, including survivors' benefits, fall within the scope of Article 119 of the EC Treaty.*

2) *Where a survivor's pension falls within the definition of pay for the purposes of Article 119 of the Treaty, Article 119 precludes the application of a provision of national law which makes the award of such a pension to a widower subject to special conditions which are not applied to widows, and there is no rule of Community law which could justify the maintenance in force of such a provision.*

3) *On a proper construction of the Protocol concerning Article 119 of the Treaty establishing the European Community, that Article may be relied upon in proceedings initiated before 17 May 1990 in order to obtain benefits under an occupational social security scheme, even if the action was declared inadmissible on the ground that the applicant had not lodged a prior objection, where the national court has granted an extension of the period prescribed for lodging such an objection.*

4) *Article 119 of the Treaty requires that widowers discriminated against in breach of that provision be awarded a pension or other survivor's benefit under the same conditions as widows.*

Case C-66/95
THE QUEEN v SECRETARY OF STATE FOR SOCIAL SECURITY EX PARTE: EUNICE SUTTON
Date of judgment:
22 April 1997
Reference:
[1997] ECR I-2163
Content:
Directive 79/7/EEC — Responsibility of a Member State for an infringement of Community law — Right to receive interest on arrears of social security benefits

1. Facts and procedure

Mrs Sutton cared for her daughter from 1968, the year in which the daughter fell ill. On 19 February 1987, Mrs Sutton, who was then 63 years old, submitted an application for Invalid Care Allowance ('ICA') which the Adjudication Officer, the competent national authority, rejected on the ground that Mrs Sutton had reached retirement age and could not be treated as if she had been entitled to ICA before reaching that age. Article 37(1) of the Social Security Act 1975 ('the Act'), as amended, provides that a person is entitled to ICA for any day on which he is engaged in caring for a severely disabled person, if that activity is regular and substantial, he is not gainfully employed and the severely disabled person is a relative of the person concerned for the purposes of the Act. Section 37(5) of the Act provides that a person who has attained pensionable age is not entitled to ICA unless he was entitled or is considered to have been so entitled immediately before attaining that age. In the United Kingdom, pensionable age is fixed at 60 for women and 65 for men. Under English law, no interest is payable on arrears of social security benefits in respect of a period prior to the decision of the competent body in favour of the claimant.

Mrs Sutton appealed against that decision, claiming that Article 37(5) of the Act was contrary to Directive 79/7, since it prevented her, on account of her age, from obtaining the social security benefits to which a man of the same age would have been entitled. Following the Court's judgment of 30 March 1993 in Case C-328/91, *Thomas and Others,* [1993] ECR I-1247, the Social Security Commissioner held that the Adjudication Officer could not rely on Article 7(1)(a) of Directive 79/7 to justify a refusal, by virtue of Article 37(5) of the Act, to award ICA to women aged over 60. The Commissioner therefore decided that Mrs Sutton was entitled to ICA with effect from 19 February 1986 until the date of her death and that payment of arrears of ICA was to be subject to set-off in respect of overpayments which had previously been made by way of other non-cumulative benefits. Mrs Sutton claimed interest on the arrears which had been awarded to her. The Secretary of State dismissed that claim on the ground that national law did not provide for payment of interest on social security benefits.

2. Question referred to the Court

Where a claimant is entitled to a national social security benefit by virtue of falling within the scope of Council Directive 79/7/EEC, does Community law, in the circumstances of the present case, entitle the claimant to interest on the award of benefit and, if so:

1) from what date is interest payable?

2) what shall the rate of interest be?

3) is interest to be calculated only on the balance which falls due after offsetting, in accordance with national overlapping rules, any other benefit payments made for the same period?

3. Judgment of the Court

Having examined the scope of Article 6 of Directive 79/7, the Court first made a distinction between Mrs Sutton's situation and that giving rise to the judgment of 2 August 1993, *Marshall II,* Case C-271/91, [1993] ECR I-4367). The *Marshall II* judgment concerns the award of interest on amounts payable by way of reparation for loss and damage

sustained as a result of discriminatory dismissal. As the Court observed in paragraph 31 of that judgment, in such a context full compensation for the loss and damage sustained cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment. By contrast, the action brought by Mrs Sutton concerns the right to receive interest on amounts payable by way of social security benefits. Those benefits are paid to the person concerned by the competent bodies, which must, in particular, examine whether the conditions laid down in the relevant legislation are fulfilled. Consequently, the amounts paid in no way constitute reparation for loss or damage sustained and the reasoning of the Court in its Marshall II judgment cannot be applied to a situation of that kind. Accordingly, although Article 6 of Directive 79/7 requires the Member States to adopt the measures necessary to enable all persons who consider themselves to have been wronged by discrimination prohibited under the directive in the context of the award of social security benefits to establish the unlawfulness of such discrimination and to obtain the benefits to which they would have been entitled in the absence of discrimination, the payment of interest on arrears of benefits cannot be regarded as an essential component of the right thereby defined.

With reference having been made also to the possibility that the right to payment of interest on arrears of social security benefits flows from the principle that a State is liable for breach of Community law, the Court noted first of all that the principle of the State being liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (judgments in *Francovich and Others,* paragraph 35; of 5 March 1996, *Brasserie du pêcheur and Factortame,* Joined Cases C-46/93 and C-48/93, [1996] ECR I-1029, paragraph 31; of 26 March 1996, *British Telecommunications,* Case C-392/93, [1996] ECR I-1631, paragraph 38; and of 23 May 1996, *Hedley Lomas,* Case C-5/94, [1996] ECR I-2553, paragraph 24). According to the abovementioned case law, a Member State's obligation to make reparation for the loss and damage so caused is subject to three conditions: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. Finally, it is settled law that, while the right to reparation is founded directly on Community law where the three conditions set out above are fulfilled, the national law on liability provides the framework within which the State must make reparation for the consequences of the loss and damage caused, provided always that the conditions laid down by national law relating to reparation of loss and damage must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.

It is for the national court to assess whether, in the context of the dispute before it and of the national procedure, Mrs Sutton is entitled to reparation for the loss which she claims to have suffered as a result of the breach of Community law by the Member State concerned, and, if appropriate, to determine the amount of such reparation.

The Court, hereby rules:

Article 6 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security does not require that an individual should be able to obtain interest on arrears of a social security benefit such as Invalid Care Allowance, when the delay in payment of the benefit is the result of discrimination prohibited by Directive 79/7. However, a Member State is required to make reparation for the loss and damage caused to an individual as a result of the breach of Community law. Where the conditions for State liability are fulfilled, it is for the national court to apply that principle.

Case C-180/95
NILS DRAEHMPAEL v URANIA IMMOBILIENSERVICE OHG
Date of judgment:
22 April 1997
Reference:
[1997] ECR I-2195
Content:
Directive 76/207/EEC — Right to reparation in the event of discrimination as regards access to employment — Choice of sanctions by the Member States — Setting of a ceiling for awards of compensation — Setting of a ceiling for aggregate of compensation awards

1. Facts and procedure

Mr Draehmpaehl applied by letter dated 17 November 1994 for a post advertised by Urania in the daily newspaper *Hamburger Abendblatt*. The advertisement was worded as follows: 'We are seeking an experienced female assistant in our sales management department. If you can get along with the chaotic members of a sales-orientated firm, are willing to make them coffee, get little praise and can work hard, you are the right person for us. We need someone who is able to work on the computer and think with and for others. If you can really face this challenge, we await your application with documents giving full information. But do not say we have not warned you ....' Urania did not reply to Mr Draehmpaehl's letter, nor did it return the documents accompanying his application. Claiming that he was the best qualified applicant for the position and that he had suffered discrimination on grounds of sex in the making of an appointment, Mr Draehmpaehl brought proceedings in the Arbeitsgericht Hamburg for reparation of damage by payment of compensation equal to three-and-a-half months' earnings. The Arbeitsgericht took the view that the plaintiff had been discriminated against by Urania on the grounds of his sex since its job advertisement was formulated in terms which were not neutral and was clearly addressed to women.

2. Questions referred to the Court

1) Does a statutory provision which makes it a condition for an award of compensation for discrimination on grounds of sex in the making of an appointment that there must be fault on the part of the employer conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions?

2) Does a statutory provision which prescribes an upper limit of three months' salary as compensation for discrimination on grounds of sex in the making of an appointment — in contrast to other provisions of domestic civil and labour law — for applicants of either sex who have been discriminated against in the procedure, but who would not have obtained the position to be filled even in the event of non-discriminatory selection by reason of the superior qualifications of the applicant appointed, conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions?

3) Does a statutory provision which prescribes an upper limit of three months' salary as compensation for discrimination on grounds of sex in the making of an appointment — in contrast to other domestic provisions of civil and labour law — for applicants of either sex who, in the event of non-discriminatory selection, would have obtained the position to be filled, conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions?

4) Does a statutory provision which, where compensation is claimed by several parties for discrimination on grounds of sex in the making of an appointment, prescribes an upper limit of the aggregate of six months' salary for all persons who have suffered discrimination — in contrast to other provisions of domestic civil and labour law — conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions?

3. Judgment of the Court

With regard to the first question, the Court pointed to its judgment of 8 November 1990, *Dekker* (Case C-177/ 88, [1990] ECR I-3941, paragraph 22), in which it held that the Directive does not make liability on the part of the person guilty of discrimination conditional on proof of fault or on the absence of any ground discharging such liability. In the same judgment, the Court stated that when the sanction chosen by the Member State is provided for in rules governing the employer's civil liability, any breach of the prohibition of discrimination must, in itself, be sufficient to render the employer fully liable, without there being any possibility of invoking the grounds of exemption provided for by domestic law. It must therefore be concluded that the Directive precludes provisions of domestic law which make reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment subject to the requirement of fault.

As regards the second and third questions, the Court pointed out first of all that, even though the Directive does not impose a specific sanction on the Member States, nevertheless Article 6 obliges them to adopt measures which are sufficiently effective for achieving the aim of the Directive and to ensure that those measures may be effectively relied on before the national courts by the persons concerned (judgment of 10 April 1984, *Von Colson and Kamann,* Case 14/83, [1984] ECR 1891, paragraph 18). Moreover, the Directive requires that, if a Member State chooses to penalise breach of the prohibition of discrimination by the award of compensation, that compensation must be such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained. Purely nominal compensation would not satisfy the requirements of an effective transposition of the Directive (*Von Colson and Kamann* judgment, paragraphs 23 and 24). The Court noted further that the provisions of German law applicable in the case in question place on compensation a specific ceiling which is not provided for by other provisions of domestic civil and labour law. In choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance (judgment of 21 September 1989, *Commission* v *Greece,* Case 68/88, [1989] ECR 2965, paragraph 24).

The Court next considered whether its reasoning applies equally to job applicants who, because the successful applicant had superior qualifications, would not have obtained the position, even if the selection process had been free of discrimination, and to those who would have obtained the position if the selection process had been carried out without discrimination. In this connection, the Court pointed out that, while reparation must be adequate in relation to the damage sustained, such reparation may nevertheless take account of the fact that, even if there had been no discrimination in the selection process, some applicants would not have obtained the position to be filled since the applicant appointed had superior qualifications. It is indisputable that such applicants, not having suffered any damage through exclusion from the recruitment procedure, cannot claim that the extent of the damage they have sustained is the same as that sustained by appli-

cants who would have obtained the position if there had been no discrimination in the selection process. The Court therefore did not deem it unreasonable for a Member State to lay down a statutory presumption that the damage suffered by an applicant belonging to the first category may not exceed a ceiling of three months' salary. The Court nevertheless made clear that it is for the employer, who has in his possession all the applications submitted, to adduce proof that the applicant would not have obtained the vacant position even if there had been no discrimination.

As to the fourth question, the Court referred to its *Von Colson and Kamann* judgment, in which it held that the Directive entails that the sanction chosen by the Member States must have a real dissuasive effect on the employer and must be adequate in relation to the damage sustained in order to ensure real and effective judicial protection. In the present case, it is clear that the disputed national provision, which places a ceiling of six months' salary on the aggregate amount of compensation for all applicants harmed by discrimination on grounds of sex in the making of an appointment, where several applicants claim compensation, may lead to the award of reduced compensation and may have the effect of dissuading applicants so harmed from asserting their rights. The Court noted, moreover, that such a ceiling on the aggregate compensation is not prescribed by other provisions of domestic civil and labour law.

The Court, hereby rules:

1) *When a Member State chooses to penalise, under rules governing civil liability, breach of the prohibition of discrimination, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and, in particular, Articles 2(1) and 3(1) thereof, preclude provisions of domestic law which make reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment subject to the requirement of fault.*

2) *Directive 76/207 does not preclude provisions of domestic law which prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant where the employer can prove that, because the applicant engaged had superior qualifications, the unsuccessful applicant would not have obtained the vacant position even if there had been no discrimination in the selection process. In contrast, the Directive precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant discriminated against on grounds of sex in the making of an appointment where that applicant would have obtained the vacant position if the selection process had been carried out without discrimination.*

3) *Directive 76/207 precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, impose a ceiling of six months' salary on the aggregate amount of compensation which, where several applicants claim compensation, may be claimed by applicants who have been discriminated against on grounds of their sex in the making of an appointment.*

Case C-400/95
HANDELS- OG KONTORFUNKTIONAERERNES FORBUND I DANMARK, ACTING ON BEHALF OF HELLE ELISABETH LARSSON v DANSK HANDEL & SERVICE, ACTING ON BEHALF OF FØTEX SUPERMARKED A/S
Date of judgment:
29 May 1997
Reference:
[1997] ECR I-2757
Content:
Directive 76/207/EEC — Conditions governing dismissal — Absence due to an illness attributable to pregnancy or confinement — Absence during pregnancy and after confinement

1. Facts and procedure

Ms Larsson, who was employed by Føtex as from March 1990, informed her employer in August 1991 that she was pregnant. During her pregnancy, Ms Larsson was twice on sick leave. The first period of sick leave was from 7 to 24 August 1991. The second, which was caused by a loosening of the pelvic ring linked to her pregnancy, lasted from 4 November 1991 to 15 March 1992, when her maternity leave commenced. Ms Larsson gave birth on 2 April 1992. She then took maternity leave of 24 weeks, to which she was entitled under the applicable Danish legislation. Her maternity leave came to an end on 18 September 1992, after which she took her annual leave until 16 October 1992. Then, as she was still under treatment for the loosening of the pelvic ring, she was again on sick leave. She was not found fit to resume work until 4 January 1993. By letter dated 10 November 1992, less than one month after the end of her annual leave, Fotex informed Ms Larsson that it was terminating her employment contract as from the end of December 1992. Ms Larsson claimed that her dismissal while on sick leave was contrary to the Directive inasmuch as her illness began during her pregnancy and continued after the expiry of her maternity leave.

2. Question referred to the Court

Does Article 5(1), in conjunction with Article 2(1), of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, cover dismissal as a result of absence following the end of maternity leave if the absence is attributable to an illness which arose during pregnancy and continued during and after maternity leave, it being assumed that the dismissal took place after the end of the maternity leave?

3. Judgment of the Court

The Court pointed out firstly that, in its judgment of 8 November 1990, *Handels- og Kontorfunktionaerernes Forbund i Danmark* (Case C-179/88, [1990] ECR I-3979 — *Hertz* judgment), which concerned the dismissal of a woman on the ground of periods of absence following her maternity leave, the Court held that, without prejudice to the provisions of national law adopted pursuant to Article 2(3) of the Directive, Article 5(1) in conjunction with Article 2(1) thereof does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement. Responding to Ms Larsson's belief that a distinction should be drawn between her case and that of Mrs Hertz, the Court stated that, in the Hertz judgment, it considered that, in the case of an illness manifesting itself after maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness, and that such a pathological condition is covered by the general rules applicable in the event of illness. Contrary to what was being maintained, the Court was not thereby drawing a distinction on the basis of the moment of onset or first appearance of the illness.

The Court went on to state that during the maternity leave accorded to her pursuant to national law, a woman is accordingly protected against dismissal due to absence (see *Hertz* judgment,

paragraph 15). To accept that absence during such a period could be taken into account as grounds for a subsequent dismissal would be contrary to the objective of permitting national measures concerning the protection of women, particularly as regards pregnancy and maternity, pursued by Article 2(3) of the Directive, and would deprive that provision of its effectiveness (see, with regard to night-time work by pregnant women, judgment of 5 May 1994, *Habermann-Beltermann,* Case C-421/92, [1994] ECR I-1657, paragraph 24). Outside the periods of maternity leave laid down by the Member States to allow female workers to be absent during the period in which the problems inherent in pregnancy and confinement occur, however, and in the absence of any national or, as the case may be, Community provisions affording women specific protection, a woman is not protected under the Directive against dismissal on grounds of periods of absence due to an illness originating in pregnancy. As male and female workers are equally exposed to illness, the Directive does not concern illnesses attributable to pregnancy or confinement.

Although Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ L 348, p. 1) is not applicable *ratione temporis* to the case at issue, the Court added that in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, the Community legislature has subsequently provided, pursuant to Article 10 of that Directive, for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases unconnected with their condition (judgment of 14 July 1994, *Webb,* Case C-32/93, [1994] ECR I-3567, paragraphs 21 and 22). It is clear from the objective of that provision that absence during the protected period, other than for reasons unconnected with the employee's condition, can no longer be taken into account as grounds for subsequent dismissal.

The Court (Sixth Chamber), hereby rules:

Without prejudice to the provisions of national law adopted pursuant to Article 2(3) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1), in conjunction with Article 2(1), of that directive does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement, even where that illness arose during pregnancy and continued during and after maternity leave.

Case C-1/95
HELLEN GERSTER v FREISTAAT BAYERN
Date of judgment:
2 October 1997
Reference:
[1997] ECR I-5253
Content:
Article 119 of the Treaty — Employment relationships arising in the public service — Directive 76/207/EEC — Part-time employment — Calculation of length of service

1. Facts and procedure

Mrs Gerster entered the service of the Bavarian State finance administration on 1 August 1966. She was made a probationary official on 1 May 1968 and given a permanent appointment on 27 June 1977. Mrs Gerster took unpaid leave between 7 September 1984 and 6 September 1987 since when she has worked part-time — one-half of normal working hours — at the local office of the Bavarian State finance administration. By letter of 2 December 1993, Mrs Gerster applied for a vacancy with the Finanzamt Numberg West (Nuremberg-West Tax Office). In her letter she asked for her part-time employment since September 1987 to be treated as full-time employment for the purpose of calculating length of service when it came to assessing her candidature. The Oberfinanzdirektion (Principal Revenue Office), Nuremberg, rejected Mrs Gerster's application by decision of 5 January 1994 on the ground that the vacant post should be filled by a civil servant placed higher than Mrs Gerster on 'the list of persons eligible for promotion'.

The rules applicable to the Bavarian State civil service are set out in the Laufbahnverordnung (hereafter 'the LBV'). This provides that promotion to a higher grade is to be based on merit and length of service. Section 13(2) of the LBV, as applicable at the material time, provides that 'periods of employment during which the hours worked are less than half normal working hours are not to be taken into account for the purposes of calculating length of service; periods of employment during which the hours worked are at least half of normal working hours are treated as equivalent to two-thirds for the purposes of calculating length of service; periods of employment during which the hours worked exceed two-thirds of normal working hours are deemed equivalent to periods of full-time employment for the purposes of calculating length of service'.

2. Questions referred to the Court

1) Is Article 119 of the EC Treaty applicable to public servants?

2) If question (1) is to be answered in the affirmative, is there an infringement of Article 119 of the EC Treaty and of Council Directive 75/117/EEC in the form of indirect discrimination against women where section 13(2), second sentence, of the Laufbahnverordnung (regulations on career structure) provides that, for the purpose of calculating the length of service of public servants, periods of employment involving working hours of at least one-half to two-thirds of normal working hours are counted only as two-thirds of normal working hours?

3) If question (1) is to be answered in the affirmative, is there an infringement of Council Directive 76/207/EEC in the form of indirect discrimination against women in regard to access to career progression (promotion), where section 13(2), second sentence, of the Laufbahnverordnung provides that, for the purpose of calculating the length of service of public servants, periods of employment involving working hours of at least one-half to two-thirds of normal working hours are counted only as two-thirds of normal working hours?

3. Judgment of the Court

With regard to the first question, the Court pointed out that Article 119 of the Treaty lays down the

principle that men and women should receive equal pay for equal work and that to exclude the public service from the scope of Article 119 would run counter to that objective. Moreover, the Court held in its judgment of 21 May 1985, *Commission* v *Germany,* Case 248/83, [1985] ECR 1459, paragraph 16), that both Directive 76/207 and Directive 75/117 apply to employment in the public service. It further stated that those directives — like Article 119 — are of general application, a factor inherent in the very nature of the principle which they lay down.

Replying to the second question, the Court emphasised that where, as in the present case, a civil servant is placed on the list of candidates eligible for promotion, his progression to a higher grade, and accordingly to a higher level of remuneration, is not a right but a mere possibility. Actual promotion depends on various factors such as, first, the availability of a post in the higher grade and, secondly, the maintenance of his position on the list of persons eligible for promotion. A provision such as section 13(2), second sentence, of the LBV is thus primarily designed to lay down the conditions, in terms of length of service, for a civil servant's inclusion on the list of persons eligible for promotion and thus for access to a higher grade. Accordingly, it only affects indirectly the level of pay to which the person concerned is entitled upon completion of the promotions procedure.

As regards the third question, the Court's first comment was that the provision of national law at issue in the main proceedings does not discriminate directly, since the method of calculating length of service in the case of part-time employees is not determined by gender. It should therefore be determined whether a measure of that kind may amount to indirect discrimination. The Court has consistently held that indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, to that effect, judgments of 14 December 1995, *Megner and Scheffel,* Case C-444/93, [1995] ECR I-4741, paragraph 24, and of 24 February 1994, *Roks and Others,* Case C-343/92, [1994] ECR I-571, paragraph 33). Accordingly, the provision of national law at issue in the main proceedings treats part-time employees less favourably than full-time employees in so far as, since the former accrue length of service more slowly, they perforce gain promotion later. Mrs Gerster maintains that, in the department where she completed her period of service, 87 % of part-time employees are women. According to the national court's findings, this percentage reflects the situation across the board in the Bavarian civil service. In a situation of that kind, it must be concluded that in practice provisions such as those at issue in the main proceedings result in discrimination against women employees as compared with men and must in principle be regarded as contrary to Directive 76/207. The position would be different only if the distinction between those two categories of employee were justified by factors unrelated to any discrimination on grounds of sex (see, *inter alia,* judgments of 13 May 1986, *Bilka,* Case 170/84, [1986] ECR 1607, paragraph 29; of 13 July 1989, *Rinner-Kühn,* Case 171/88, [1989] ECR 2743, paragraph 12; and of 6 February 1996, *Lewark,* Case C-457/93, [1996] ECR I-243, paragraph 31). The Court has consistently held that it is for the national court, which alone has jurisdiction to assess the facts and interpret the national legislation, to determine in the light of all the circumstances whether, and to what extent, a legislative provision which, although applying irrespective of gender, actually affects a greater number of women than men, is justified by objective reasons unrelated to any discrimination on grounds of sex (see judgments of 31 March 1981, *Jenkins,* Case 96/80, [1981] ECR 911, paragraph 14; *Bilka,* paragraph 36; and *Rinner-Kühn,* paragraph 15).

In this connection, the Court noted that according to the Bayerisches Verwaltungsgericht (Bavarian Administrative Court), the defendant stated that the amendment made to the LBV in 1995 was 'intended to assist in making working life more compatible with family life'. The protection of

women — and men — both in family life and in the workplace is a principle broadly accepted in the legal systems of the Member States as a natural corollary of the fact that men and women are equal, and is upheld by Community law. The Court then referred to its judgment of 7 February 1991, *Nimz,* Case C-184/89, [1991] ECR I-297, paragraph 14), in which the Court took the view that it is impossible to identify objective criteria unrelated to any discrimination on grounds of sex on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalisation concerning certain categories of worker. Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours.

The Court left it to the Bayerisches Verwaltungsgericht to ascertain the relevant facts in the light of these principles.

The Court (Sixth Chamber), hereby rules:

1) *Article 119 of the EC Treaty is to be interpreted as applying to employment relationships arising in the public service.*

2) *A provision of national law which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours does not fall within the scope of Article 119 of the Treaty or of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.*

3) *Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes national legislation which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours, save where such legislation is justified by objective criteria unrelated to any discrimination on grounds of sex.*

Case C-100/95
BRIGITTE KORDING v SENATOR FÜR FINANZEN
Date of judgment:
2 October 1997
Reference:
[1997] ECR I-5289
Content:
Directive 76/207 — Public servant — Part-time employment — Right of exemption from a qualifying examination for entry to a profession — Indirect discrimination

1. Facts and procedure

The duties carried out by Mrs Kording at the Bremen Oberfinanzdirektion (Principal Revenue Office) are those of a case officer. By letter of 21 October 1992, she requested the Senator für Finanzen to provide her with a written statement, binding on the administration, to the effect that as of 30 April 1993 she would be exempt, by virtue of the duties she had performed, from the qualifying examination for entry to the profession of tax consultant. On 11 February 1993 the admissions committee issued Mrs Kording with a written statement, binding on the administration, to the effect that the duties performed were such as to satisfy the relevant requirements but adding that Mrs Kording would not have acquired by 30 April 1993 the minimum length of professional experience — 15 years — required under the Steuerberatungsgesetz (Law on Tax Consultancy). According to that statement, in prescribing the length of practical experience required, the legislature had proceeded on the assumption that the work would be performed by way of a main occupation, that is to say, through full-time employment. Consequently, in the case of an applicant employed part-time, the hours worked can be taken into account only on a pro rata basis.

2. Question referred to the Court

Is there an infringement, in the form of indirect discrimination against women, of Article 3(1) of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, p. 40), or of other Community legislation, where, under domestic legislation (Paragraph 38(1), No 4(a), second subparagraph, in conjunction with Paragraph 36(3) of the Steuerberatungsgesetz (Law on Tax Consultancy)), the 15-year minimum period of employment as a case officer in the executive grade of the revenue administration, which is required for exemption from the tax consultants' examination, is proportionately extended in the case of part-time employment involving working hours of no less than one-half of the normal working hours, and where, of the 119 part-time executive-grade officers in the Bremen revenue administration, 110 are women (92.4 %)?

3. Judgment of the Court

As the Court stated in its judgment of 14 February 1995, *Schumacker* (Case C-279/93, [1995] ECR I-225, paragraph 30), discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. In this connection, the Court observed that the legislation applicable in the main proceedings does not involve any direct discrimination since, where the same work is performed on a part-time basis, the total length of service required of persons working as case officers in the revenue administration who wish to work as tax consultants without taking the examination is extended in exactly the same way for men as for women. It should therefore be determined whether a measure of that kind may amount to indirect discrimination. The Court has consistently held that indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, to that effect, judgments of 14 December 1995, *Megner and Scheffel,* Case C-444/93, [1995] ECR I-4741, paragraph 24, and of 24 February 1994, *Roks and Others,* Case C-343/92, [1994] ECR I-571, paragraph 33). In that

regard, it cannot be denied that measures such as those at issue in the main proceedings have an impact on part-time employees and place them at a disadvantage by comparison with those who work full-time. To gain exemption from the qualifying examination, part-time employees must work several years longer than full-time employees. Moreover, the order for reference discloses that 92.4 % of executive-grade employees working on a part-time basis in the Bremen revenue administration are women.

In those circumstances, the Court concluded that measures such as those at issue in the main proceedings give rise in practice to discrimination against women as compared with men and must in principle be regarded as contrary to the Directive. The position would be different only if the distinction between those two categories of employee were justified by factors unrelated to any discrimination on grounds of sex (see, inter alia, judgments of 13 May 1986, *Bilka,* Case 170/84, [1986] ECR 1607, paragraph 29; of 13 July 1989, *Rinner-Kühn,* Case 171/88, [1989] ECR 2743, paragraph 12; and of 6 February 1996, *Lewark,* Case C-457/93, [1996] ECR I-243, paragraph 31). It is for the national court, which alone has jurisdiction to assess the facts and interpret the national legislation, to determine in the light of all the circumstances whether, and to what extent, a legislative provision which, although applying irrespective of gender, actually affects a greater number of women than men, is justified by objective reasons unrelated to any discrimination on grounds of sex (see judgments of 31 March 1981, *Jenkins,* Case 96/80, [1981] ECR 911, paragraph 14; *Bilka,* paragraph 36; and *Rinner-Kühn,* paragraph 15).

In this connection, the Court pointed to its judgment of 7 February 1991, *Nimz* (Case C-184/89, [1991] ECR I-297, paragraph 14), in which the Court took the view that it is impossible to identify objective criteria unrelated to any discrimination on grounds of sex on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalisation concerning certain categories of worker. Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours. In situations of this kind, where a part-time employee is treated less favourably than a full-time employee, measures such as those applicable in the main proceedings give rise to indirect discrimination against female employees if substantially fewer men than women work part-time; the measures in question are therefore contrary to Article 3(1) of the Directive. However, such inequality of treatment would be compatible with that provision if it were justified by objective factors unrelated to any discrimination on grounds of sex.

The Court left it to the Finanzgericht to ascertain the relevant facts in the light of these principles.

The Court (Sixth Chamber), hereby rules:

Article 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes, in cases where far more women will be affected than men, national legislation which provides that, in the case of part-time employment involving working hours of no less than one-half of normal working hours, the total length of professional experience required for exemption from the qualifying examination for tax consultants is to be extended on a pro rata basis, save where such legislation is justified by objective factors unrelated to any discrimination on grounds of sex.

Case C-409/95
HELLMUT MARSCHALL v LAND NORDRHEIN-WESTFALEN
Date of judgment:
11 November 1997
Reference:
[1997] ECR I-6363
Content:
Directive 76/207 — Equally qualified male and female candidates — Priority for female candidates — Saving clause

1. Facts and procedure

The second sentence of Paragraph 25(5) of the Beamtengesetz (Law on Civil Servants, hereafter 'the provision in question') provides: 'Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual (male) candidate tilt the balance in his favour'. According to the observations of the *Land,* the rule of priority laid down by that provision introduced an additional promotion criterion, that of being a female, in order to counteract the inequality affecting female candidates as compared with male candidates applying for the same post. Where qualifications are equal, employers tend to promote men rather than women because they apply traditional promotion criteria which in practice put women at a disadvantage, such as age, seniority and the fact that a male candidate is a head of household and sole breadwinner for the household. In providing that priority is to be given to the promotion of women 'unless reasons specific to an individual (male) candidate tilt the balance in his favour', the legislature deliberately chose, according to the *Land,* a legally imprecise expression in order to ensure sufficient flexibility and, in particular, to allow the administration latitude to take into account any reasons which may be specific to individual candidates. Consequently, notwithstanding the rule of priority, the administration can always give preference to a male candidate on the basis of promotion criteria, traditional or otherwise.

Mr Marschall works as a tenured teacher for the *Land,* his salary being that attaching to the basic grade in career bracket A 12. On 8 February 1994 he applied for promotion to an A 13 post ('teacher qualified for teaching in a first-grade secondary school and so employed') at the Gesamtschule Schwerte. The Bezirksregierung (District Authority) Arnsberg informed him, however, that it intended to appoint a female candidate to the position. Mr Marschall lodged an objection which the Bezirksregierung rejected by decision of 29 July 1994 on the ground that, in view of the provision in question, the female candidate must necessarily be promoted to the position since, according to their official performance assessments, both candidates were equally qualified and since at the time when the post was advertised there were fewer women than men in career bracket A 13.

2. Question referred to the Court

Does Article 2(1) and (4) of Council Directive 76/207/ EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions preclude a rule of national law which provides that, in sectors of the public service in which fewer women than men are employed in the relevant higher grade post in a career bracket, women must be given priority where male and female candidates for promotion are equally qualified (in terms of suitability, competence and professional performance), unless reasons specific to an individual male candidate tilt the balance in his favour *(sofern nicht in der Person eines mannlichen Mitbewerbers liegende Grunde uberwiegen)?*

3. Judgment of the Court

The Court pointed firstly to its judgment of 17 October 1995, *Kalanke* (Case C-450/93, [1995] ECR

I-3051), in which the Court held that a national rule which provides that, where equally qualified men and women are candidates for the same promotion in fields where there are fewer women than men at the level of the relevant post, women are automatically to be given priority, involves discrimination on grounds of sex. However, unlike the provisions in question in the *Kalanke* judgment, the provision in question in this case contains a clause (*Offnungsklausel,* hereafter 'saving clause') to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour. It is therefore necessary to consider whether a national rule containing such a clause is designed to promote equality of opportunity between men and women within the meaning of Article 2(4) of the Directive.

In this connection, the Court noted that such a provision is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life (judgment of 25 October 1988, *Commission* v *France,* Case 312/86, [1988] ECR 6315, paragraph 15, and *Kalanke,* cited above, paragraph 18). It thus authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men (*Kalanke,* paragraph 19). As noted by the Court, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.

The Court went on to observe that since Article 2(4) constitutes a derogation from an individual right laid down by the Directive, such a national measure specifically favouring female candidates cannot guarantee absolute and unconditional priority for women in the event of a promotion without going beyond the limits of the exception laid down in that provision *(Kalanke,* paragraphs 21 and 22). Unlike the rules at issue in *Kalanke,* a national rule which, as in the case in point in the main proceedings, contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. The Court stated, however, that those criteria must not be such as to discriminate against female candidates and pointed out that it is for the national court to determine whether those conditions are fulfilled on the basis of an examination of the scope of the provision in question as it has been applied by the *Land*.

The Court, hereby rules:

A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, provided that:

- *in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and*

- *such criteria are not such as to discriminate against the female candidates.*

Case C-207/96
COMMISSION OF THE EUROPEAN COMMUNITIES v ITALIAN REPUBLIC
Date of judgment:
4 December 1997
Reference:
[1997] ECR I-6869
Content:
Failure to fulfil obligations — Directive 76/207/EEC — Prohibition of night work

1. Facts and procedure

By application lodged at the Court Registry on 19 June 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary in order to comply with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40; 'the Directive'), and by retaining in national law rules prohibiting night work by women, contrary to Article 5 of the Directive, the Italian Republic had failed to fulfil its obligations under Community law.

In Italy, Article 5(1) of Law No 903 of 9 December 1977 on Equal Treatment for Men and Women at Work ('the Italian Law') provides: 'Women shall not be employed in factories or workshops between the hours of midnight and 6.00 a.m. This prohibition shall not apply to women who occupy managerial posts or are employed in the health services of the undertaking.'. The Italian Law thus maintains in force the prohibition on night work by women laid down by Law No 1305 of 22 October 1952 which ratified Convention No 89 of 9 July 1948 of the International Labour Organisation concerning Night Work of Women Employed in Industry ('the Convention').

The Court held in its judgment of 25 July 1991, *Stoeckel* (Case C-345/89, [1991] ECR I-4047) that Article 5 of the Directive is sufficiently precise to impose on Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that is subject to exceptions, where night work by men is not prohibited. Furthermore, it has repeatedly held that Article 5 is sufficiently precise and unconditional to be relied upon by an individual before a national court in order to avoid the application of any national provision not conforming to Article 5(1), which lays down the principle of equal treatment with regard to working conditions (*Stoeckel* judgment, cited above, paragraph 12; judgment of 26 February 1986, *Marshall,* Case 152/84, [1986] ECR 723, paragraph 55). Following the *Stoeckel* judgment, cited above, the Italian Republic denounced the ILO Convention No 89 in February 1992, with effect from February 1993. In view of the *Stoeckel* judgment and the Italian Republic's denunciation of the Convention, the Commission took the view that the Italian Government was required to adopt the measures needed to make the Italian Law compatible with Article 5 of the Directive.

Consequently, by letter dated 2 March 1994, it gave formal notice to the Italian Government to submit observations within two months pursuant to the first paragraph of Article 169 of the Treaty. Since that letter remained unanswered, the Commission issued a reasoned opinion on 19 November 1995 in which it called on the Italian Republic to take the necessary measures to comply with the opinion within two months from receipt thereof. Since the Commission received no reply, it brought this action before the Court. The Commission's action is based on two complaints against the Italian Republic: first, it failed to adopt within the prescribed period the laws, regulations and administrative provisions necessary in order to comply with the Directive and, secondly, it infringed Article 5 of the Directive by retaining the Italian Law after the denunciation of the ILO Convention No 89.

2. *Judgment of the Court*

With regard to the first complaint, the Court noted that although the Commission pointed out in the letter of formal notice and in the reasoned opinion that the Italian Republic was required to adopt the measures needed in order to bring domestic legislation into line with Community law, it indicated that that obligation did not arise until the Italian Republic was no longer bound by the ILO Convention No 89. The Commission claimed in its application, however, that the Italian Republic had failed to fulfil its obligations under the Directive by not adopting, within the period prescribed by the Directive, the laws, regulations and administrative provisions necessary in order to comply with it. Since there was no cogent and detailed exposition, either in the pre-litigation procedure or in the application, of the considerations which led the Commission to take the view that the Italian Republic should have complied, as regards night work by women, with the provisions of the Directive even before it had denounced the Convention, the Italian Republic was unable effectively to put forward its defence to that complaint. Accordingly, the Court declared that the first complaint was inadmissible.

As regards the second complaint, the Court noted that, even though the prohibition on night work laid down by Article 5 of the Italian Law may be relaxed, or even disapplied, in certain circumstances, the Italian Republic did not deny that, after it denounced the ILO Convention No 89, Community law precluded retention of the prohibition in Italian law. The Italian Republic stated, moreover, that that incompatibility would be rectified as soon as possible. Second, it is settled case law that the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended and also that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (judgment of 13 March 1997, *Commission* v *France,* Case C-197/96, [1997] ECR I-1489, paragraphs 14 and 15). In the present case, the Court observed that retention of the Italian Law means that those to whom it is directed are in a position of uncertainty as to their legal situation and exposed to unjustified criminal proceedings. The obligation on national courts to secure the full effect of Article 5 of the Directive by not applying any contrary national provision cannot have the effect of amending a statutory provision.

The Court (Fifth Chamber), hereby:

1) *Declares that, by retaining in national law rules prohibiting night work by women, contrary to Article 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, the Italian Republic has failed to fulfil its obligations under Community law.*

2) *Dismisses the remainder of the application as inadmissible.*

3) *Orders the Italian Republic to pay the costs.*

Case C-246/96
MARY TERESA MAGORRIAN AND IRENE PATRICIA CUNNINGHAM v EASTERN HEALTH AND SOCIAL SERVICES BOARD AND DEPARTMENT OF HEALTH AND SOCIAL SERVICES
Date of judgment:
11 December 1997
Reference:
[1997] ECR I-7153
Content:
Article 119 of the Treaty — Protocol No 2 annexed to the Treaty on European Union — Occupational social security schemes — Exclusion of part-time workers from status conferring entitlement to certain additional retirement pension benefits — Date from which such benefits are payable — National procedural time-limits

1. Facts and procedure

Under section 2(4) of the Equal Pay Act (Northern Ireland) 1970 ('the EPA), claims concerning equal pay must be brought within six months of the end of the relevant period of employment. Section 2(5) of the EPA provides that, in proceedings brought in respect of a failure to comply with an equal pay clause, a woman is not to be entitled to be awarded any payment by way of arrears of remuneration or damages in respect of a period earlier than two years before the date on which the proceedings were instituted. Regulation 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations (Northern Ireland) 1976 No 238 ('Occupational Pension Regulations'), amending the EPA, provides that, in proceedings concerning access to membership of occupational pension schemes, the right to be admitted to the scheme is to have effect from a date no earlier than two years before the institution of proceedings. Under Regulation 50(2) of the Health and Personal Social Services (Superannuation) Regulations (Northern Ireland) 1984 ('the Superannuation Regulations'), where a person has reached or passed the age of 50 and has worked as a mental health officer ('MHO') for a period of 20 years and continues to work in that capacity, his or her subsequent service is reckoned for pension purposes at twice its length and the right to a pension is obtained at the age of 55 instead of the normal age of 60. A MHO is defined as a whole-time officer on the medical or nursing staff of a hospital used wholly or partly for the treatment of persons suffering from mental disorder who devotes the whole or substantially the whole of his time to the treatment of such persons.

Mrs Magorrian and Mrs Cunningham were employed as qualified nurses in the mental health sector by a public-sector health board responsible for supplying medical and other services in a region of Northern Ireland. They commenced their careers working full-time with MHO status. When their family responsibilities increased, they both commenced working part-time and therefore lost that status. Each of them was nevertheless in charge of a hospital ward and as such responsible for full-time nurses. Both of the applicants in the main proceedings were affiliated to and contributed to the Health and Personal Social Services Superannuation Scheme ('the Superannuation Scheme'), a voluntary contracted-out pension scheme to which both the employer and the employee contribute. On 18 October 1992, Mrs Magorrian retired at the age of 59 years and 355 days, having completed 9 years and 111 days of full-time work as an MHO between 1951 and 1963, and the equivalent of 11 years and 25 days of part-time service between 1979 and 1992. She had also worked part-time between 1969 and 1979, but for hours not reckonable for pension purposes. Mrs Cunningham retired in April 1994 at the age of 56 years and 80 days, having completed 15 years and 175 days of full-time service as an MHO between 1956 and 1974, and the equivalent of 11 years and 105 days of part-time service between 1980 and 1994. She had also worked part-time between 1974 and 1980 for hours not reckonable for pension purposes and had elected not to make pension contributions during that period.

On their retirement, the applicants in the main proceedings received the lump sums to which they were entitled, together with their basic retirement pensions, but were not given certain additional benefits to which they would have been entitled under regulation 50(2) of the Superannuation Regulations if they had had MHO status at the time of their retirement.

By application dated 22 September 1992, the applicants in the main proceedings brought the matter before the national court, relying on Article 119 of the Treaty in support of their claim for additional benefits on the basis of their length of service calculated from 8 April 1976, the date of the *Defrenne* judgment (Case 43/75, [1976] ECR 455) or, in the alternative, from 13 May 1986, the date of the *Bilka* judgment (Case 170/ 84, [1986] ECR 1607). In its interlocutory judgment of 12 September 1995, the national court found that the exclusion of part-time psychiatric nurses from MHO status constituted indirect discrimination based on sex, since a considerably smaller proportion of women than men working in the mental-health sector in Northern Ireland were in a position to satisfy the requirements imposed by full-time working. It further found that discrimination to be unjustified.

2. Questions referred to the Court

In circumstances where:

a) a worker has been employed by a Health Board which is part of the State, in employment concerned with the care of the mentally ill to which an occupational pension scheme applies;

b) the worker has at all material times either been a member or been eligible to be a member of the pension scheme;

c) the pension scheme contains a term according to which those who work full-time and devote all or substantially all their working hours to the care of the mentally ill (who are described as 'Mental Health Officers') are entitled to additional benefits not available to those doing the same work part-time, viz.: Where a person has reached or passed the age of 50 and has worked as a Mental Health Officer for 20 years (here referred to as the 'qualifying service') and continues to work as a Mental Health Officer, then (i) their subsequent service is reckoned for pension purposes at twice its length (here referred to as the 'double-time service'); and (ii) they have the right to a pension at the age of 55 instead of the normal age of 60;

d) the worker is deprived of the status of Mental Health Officer and the additional benefits attached thereto solely on the ground that her employment was part-time;

e) the national tribunal has held that the provisions described at (c) and (d) constitute discrimination on grounds of sex against women working part-time in the care of the mentally ill;

f) the pension which the workers receive, and the additional benefits which they claim, are only payable to them as from their respective retirements in 1992 and 1994, after their claims have been brought before the national tribunal; and

g) the calculation of the additional benefits from their respective retirement dates in 1992 and 1994 would involve counting their years of service prior to 1992;

Question 1: From what date should the service of the workers be counted for the purpose of calculating the additional benefits to which they are entitled:

1) 8 April 1976

2) 17 May 1990

3) some other and, if so, what date?

Question 2: Where the relevant national legislation restricts back-dating entitlement in the event of a successful claim to a period of 2 years prior to the date on which the claim was made, does this amount to the denial of an effective remedy under Community law and is the Industrial Tribunal obliged to disregard such provision in domestic law if it feels it necessary to do so?

3. *Judgment of the Court*

Replying to the first question, the Court drew attention to its earlier case law. In its judgment of 17 May 1990, *Barber* (Case C-262/88, [1990] ECR 1889), the Court stated that overriding considerations of legal certainty precluded reliance being placed on the direct effect of Article 119 of the Treaty in order to claim entitlement to a pension with effect from a date prior to delivery of that judgment, except in the case of persons who had in the meantime taken steps to safeguard their rights. However, in judgments of 28 September 1994, *Vroege* (Case C-57/93, [1994] ECR I-4541, paragraphs 20 to 27) and *Fisscher* (Case C-128/93, [1994] ECR I-4583, paragraphs 17 to 24), the Court took the view that the limitation of the effects in time of the *Barber* judgment concerned only those kinds of discrimination which, owing to the transitional derogations for which Community law provided and which were capable of being applied to occupational pensions, employers and pension schemes could reasonably have considered to be permissible (judgment of 24 October 1996, *Dietz,* Case C-435/93, [1996] ECR I-5223, paragraph 19). As far as the right to join an occupational scheme was concerned, it also stated that there was no reason to suppose that those concerned could have been mistaken as to the applicability of Article 119.

As regards the right to receive benefits additional to a retirement pension under an occupational scheme such as that involved in the main proceedings, the Court finds that, even if the persons concerned have always been entitled to a retirement pension under the Superannuation Scheme, nevertheless they were not fully admitted to that contributory scheme. Solely on account of the fact that they worked part-time, they were specifically excluded from MHO status which gives access to a special scheme under the Superannuation Scheme.

In respect of the second question, the Court has consistently held that, in the absence of relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (see, to that effect, judgments of 16 December 1976, *Rewe,* Case 33/76, [1976] ECR 1989, paragraphs 5 and 6; *Comet,* Case 45/76, [1976] ECR 2043, paragraph 13; *Fisscher,* cited above, paragraph 39; and of 6 December 1994, *Johnson,* Case C-410/92, [1994] ECR I-5483, paragraph 21). The Court also stated that application of a procedural rule whereby, in proceedings concerning access to membership of occupational pension schemes, the right to be admitted to a scheme may have effect from a date no earlier than two years before the institution of proceedings would deprive the applicants in the main proceedings of the additional benefits under the scheme to which they are entitled to be affiliated, since those benefits could be calculated only by reference to periods of service completed by them as from 1990, that is to say two years prior to commencement of proceedings by them.

However, it should be noted that, in such a case, the claim is not for the retroactive award of certain additional benefits but for recognition of entitlement to full membership of an occupational scheme through acquisition of MHO status which confers entitlement to the additional benefits. Thus, whereas the rules at issue in the judgments of 27 October 1993, *Steenhorst-Neerings* (Case

C-338/91, [1993] ECR I-5475), and in *Johnson,* cited above, merely limited the period, prior to commencement of proceedings, in respect of which backdated benefits could be obtained, the rule at issue in the main proceedings in this case prevents the entire record of service completed by those concerned after 8 April 1976 until 1990 from being taken into account for the purposes of calculating the additional benefits which would be payable even after the date of the claim. Consequently, unlike the rules at issue in the judgments cited above, which in the interests of legal certainty merely limited the retroactive scope of a claim for certain benefits and did not therefore strike at the very essence of the rights conferred by the Community legal order, a rule such as that before the national court in this case is such as to render any action by individuals relying on Community law impossible in practice.

The Court (Sixth Chamber), hereby rules:

1) *Periods of service completed by part-time workers who have suffered indirect discrimination based on sex must be taken into account as from 8 April 1976, the date of the judgment in Case C-43/75 Defrenne, for the purposes of calculating the additional benefits to which they are entitled.*

2) *Community law precludes the application, to a claim based on Article 119 of the EC Treaty for recognition of the claimants' entitlement to join an occupational pension scheme, of a national rule under which such entitlement, in the event of a successful claim, is limited to a period which starts to run from a point in time two years prior to commencement of proceedings in connection with the claim.*

Case C-249/96
LISA JACQUELINE GRANT v SOUTH-WEST TRAINS LTD
Date of judgment:
17 February 1998
Reference:
[1998] ECR I-621
Content:
Article 119 of the Treaty — Scope — Refusal of travel concessions to co-habitees of the same sex

1. Facts and procedure

Ms Grant is employed by SWT, a company which operates railways in the Southampton region. Clause 18 of her contract of employment, entitled 'Travel facilities', states: 'You will be granted such free and reduced rate travel concessions as are applicable to a member of your grade. Your spouse and dependents will also be granted travel concessions'. The regulations adopted by the employer for the application of those provisions (Staff Travel Facilities Privilege Ticket Regulations) provided that concessionary tickets are granted also for one common law opposite sex spouse of staff ... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more ...'. Ms Grant applied for travel concessions for her female partner, with whom she declared she had had a 'meaningful relationship' for over two years. SWT refused to allow the benefit sought, on the ground that for unmarried persons travel concessions could be granted only for a partner of the opposite sex.

2. Questions referred to the Court

1) Is it (subject to (6) below) contrary to the principle of equal pay for men and women established by Article 119 of the Treaty establishing the European Community and by Article 1 of Council Directive 75/117 for an employee to be refused travel concessions for an unmarried cohabiting same-sex partner where such concessions are available for spouses or unmarried opposite-sex cohabiting partners of such an employee?

2) For the purposes of Article 119, does 'discrimination based on sex' include discrimination based on the employee's sexual orientation?

3) For the purposes of Article 119, does 'discrimination based on sex' include discrimination based on the sex of that employee's partner?

4) If the answer to Question (1) is yes, does an employee, to whom such concessions are refused, enjoy a directly enforceable Community right against his employer?

5) Is such a refusal contrary to the provisions of Council Directive 76/207?

6) Is it open to an employer to justify such refusal if he can show (a) that the purpose of the concessions in question is to confer benefits on married partners or partners in an equivalent position to married partners and (b) that relationships between same-sex cohabiting partners have not traditionally been, and are not generally, regarded by society as equivalent to marriage, rather than on the basis of an economic or organisational reason relating to the employment in question?

3. Judgment of the Court

In view of the close links between the questions, they should be considered together. As a preliminary point, it should be observed that the Court has already held that travel concessions granted by an employer to former employees, their spouses or dependants, in respect of their employment are pay within the meaning of Article 119 of the Treaty (see, to that effect, judgment of 9 February 1982, *Garland,* Case 12/81, [1982] ECR 359, paragraph 9). In the present case, it is common ground that a travel concession granted by an employer, on the basis of the contract of employment, to

the employee's spouse or the person of the opposite sex with whom the employee has a stable relationship outside marriage falls within Article 119 of the Treaty. Such a benefit is therefore not covered by Directive 76/207, referred to in the national tribunal's Question 5 (see judgment of 13 February 1996, *Gillespie and Others,* Case C-342/93, [1996] ECR I-475, paragraph 24).

The refusal to allow Ms Grant the concessions is based on the fact that she does not satisfy the conditions prescribed in the regulations, more particularly on the fact that she does not live with a 'spouse' or a person of the opposite sex with whom she has had a 'meaningful' relationship for at least two years. That condition, the effect of which is that the worker must live in a stable relationship with a person of the opposite sex in order to benefit from the travel concessions, is, like the other alternative conditions prescribed in the undertaking's regulations, applied regardless of the sex of the worker concerned. Thus, the Court concluded that travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex. Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex.

Second, the Court must consider whether, with respect to the application of a condition such as that at issue in the main proceedings, persons who have a stable relationship with a partner of the same sex are in the same situation as those who are married or have a stable relationship outside marriage with a partner of the opposite sex. As for the laws of the Member States, while in some of them cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognised in any particular way. The European Commission of Human Rights for its part considers that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Convention (see in particular the decisions in application No 9369/81, *X and Y* v *the United Kingdom,* 3 May 1983, Decisions and Reports 32, p. 220; application No 11716/85, *S* v *the United Kingdom,* 14 May 1986, D.R. 47, p. 274, paragraph 2; and application No 15666/89, *Kerkhoven and Hinke* v *the Netherlands,* 19 May 1992, unpublished, paragraph 1), and that national provisions which, for the purpose of protecting the family, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to Article 14 of the Convention, which prohibits *inter alia* discrimination on the ground of sex (see the decisions in *S* v *the United Kingdom,* cited above, paragraph 7; application No 14753/89, *C and L. M* v *the United Kingdom,* 9 October 1989, unpublished, paragraph 2; and application No 16106/90, *B* v *the United Kingdom,* 10 February 1990, D.R. 64, p. 278, paragraph 2).

It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex. In those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position.

In reply to Ms Grant's reliance also on the judgment in *P* v *S,* the Court stated that the provisions of Directive 76/207 prohibiting discrimination between men and women were simply the expression, in their limited field of application, of the principle of equality, which is one of the fundamental principles of Community law. It consid-

ered that that circumstance argued against a restrictive interpretation of the scope of those provisions and in favour of applying them to discrimination based on the worker's gender reassignment. That reasoning, which leads to the conclusion that such discrimination is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex, is limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation.

Ms Grant submitted, however, that, like certain provisions of national law or of international conventions, the Community provisions on equal treatment of men and women should be interpreted as covering discrimination based on sexual orientation. In this connection, she referred to the International Covenant of Civil and Political Rights of 19 December 1966 (United Nations Treaty Series, Vol. 999, p. 171). The Court replied that although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competencies of the Community (see, *inter alia,* on the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/ 94 of 28 March 1996, [1996] ECR I-1759, paragraphs 34 and 35). Furthermore, the scope of Article 119, as of any provision of Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context. Community law as it stands at present does not cover discrimination based on sexual orientation. The Court observed, however, that the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.

The Court hereby rules:

The refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the EC Treaty or Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

Joined Cases C-377 to C-384/96
AUGUST DE VRIENDT v RIJKSDIENST VOOR PENSIOENEN
Date of judgment:
30 April 1998
Reference:
[1998] ECR I-2105
Content:
Directive 79/7/EEC (Article 7) — Old-age and retirement pensions — Method of calculation — Pensionable age

1. Facts and procedure

Royal Decree No 50 of 24 October 1967 on the retirement and survivor's pension of employed workers (hereafter 'the Royal Decree'), which applied until 1 January 1991, fixed the normal retirement age at 65 for men and 60 for women. Under Article 10 of the Royal Decree, entitlement to a retirement pension accrued, for each calendar year, at the rate of a fraction of the remuneration received by the person concerned, which was determined according to specific rules, either 75 % or 60 % of such remuneration being taken into account according to whether or not there was a dependant spouse. The fraction for each calendar year had 1 as numerator and a figure not higher than 45 for men and 40 for women as denominator. The Royal Decree provided that both men and women could draw their retirement pension five years earlier than the minimum age, with the pension being reduced by 5 % for each year of anticipation. The right to an early retirement pension was abolished for women by Royal Decree No 415 of 16 July 1976.

As from 1 January 1991 a new system, established by the Law of 20 July 1990 introducing a flexible retirement age for employed workers and adapting their pensions to trends in general well-being (hereafter 'the 1990 Law') has allowed all employees, both male and female, to retire at the age of 60. As regards the calculation of the pension, the 1990 Law provided that entitlement to a retirement pension accrued, per calendar year, at the rate of a fraction, specified by the Royal Decree, of the remuneration of the person concerned, the denominator of that fraction remaining 45 for men and 40 for women. The 1990 Law also abolished, for men too, the reduction of the pension by 5 % per year anticipated.

In the case giving rise to the judgment of 1 July 1993, *Van Cant* (Case C-154/92, [1993] ECR p. I-3811), the Arbeidsrechtbank (Labour Court), Antwerp, asked the Court whether the method of calculating retirement pensions for male workers, as described above, constituted discrimination on grounds of sex within the meaning of Article 4 of the Directive. The Court went on to hold in that judgment that Articles 4(1) and 7(1) of the Directive preclude national legislation which authorises male and female workers to take retirement as from an identical age from retaining in the method of calculating the pension a difference according to sex which is itself linked to the difference in pensionable age which previously existed.

By decisions made between 18 December 1990 and 16 December 1994, the Pensions Office awarded the plaintiffs in the main proceedings, all of whom were male employees, retirement pensions on the basis of a fraction representing their employment record, calculated in forty-fifths. In appeals to the competent courts, the persons concerned applied for their pensions to be calculated in fortieths instead of forty-fifths. The matter was then brought before the Court of Cassation. On 19 June 1996, while those proceedings were still pending, the Belgian Parliament enacted a law interpreting the 1990 Law.

2. Questions referred to the Court

1) Is Article 7 of Council Directive 79/7/EEC of 19 December 1978 to be interpreted as leaving the Member States free to determine differently for men and women the age at which they are respectively deemed to have become unfit for work by reason of old age, for the purpose of acquiring entitlement to a re-

tirement pension for employees, and consequently to calculate those pensions differently, in the manner indicated in this judgment?

2) Is that Article to be interpreted as precluding men and women deemed to have become unfit for work by reason of old age as from the age of 65 and 60 respectively who, from that age, also lose their rights to social security benefits, such as unemployment benefit, from claiming an unconditional right to a pension as from the age of 60 years, the amount of the pension being calculated differently, according to whether the claimant is a man or a woman?

3) Should the expression 'pensionable age' in Article 7 of Council Directive 79/7/EEC of 19 December 1978 be understood as meaning the age which gives rise to entitlement to a pension, or is it the age at which the employee is deemed to have become unfit for work by reason of old age, in accordance with national criteria, and enjoys the benefit of a replacement income excluding other social security benefits of the same description? Can that expression be interpreted as covering both of the above definitions?

3. Judgment of the Court

The Court examined the three questions together. It should first be noted that it is settled case-law that the possibility of derogation provided for in Article 7(1)(a) of the Directive must be construed strictly (see, in particular, judgment of 30 March 1993, *Thomas and Others,* Case C-328/91, [1993] ECR I-1247, paragraph 8). Thus where, pursuant to that article, a Member State prescribes different retirement ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation is limited to forms of discrimination which are necessarily and objectively linked to the difference in retirement age (*Thomas and Others,* cited above, and judgment of 19 October 1995, *Richardson,* Case C-137/94, [1995] ECR I-3407, paragraph 18). If, on the other hand, national legislation has abolished the difference in pensionable age, the Member State is not authorised to maintain a difference according to sex in the method of calculating the pension (*Van Cant* judgment, paragraph 13). It is therefore necessary to determine whether, in a case such as that in point in the main proceedings, the discrimination relating to the method of calculating retirement pensions is necessarily and objectively linked to the maintenance of national provisions which prescribe different pensionable ages for men and women and therefore come under the derogation provided for in Article 7(1)(a) of the Directive.

In this connection, the Court declared that the question whether national legislation has maintained different pensionable ages for male and female workers is a question of fact which it is for the national court to determine. It is thus apparent that, in such a case, a form of discrimination in the method of calculating pensions such as that which follows from the national legislation at issue would be necessarily and objectively linked to the difference that had been maintained as regards the specification of the pensionable age.

The Court (Sixth Chamber), hereby rules:

Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that, if national legislation has maintained a different pensionable age for male and female workers, the Member State concerned is entitled to calculate the amount of pension differently depending on the worker's sex.

Case C-136/95
CAISSE NATIONALE D'ASSURANCE VIEILLESSE DES TRAVAILLEURS SALARIÉS (CNAVTS) v EVELYNE THIBAULT
Date of judgment:
30 April 1998
Reference:
[1998] ECR I-2011
Content:
Directive 76/207/EEC (Articles 2 and 5) — Maternity leave — Right to an assessment of performance

1. Facts and procedure

Mrs Thibault was recruited by the CNAVTS in 1973 as an *agent technique* (skilled clerical worker) and was promoted to *rédacteur judique* (official responsible for legal drafting) in 1983. In that year, Mrs Thibault was absent on account of sickness from 4 to 13 February, from 3 to 16 March and from 16 May to 12 June. She then took maternity leave from 13 June to 1 October 1983, under Article 45 of the collective agreement, followed by maternity leave on half pay from 3 October to 16 November 1983 under Article 46 of the collective agreement. On the basis of its standard service regulations, the CNAVTS refused to carry out an assessment of performance for Mrs Thibault for 1983. In its view, because of her absences, Mrs Thibault did not meet the conditions laid down by the relevant provisions, namely six months' presence at work. It is clear from the documents before the Court that, in 1983, Mrs Thibault was at work for a period of about five months. If she had not taken maternity leave between 13 June and 1 October 1983, she could have relied on the six months' attendance necessary for an assessment of performance under the standard service regulations.

The Court of Cassation decided to stay proceedings and to refer a question to the Court of Justice for a preliminary ruling.

2. Question referred to the Court

Whether Articles 1(1), 2(1), 5(1) and, if relevant, 2(4) of Council Directive 76/207/EEC of 9 February 1976 must be interpreted as meaning that a woman may not be deprived of the right to an assessment of performance, and consequently to the possibility of an advancement in career, on the ground that she was absent from work by reason of maternity leave.

3. Judgment of the Court

The Court pointed out firstly that the directive allows national provisions which guarantee women specific rights on account of pregnancy and maternity, such as maternity leave (see judgment of 8 November 1990, *Handels- og Kontorfunktionaerernes Forbund,* Case C-179/88, [1990] ECR I-3979, paragraph 15). Furthermore, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of the Directive recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see, in particular, judgments of 12 July 1984, *Hofmann,* Case 184/83, [1984] ECR 3047, paragraph 25; of 5 May 1994, *Habermann-Beltermann,* Case C-421/92, [1994] ECR I-1657, paragraph 21; and of 14 July 1994, *Webb,* Case C-32/93, [1994] ECR I-3567, paragraph 20). In that light, the result pursued by the Directive is substantive, not formal, equality. The Court found that the right of any employee to have their performance assessed each year and, consequently, to qualify for promotion, forms an integral part of the conditions of their contract of employment within the meaning of Article 5(1) of the Directive.

In circumstances such as those of this case, to deny a female employee the right to have her performance assessed annually would discrimi-

nate against her merely in her capacity as a worker because, if she had not been pregnant and had not taken the maternity leave to which she was entitled, she would have been assessed for the year in question and could therefore have qualified for promotion. It is true that the Court has recognised that the Member States have a discretion as to the social measures they adopt in order to guarantee, within the framework laid down by the directive, protection of women in connection with pregnancy and maternity and as to the nature of the protection measures and the detailed arrangements for their implementation (see, inter alia, Hofmann judgment, cited above, paragraph 27). Nevertheless, such discretion, which must be exercised within the bounds of the directive, cannot serve as a basis for unfavourable treatment of a woman regarding her working conditions.

The Court (Sixth Chamber), hereby rules:

Articles 2(3) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions preclude national rules which deprive a woman of the right to an assessment of her performance and, consequently, to the possibility of qualifying for promotion because she was absent from the undertaking on account of maternity leave.

Case C-243/95
KATHLEEN HILL AND ANN STAPLETON v THE REVENUE COMMISSIONERS AND DEPARTMENT OF FINANCE
Date of judgment:
17 June 1998
Reference:
[1998] ECR I-3739
Content:
Article 119 of the Treaty and Directive 75/117/EEC — National civil servants — Job-sharing scheme — Incremental credit determined on the basis of the criterion of actual time worked

1. Facts and procedure

Job-sharing was introduced in Ireland by a Government decision in 1984, primarily with a view to creating employment. Job-sharing, established by Circular 3/84, involved an arrangement under which two civil servants shared equally one full-time job, such that the benefits were shared equally by both persons concerned and the costs of the post to the administration remained the same. Staff recruited on a full-time basis could decide to participate in that scheme and retained the right to return to full-time employment at the end of the period for which they had opted to job-share, provided that suitable vacancies existed. Staff recruited on a job-sharing basis between 1986 and 1987 were entitled to be appointed to full-time positions within two years of appointment, again provided that suitable vacancies existed. In a letter sent to Ministries on 31 March 1987 by the Department of Finance, it was stated: 'The position is that, as each year's job-sharing service is reckonable as six months' full-time service, an officer who has served for two years in a job-sharing capacity should be placed on the second point of the full-time scale (equivalent to one year's full-time service). In cases where officers have been job-sharing for more than two years, the incremental date should be adjusted on a pro-rata basis.'

Ms Hill and Ms Stapleton were recruited to the Irish Civil Service through open competitions for the grade of Clerical Assistant and were assigned to the office of the Revenue Commissioners. Ms Hill was recruited in July 1981 and began job-sharing in May 1988. Ms Stapleton was recruited in a job-sharing capacity in April 1986. Ms Hill and Ms Stapleton were employed in a job-sharing capacity for two years. They worked exactly half the time which a full-time employee would have worked, on a one week on/one week off basis. During their respective job-sharing periods of employment, each moved one point up the incremental scale with each year of service and was paid at the rate of 50 % of the salary for Clerical Assistants, according to the point each had reached on the scale. Ms Hill returned to full-time employment in June 1990. At that time she had reached the ninth point on the incremental job-sharing scale. Initially, on her return to full-time work, she was assimilated to the ninth point of the corresponding scale, but was subsequently placed on the eighth point, on the ground that two years' job-sharing were equivalent to one year's full-time service. Ms Stapleton secured a full-time post in April 1988. She had at that time reached the third point on the incremental job-sharing scale. She continued to move up the scale in 1989 and 1990 to the fourth and fifth points respectively, but was informed in April 1991 that there had been a mistake in her classification, with the result that she was unable to progress to the sixth point. She was informed that her two years' job-sharing service should have been counted as one year's full-time service.

Ms Hill and Ms Stapleton challenged the decision reclassifying them before an Equality Officer. The matter was brought to the attention of the Labour Court, which referred three questions to the Court of Justice for a preliminary ruling.

2. Questions referred to the Court

In circumstances in which far more female workers than male workers spend part of their working lives in a job-sharing capacity,

1) Does a prima facie case of indirect discrimination arise where job-sharing workers who convert to full-time work are given credit for incremental progression on the scale of pay for full-time staff by reference to actual time worked such that, while the benefits awarded to them are fully pro-rated to those awarded to staff who have always worked full-time, they are placed at lower points on the full-time scale than colleagues who are in all respects similar to them except that they have worked continuously on a full-time basis?

   In other words, is the principle of equal pay, as defined in Directive 75/117/EEC, contravened if employees, who convert from job-sharing to full-time work, regress on the incremental scale, and hence on their salary scale, due to the application by the employer of the criterion of service calculated by time worked in a job?

2) If so, does the employer have to provide special justification for recourse to the criterion of service, defined as actual time worked, in awarding incremental credit?

3) If so, can a practice of incremental progression by reference to actual time worked be objectively justified by reference to factors other than the acquisition of a particular level of skill and experience over time?

3. Judgment of the Court

The Court examined the three questions together. It stated firstly that the system in question determines the progression of pay due to the workers concerned and thus comes within the concept of pay for the purposes of Article 119 of the Treaty. It went on to note that it had not been established that the unfavourable treatment applied to Ms Hill and Ms Stapleton constituted direct discrimination on grounds of sex and it was thus necessary to examine whether that treatment may amount to indirect discrimination.

It is apparent from the case-file that 99.2 % of Clerical Assistants who job-share are women, as are 98 % of all civil servants employed under job-sharing contracts. In those circumstances, a provision which, without objective justification, adversely affects the legal position of those workers coming within the category of job-sharers has discriminatory effects based on sex. The Court went on to state that when workers convert from job-sharing, under which they will have worked for 50 % of full time, receiving 50 % of the salary corresponding to that point on the pay scale for full-time work, they should expect both their hours of work and the level of their pay to increase by 50 %, in the same way as workers converting from full-time work to job-sharing would expect those factors to be reduced by 50 %, unless a difference in treatment can be justified.

There is, however, no such progression in the present case. When job-sharing workers convert to full-time work, their situation is automatically reviewed in such a way that they are placed, on the full-time pay scale, at a level lower than that which they occupied on the pay scale applicable to job-sharing. The Court concluded that provisions of the kind at issue in the main proceedings result in discrimination of female workers *vis-a-vis* male workers and must in principle be treated as contrary to Article 119 of the Treaty and therefore contrary to the Directive. It would be otherwise only if the difference of treatment found to exist between the two categories of worker were justified by objective factors unrelated to any discrimination based on sex (see, along these lines, judgments of 13 May 1986, *Bilka,* Case 170/84, [1986] ECR 1607, paragraph 29; of 13 July 1989, *Rinner-Kühn,* Case 171/88, [1989] ECR 2743, paragraph 12; and of 6 February 1996, *Lewark,* Case C-457/93, [1996] ECR I-243, paragraph 31).

So far as the justification based on economic grounds is concerned, it should be noted that an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground

that avoidance of such discrimination would involve increased costs. The Court pointed out that approximately 83 % of those opting for job-sharing did so in order to be able to combine work and family responsibilities, which invariably involve caring for children. Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of equality between men and women, and which is recognised by Community law.

The Court (Sixth Chamber), hereby rules:

Article 119 of the EC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women are to be interpreted as precluding legislation which provides that, where a much higher percentage of female workers than male workers are engaged in job-sharing, job-sharers who convert to full-time employment are given a point on the pay scale applicable to full-time staff which is lower than that which those workers previously occupied on the pay scale applicable to job-sharing staff due to the fact that the employer has applied the criterion of service calculated by the actual length of time worked in a post, unless such legislation can be justified by objective criteria unrelated to any discrimination on grounds of sex.

Case C-394/96
MARY BROWN v RENTOKIL LTD
Date of judgment:
30 June 1998
Reference:
[1998] ECR I-4185
Content:
Directive 76/207/EEC (Articles 2 and 5) — Dismissal of a pregnant women — Absences due to illness arising from pregnancy — Reversal of Larsson precedent

1. Facts and procedure

Mrs Brown was employed by Rentokil as a driver. Her job was mainly to transport and change 'Sanitact' units in shops and other centres. In her view, it was heavy work. In August 1990, Mrs Brown informed Rentokil that she was pregnant. Thereafter she had difficulties associated with the pregnancy. From 16 August 1990 onwards, she submitted a succession of four-week certificates mentioning various pregnancy-related disorders. She did not work again after mid-August 1990. Rentokil's contracts of employment included a clause stipulating that, if an employee was absent because of sickness for more than 26 weeks continuously, he or she would be dismissed. By letter of 30 January 1991, which took effect on 8 February 1991, she was accordingly dismissed while pregnant. Her child was born on 22 March 1991.

Mrs Brown appealed to the House of Lords, which referred various questions to the Court of Justice for a preliminary ruling.

2. Questions referred to the Court

1) a) Is it contrary to Articles 2(1) and 5(1) of Council Directive 76/207/EEC ('the Equal Treatment Directive') to dismiss a female employee, at any time during her pregnancy, as a result of absence through illness arising from that pregnancy?

   b) Does it make any difference to the answer given to question 1(a) that the employee was dismissed in pursuance of a contractual provision entitling the employer to dismiss employees, irrespective of gender, after a stipulated number of weeks of continued absence?

2) (a) Is it contrary to Articles 2(1) and 5(1) of the Equal Treatment Directive to dismiss a female employee as a result of absence through illness arising from pregnancy who does not qualify for the right to absent herself from work on account of pregnancy or childbirth for the period specified by national law because she has not been employed for the period imposed by national law, where dismissal takes place during that period?

   b) Does it make any difference to the answer given to question 2(a) that the employee was dismissed in pursuance of a contractual provision entitling the employer to dismiss employees, irrespective of gender, after a stipulated number of weeks of continued absence?

3. Judgment of the Court

With regard to the first part of the first question, the Court pointed to its settled case-law whereby the dismissal of a female worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex (see judgments of 8 November 1990, *Dekker,* Case C-177/88, [1990] ECR I-3941, paragraph 12; of 5 May 1994, *Habermann-Beltermann,* Case C-421/92, [1994] ECR I-1657, paragraph 15; and of 14 July 1994, *Webb,* Case C-32/93, [1994] ECR I-3567, paragraph 19). The Court considered that dismissal of a woman during pregnancy cannot be based on her inability, as a result of her condition, to perform the duties which she is contractually bound to carry out. If such an interpretation were adopted, the protection afforded by Community law to a woman during pregnancy would be available

only to pregnant women who were able to comply with the conditions of their employment contracts, with the result that the provisions of Directive 76/207 would be rendered ineffective. Although, under Article 2(3) of Directive 76/207, protection against dismissal must be afforded to women during maternity leave, the principle of nondiscrimination, for its part, requires similar protection throughout the period of pregnancy. Dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex.

On this basis, the Court referred to its earlier case law and concluded that, contrary to its ruling in the judgment of 29 May 1997, *Larsson* (Case C-400/95, [1997] ECR I-2757, paragraph 23), where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work.

As regards the second part of the first question, the Court pointed out that it is well settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, judgment of 13 February 1996, *Gillespie and Others,* Case C-342/93, [1996] ECR I-475, paragraph 16). Where it is relied on to dismiss a pregnant worker because of absences due to incapacity for work resulting from her pregnancy, such a contractual term, applying both to men and to women, is applied in the same way to different situations since, as is clear from the answer given to the first part of the first question, the situation of a pregnant worker who is unfit for work as a result of disorders associated with her pregnancy cannot be considered to be the same as that of a male worker who is ill and absent through incapacity for work for the same length of time. Consequently, the contractual term in question constitutes direct discrimination on grounds of sex.

In view of the answer given to the first question, the Court deemed it unnecessary to answer the second question.

The Court, hereby rules:

Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy. The fact that a female worker has been dismissed during her pregnancy on the basis of a contractual term providing that the employer may dismiss employees of either sex after a stipulated number of weeks of continuous absence does not affect the answer given.

Case C-185/97
BELINDA JANE COOTE/GRANADA HOSPITALITY LTD
Date of judgment
22 September 1998
Reference:
Compilation 1998, I-5199
Content:
Directive 76/207/EEC (Article 6) – Refusal of the employer to provide references to a former employee who had been laid off — Principle of actual jurisdictional verification — Upheld

1. Facts and procedure

The Sex Discrimination Act (British law relating to discrimination on the grounds of sex, hereafter the 'SDA', which transposes into British law the provisions of directive 76/207/EEC, states at Article 4:

'(1) A person (hereafter the 'perpetrator of discrimination') discriminates against another person (hereafter the 'victim') in any relevant circumstances under provisions of the current law, if he treats the victim less favourably than he treats or would treat another person in the same circumstances, acting in this way because the victim ...

Has brought an action against the perpetrator of the discrimination or any other person by virtue of the current law or the Equal Pay Act 1970 (the British law of 1970 on equality of pay), or

[...]'

Mrs Coote was employed by Granada Hospitality Ltd (hereafter 'Granada') from December 1992 to September 1993. In 1993, she brought a sex discrimination lawsuit against Granada on the grounds she had been fired because of her pregnancy. This lawsuit was the subject of a settlement agreement and the employment relationship between Mrs Coote and Granada terminated by common agreement on 7 September 1993. In July 1994, Mrs Coote, in search of new employment, had recourse to two employment agencies. She considered that the difficulties she encountered in finding a job were explained by the fact that Granada would not provide references to one of the employment agencies. Mrs Coote then brought a new claim against Granada before the Stratford Industrial Tribunal, asserting that she had been injured by Granada's refusal to provide references to the employment agency. Mrs Coote maintained that this refusal was a reaction to the lawsuit she had previously brought against her former employer. This claim was dismissed on the grounds that the alleged discrimination had taken place after the end of the employment relationship with Granada and that the detriment alleged arose, in any case, after this date. Indeed, according to the Industrial Tribunal, the SDA must be interpreted in such a way that it only prohibits retaliatory measures where the detrimental effects appear in the course of the employment relationship. Mrs Coote gave notice of appeal against this order before the Employment Appeal Tribunal.

2. Questions referred to the Court

1) The Council Directive 76/207/EEC, relating to the implementation of the principle of equality of treatment between men and women as regards access to employment, occupational training and promotion and working conditions, obliged the Member States to introduce into their internal judicial systems the measures necessary to allow a party considering itself injured to assert its rights when the following conditions are met:

   a) the petitioner (appellant) was employed by the respondent;

   b) during the course of their employment, the appellant brought against the respondent a lawsuit for discrimination on the grounds of sex, which was the subject of a settlement agreement;

c) at the end of the term of employment, the appellant endeavoured, in vain, to find a full time job;

d) the respondent, in refusing, when requested, to provide references intended for potential employers, was the cause of the appellant's difficulties in finding employment or contributed to them;

e) the employer took the decision to refuse to provide references after the end of the appellant's employment term;

f) the reason, or one of the fundamental reasons for the employer's refusal to provide references to the appellant was that the latter had started proceedings against it for discrimination on the grounds of sex.

2) The Council directive 76/207/EEC, relating to the implementation of equality of treatment between men and women as regards access to employment, occupational training and promotion and working conditions, obliged the Member States to introduce into their internal judicial systems the measures necessary to allow any person to assert their rights when the circumstances set out at point 1) above are met, except where:

a) the respondent took the decision to refuse to provide references before the end of the appellant's employment term; but

b) the actual refusal or refusals to provide references took place after the conclusion of the appellant's employment.

3. The judgment of the Court

The Court began by specifying its understanding of the interlocutory questions submitted to it. It considered that there were grounds for understanding the said questions in the sense that national jurisdiction sought to establish, for the purposes of the interpretation of national provisions transposing Directive 76/207/EEC, whether this obliged the Member States to introduce into their internal judicial systems the measures necessary to ensure jurisdictional protection to workers whose employer refuses, after cessation of the employment relationship, to provide references in reaction to a lawsuit commenced with a view to enforcing the principle of equality of treatment in the sense of the directive (items 17-19).

In this respect, the Court recalled that Article 6 of the directive prescribed that Member States introduce into their internal legal systems the measures necessary to allow any persons who considered themselves to have suffered discrimination 'to enforce their rights by jurisdictional means'. The Court ruled that, as a result of this provision, the Member States are obliged to adopt measures which are sufficiently efficacious to attain the directive's purpose and to ensure that the rights thus conferred can be effectively invoked before national tribunals by the individuals affected (see, in particular, orders dated 10 April 1984, *Von Colson and Kamann*, 14/83, Rec.p. 1891, item 18; of 15 May 1986, *Johnston*, 222/84, Rec.p. 1651, item 17 and of 2 August 1993, *Marshall*, C-271/91, Rec.p. 1-4367, item 22). According to the Court, the jurisdictional monitoring imposed by this article is an expression of a general principle of law found at the basis of the common constitutional traditions of Member States, which has equally been established by Article 6 of the Convention for the Protection of Fundamental Liberties and Human Rights, dated 4 November 1950 (see, in particular, Johnston's aforementioned order, item 18). The Court pointed out that, by virtue of Article 6 of the directive, interpreted in the light of the aforementioned general principle, all individuals have a right to effective recourse before a competent jurisdiction against acts which they consider to assail the equal treatment of men and women provided for in the directive. It added that it was for the Member States to ensure effective jurisdictional monitoring for the enforcement of the applicable provisions of Community law and national legislation aimed to implement the rights provided for in the directive

(Johnston's aforementioned order, item 19). The Court considers, as already stated (order dated 2 August 1993, *Marshall*, item 34), that Article 6 of the directive sets out an indispensable component for the achievement of the fundamental objective of equality of treatment between men and women which, under uniform jurisprudence (see, in particular, the order dated 30 April 1996, P./S., C-13/94, Rec.p. 1-2143, item 19), constitutes one of the fundamental rights of mankind, the enforcement of which the Court is obliged to ensure, items 20-23).

The Court declares that the principle of effective jurisdictional monitoring established by Article 6 of the directive would be deprived of much of its effectiveness if the protection it confers did not include measures that, as in the substantive matter of the case in point, an employer could be led to take in reaction to a lawsuit commenced by an employee with a view to ensuring compliance with a principle of equality of treatment. Indeed, the fear of such steps against which there would be no jurisdictional recourse would risk, in the Court's view, dissuading workers considering themselves to have suffered discrimination from asserting their rights by jurisdictional means and, consequently, would be of a nature to gravely compromise the realisation of the objectives pursued by the directive. This being the case, the Court concluded that it could not uphold the United Kingdom government's argument according to which the steps taken by the employer against the employee in reaction to a lawsuit commenced to enforce the principle of equality of treatment did not come within the field of the directive's application, when the steps occurred after the cessation of the employment relationship (items 24-25).

The Court observed it was correct that, as already emphasised by the United Kingdom government, Article 7 of the directive expressly obliged the Member States to take the necessary measures to protect workers against employers' decisions to fire them in reaction to a law suit brought to enforce the equal treatment principle. The Court nevertheless judged that, contrary to what the same government was maintaining, with regard to the directive's objective, which was to achieve equal opportunities between men and women (order dated 2 August 19993, *Marshall*, aforementioned, item 24), and to the fundamental nature of the right to effective jurisdictional protection, one could not, in the absence of a clear indication to the contrary, deduce from Article 7 of the directive the legislator's intention to limit workers' protection against steps decided upon by the employer by way of reprisal to firing alone which, whilst constituting an especially serious action, did not, however, constitute the sole action which would effectively dissuade a worker from making use of their right to jurisdictional protection. According to the Court, amongst the dissuasive measures could be found, in particular, those which, for the case in point, occurred in reaction to a law suit embarked upon against an employer destined to impede the efforts of a sacked worker in their search for a new job (items 26-27).

The Court held:

Article 6 of the Council Directive 76/2007/EEC, dated February 1976, relating to the implementation of the principle of equal treatment between men and women as regards access to employment, occupational training and promotion, and working conditions, obliged Member States to introduce into their internal judicial systems the measures necessary to ensure jurisdictional protection for workers whose employer refuses, after the cessation of the employment relationship, to provide references by way of reaction to a law suit commenced with the aim of enforcing the principle of equality of treatment as meant by the same directive.

Case C-154/96
LOUIS WOLFS/NATIONAL PENSIONS OFFICE (NPO)
Date of judgment:
22 October 1998
Reference:
Compilation 1989, p.4407 I-6173
Content:
Directive 79/7/EEC (Article 7 (1)(a) — A permitted derogation to the equal treatment of men and women as regards the setting of the retirement age — Upheld — A different method of calculation of pensions — Referred to the order De Vriendt

1. Facts and procedure

In Belgium, the royal order No 50 dated 24 October 1967, relating to the retirement pension and life expectancy of employees (hereafter the 'royal order No 50') in force from 1 January 1991, set normal retirement age at 65 years old for men and at 60 years old for women. By virtue of Article 10 of royal order No 50, the right to retirement pension was acquired by calendar years, on the basis of a fraction of the remuneration, the amount of which was set according to certain specific rules. For men, the allowance was equal for each calendar year to 1/45 of the remuneration thus calculated, and for women, to 1/40. From 1 January 1991, a new system was implemented by the law dated 20 July 1990, bringing in a flexible age for retirement of employed workers and adjusting the pension of employed workers to the general development of well-being (hereafter the '1990 law'), to allow both men and women to retire at any time from the first day of the month following that in which the individual in question reaches the age of 60. As regards the pension calculation, the 1990 Law provided that the right to a retirement pension was acquired, by calendar year, on the basis of a fraction of the remuneration of the individual in question, set by royal order No 50, and that the denominator of this fraction remained fixed at 45 for men and 40 for women.

The National Pensions Office (hereafter the 'NPO') allowed Mr Wolfs an employed worker's retirement pension on the basis of a representative fraction of his career, equal to 13/45, the years 1955 to 1967 being taken into account (Mr Wolfs having left Belgium in 1968). Asserting that the method for calculation for a pension, applicable to female workers, taking into account the 40 working years most favourable to the employee, resulted in a higher level of pension than that granted, Mr Wolfs brought a claim before the Brussels labour tribunal to annul the decision in which the NPO had fixed the amount of his pension.

2. Questions referred to the Court

1) Did the creation by a Member State, of a flexible system of retirement, conforming to recommendation 82/857/EEC of the European Union Council of Ministers, dated 10 December 1982 (a recommendation relating to the principles of the European political community on the age of retirement), remain affected by the exclusion provided for in Article 7(1)(a) of Directive 79/7/EEC of the Council of 19 December 1978 (relating to the progressive implementation of the principle of equality of treatment between men and women in matters of social security), in the sense that the fixing of a flexible retirement age for men and women, for example between the age of 60 and 65 years old, which could not be assimilated purely and simply by fixing the same starting age for everyone, when coupled with the maintenance of a different calculation for pensions for men and women, would not necessarily be contrary to the principle of equality of treatment between men and women, established by Article 4(1) of the same Directive 79/7/EEC, each future pensioner having, under such a system, the right to freely decide the course taken for their retirement pension in terms of their own career; and particularly if the system so instituted responds to a necessary purpose of the State's social policy and is jus-

tified by reasons other than discrimination on the grounds of sex?

2) In the negative, did the combined realisation of the objectives set by Directive 79/7/EEC and by recommendation 82/857/EEC, to set up a flexible age of retirement for all and the equality of men and women in matters of social security, and the taking into account of the coupling of formal equality and real discrimination subsisting between men and women in matters of legal retirement pensions, impose on Member States, in a mechanistic fashion, a levelling down of the conditions for access to a retirement pension, whilst ensuring, for both men and women, the right to benefit from a retirement pension, at the choice of the person concerned, from the commencement of the lower age and in accordance with to the method of calculation applied to the category of person having access at this age to the retirement pension; and this no matter what the consequences may be in terms of the financial equilibrium of retirement schemes not founded on the basis of these principles?

3) On the assumption, still, of a negative reply to the first question, must the application of the most favourable solution for the person concerned, as regards European law, apply for the whole of their career? Or must it be applied solely to the years after the law bringing in the flexible age of retirement came into force, as in the order by the European Court of Justice of 1 July 1993 in the matter of *Remi Van Cant v Office of National Pensions*?

3. The judgment of the Court

The Court noted that, for the first question, the jurisdiction of the referral was, in substance, a request as to whether a system of retirement which allowed both men and women to retire at the age of 60 years, but in which the method of pension calculation remained different according to sex, was picked up by the derogation to Article 7(1) under a), of the Council Directive 79/7/EEC, dated 19 December 1978, relating to the progressive implementation of the principle of equality of treatment between men and women in matters of social security (OJ 1979, L 6, p. 24, hereafter the 'directive', worded as follows 'The .... directive does not stand in the way of Member States' right to exclude from their field of application: a) the setting of retirement age for the granting of pensions and retirement and the consequences deriving from other allowances …' (item 18).

The Court pointed out that this question corresponded, in substance, to that examined in the order of *Van Cant* (1 July 1993, C-154/92, [1993] ECR.p. I-3811). In this matter, the Court responded in the negative, judging that, on the assumption that where one national regulation suppressed the difference in retirement age which had existed between male and female workers this fell to the national jurisdiction to establish, Article 7(1)(a) of the directive could no longer be invoked to justify the maintaining of a difference as regards the method of calculation of the retirement pension tied to this difference in retirement age (item 19).

Nevertheless, the Court noted that, in the case in point, a new element was to be added to the applicable regime at the time of the *Van Cant* order and the time of referral of the current matter. It noted that on 19 June 1996, after the referral of the judgment, the Belgian legislator adopted the interpretative law of 1990 (hereafter the 'interpretative law'), which is, as from that date onwards, supposed to have had, from its entry into force, on 1 January 1991, the scope given to interpretative law. In the application of Articles 2, paragraphs 1, 2, 3, and 3, paragraphs 1, 2, 3, 5, 6, 7, of the 1990 Law, 'the meaning of the words 'retirement pension', the replacement income granted to the beneficiary who is deemed to have become incapable of work by reason of old age, a situation which is supposed to occur from the age of 65 for male beneficiaries and 60 for female beneficiaries'. It concluded that it was appropriate, from

then, for the purposes of giving a useful response to the national jurisdiction, to interpret the provisions of the directive with regard to the national rules currently in force (items 19-22).

The Court indicated that it had already undertaken such an examination, in the order dated 30 April 1989, *De Vriendt* et al. (C-377/96 to C-384/96, [1989] ECR. p. I-2105). It had, therefore, reasoning very similar to that of the order of *De Vriendt* (items 23-29).

Having replied affirmatively to the first question, the Court decided that there were no grounds to examine the second and third questions, which were put in case of the eventuality that the first invited a negative reply (item 31).

The Court (Sixth Chamber) hereby rules that:

Article 7(1)(a) of the Council Directive 79/7/EEC, dated 19 December 1978, relating to the progressive implementation of the principle of equal treatment between men and women in matters of social security, must be interpreted in the sense that, when a national regulation maintains a difference in the age of retirement between male and female workers, the Member State concerned is within its rights to calculate the amount of the pension differently according to the sex of the worker.

Case C-411/96
MARGARET BOYLE ET AL. v EQUAL OPPORTUNITIES COMMISSION
Date of judgment:
27 October 1998
Reference:
Compilation 1998, p.4407 I-6401
Content:
Article 119 of the Treaty — Directives 75/117/EEC, 76/207/EEC and 92/85/EEC — Maternity leave — Explanation of rights in respect of sick leave, annual leave and acquisition of pension rights

1. Facts and procedure

The applicants in the main proceedings are all employees of the Equal Opportunities Commission (hereafter the 'EOC') in the United Kingdom. At least three of them have taken maternity leave during the few years preceding the order. The employment contract between EOC and its employees comprises, first, the Staff Handbook (vade-mecum) which applies to all workers and, second, the Maternity Scheme, which applies to female workers. The Maternity Scheme is at the centre of the dispute in the main proceedings.

2. Questions referred to the Court

In circumstances such as those of the present case, are any of the following provisions contrary to the prohibition made by Community law (in particular, Article 119 of the EC Treaty, Council Directive 75/117/EEC, Council Directive 76/207/EEC or Council Directive 92/85/EEC) against applying discriminatory or unfavourable treatment to female workers on grounds of pregnancy, childbirth, maternity and/or illness linked to maternity:

1) A condition that maternity pay, beyond the Statutory Maternity Pay, is paid only if the woman states that she intends to return to work and agrees to be liable to repay such maternity pay if she does not return to work for one month on the conclusion of maternity leave.

2) A condition that the beginning of maternity leave for a woman who gives birth during absence on sick leave with pregnancy-related health problems may be back dated to six weeks before the expected week of childbirth or the beginning of the sick leave, whichever is the later.

3) A prohibition on a woman, who is unfit for work for any reason during her maternity leave, taking sick leave, unless she elects to return to work and terminate her maternity leave.

4) A condition limiting the time during which annual leave accrues to the statutory minimum of 14 weeks' maternity leave, accordingly excluding any other period of maternity leave.

5) A condition limiting the time in which pensionable service accrues during maternity leave to when the woman is in receipt of contractual or statutory maternity pay, accordingly excluding any other period of unpaid maternity leave?

3. The judgment of the Court

Question 1

The Court pointed out that, in the first question, the referring judge was asking in substance if Article 119 of the Treaty, as set out in Directive 75/117, and Directives 76/207 or 92/85 prevent an employment contract clause subordinating the payment, during the maternity leave referred to in Article 8 of Directive 92/85, of a higher level of remuneration than the payments set out in the national legislation for matters of maternity leave, to a condition that the woman worker undertakes to return to work after her confinement within one month at most, under penalty of having to repay

the difference between the amount of remuneration that she would have been paid during her maternity leave and that of the said payments (item 28).

Concerning firstly Directive 92/85, the Court observed that it was in consideration of the risk that the provisions relating to the maternity leave would be without useful effect if they are not accompanied by the maintenance of rights tied to the contract of employment that the Community legislator had stipulated, in Article 11(2)(b) of Directive 92/85, that 'the maintenance of remuneration and/or the benefit of an adequate allowance' for workers to which the directive applies must be ensured in the case of maternity leave alluded to in Article 8. The Court recalled that the notion of remuneration deployed at Article 11 of the directive included, in the manner of the definition appearing at Article 119, second section, of the Treaty, the benefits which the employer pays directly or indirectly during the maternity leave by reason of the employment of the worker (see order dated 13 February 1996, *Gillespie e.a.* 1-475, item 12). On the other hand, the Court noted that the notion of allowance to which this provision equally refers includes all income that the worker is paid during her maternity leave and which is not paid by the employer by right of the employment relationship. The Court pointed out that Article 11(3) of Directive 92/85 is aimed at guaranteeing that the worker benefits, during her maternity leave, from an income of an amount at least equivalent to that of the allowance set out by the national legislators in matters of social security and in the event of an interruption of work on the grounds of health. It added that the perception that an income at such a level must be ensured for workers during their maternity leave is that the income must be paid, in conformity with Article 11(2)(b) of Directive 92/85, in the form of an allowance, remuneration or a combination of the two. Indeed, according to the Court, if the text of Article 11 refers solely to the nature of the adequacy of the allowance, it must not be less than the income guaranteed to workers during their maternity leave, when paid in the form of remuneration and, if appropriate, in combination with an allowance, must equally be adequate according to the meaning of Article 11(3) of Directive 92/85. The Court judges, however, that, if it requires that the female worker benefits during the maternity leave referred to in Article 8 from an income at a level at least equal to that of the allowance set out in the national legislation on matters of social security in the event of interruption of work by reason of health, Article 11(2)(b) and (3), this does not mean that she is guaranteed the benefit of a higher income than the employer is bound to pay her under the employment contract in the event of sick leave. The Court concludes from the preceding that an employment contract clause pursuant to which a worker who does not return to work following confinement is obliged to repay the difference between the remuneration paid to her during her maternity leave and the payments which would have been due to her under the national legislation on matters of maternity leave, is compatible with Article 11(2)(b) and (3) of Directive 92/85, to the extent that the amount of the payments are not inferior to the income that would be paid to workers concerned under the national legislation applicable in matters of social security, in the case of interruption of work for reasons linked to her state of health (items 29–36).

Dealing then with Article 119 of the Treaty, as set out in Directive 75/117, and Directive 76/207, the Court called to mind that, being based on the employment relationship, the advantages paid by the employer under the legislative provisions or under the employment contract to a female worker during her maternity leave constitute a remuneration within the meaning of Article 119 of the Treaty and the first Article of Directive 75/117 (see the order *Gillespie e.a.* aforementioned, item 14) and that is not consequently likewise raised in Directive 76/207. The Court recalled, furthermore, that, according to established case-law, discrimination consists in the application of different rules in comparable situations or in the application of the same rules in different situations (order *Gillespie e.a.* aforementioned, item 16, and dated

14 February 1995, Schumacker C-279/93, [1995] ECR.p. I-225, item 30). The Court then noted, as the EU legislator recognised when adopting Directive 92/85, that a pregnant, confined, or nursing worker finds herself in a specifically vulnerable situation which necessitates that maternity leave rights be granted, but which, especially during maternity leave, cannot be likened to those of a man or woman who benefits from sick leave. Indeed, according to the Court, the maternity leave from which the worker benefits is aimed in part at the protection of woman's biological condition in the course of her pregnancy and afterwards and, on the other hand, at the protection of the individual relationship between the woman and her child in the period which follows pregnancy and childbirth (see orders dated 12 July 1984, *Hofmann*, 184/83,[1984] ECR.p. I-3047, item 25, and dated 30 April 1998, *Thibault*, C-136/95 [1998] ECR p. I-2011, item 25). The Court therefore finds that an employment contract clause which makes the application of a regime which is more favourable than that provided for in the national legislation, conditional on the pregnant woman returning to work after childbirth unlike any worker benefiting from sick leave, with the penalty of an obligation to repay the contractual remuneration provided in her maternity leave to the extent that it exceeds the level of payments provided for in the national legislation during this leave, is not a discrimination on the grounds of sex within the meaning of Article 119 of the Treaty and the first Article of Directive 75/117. It recalled, however, that the amount of the payment must meet the requirements made by Article 11(2)(b) and (3) of Directive 92/85 (items 37–43).

Question 2

The Court pointed out that, in the second question, the national judge was, in substance, asking if Article 119 of the Treaty, as set out in Directive 75/117, and Directives 76/207 or 92/85, prevented an employment contract clause obliging an employee who has declared an intention to start her maternity leave in the six weeks preceding the anticipated week of childbirth, who is on sick leave for health problems tied to her pregnancy immediately before this date and who gives birth during the sick leave, has brought forward the start date of her paid maternity leave to the start of the sixth week preceding the week of anticipated confinement or to the start of the sick leave when this second date is later than the first (item 45).

As a preliminary, the Court considered the interlocutory question, insofar as it relates to the setting of the start of the maternity leave, pointed to in Directive 76/207, in particular in Article 5(1), concerning working conditions, and not Article 119 of the Treaty or of Directive 75/117. The Court then pointed out that it provides maternity leave of at least 14 continuous weeks, including obligatory maternity leave of at least two weeks, Article 8 of Directive 92/85 leaving, nevertheless, the power to set the date of the start of maternity leave to the Member States. It noted that, in other respects, under Article 2,(3) of Directive 76/207, it was for each Member State, subject to the limits drawn by Article 8 of Directive 92/85, to set the periods of maternity leave in such as way to allow the female workers to be absent during periods in which problems inherent in pregnancy and confinement arise (order dated 8 November 1990, *Handels-og Kontorfunktionaeremes Forbund*. C-179/88, [19901] ECR.p. I-3979, item 15). In this matter, the Court judges that a national legislation can, on the case in point, stipulate that the maternity leave starts either on the date notified by the person concerned to her employer as the date on which she intends to start her period of absence, or the first day after the beginning of the sixth week preceding the week of the anticipated confinement during which the employee is wholly or partially absent from work by reason of pregnancy, if this date predates the first. According to the Court, the clause referred to in the second interlocutory question does not reflect the choice made by such national legislation (item 47–52)

Question 3

The Court pointed out that, in the third question, the national judge was asking if Article 119 of the

Treaty as stipulated in Directive 75/117 and Directives 76/207 and 92/85, prevented an employment contract clause from prohibiting a woman from taking sick leave during the minimum 14 week period of maternity leave to which a female worker is entitled under Article 8 of Directive 92/85, or any supplementary maternity leave which the employer grants her, subject to deciding to return to work and to bring a definitive end to the maternity leave (item 55).

Firstly, with regard to Directive 92/85, the Court considers that there is ground to distinguish between, on the one hand, the 14 week maternity leave referred to in Article 8 of this directive and, on the other hand, any supplementary leave which the employer, in the case in point, is ready to grant to pregnant, confined or nursing workers. The Court started by examining the disputed clause compared with Article 8. In this regard, it judged that if a woman falls sick during the course of the maternity leave referred to in Article 8 and comes within the sick leave regime, and if the latter leave ends on a date before the expiry of the said maternity leave, she is not deprived of the right to continue to benefit, after this date, from the maternity leave provided for by the aforementioned provisions until the expiry of the minimum period of 14 weeks, this period being calculated from the date of the start of maternity leave. According to the Court, a contrary interpretation would compromise the objective of the maternity leave, to the extent that this is aimed not only at the protection of the woman's biological condition, but also at the protection of the individual relationship between the woman and her child during the course of the period after the pregnancy and childbirth. As regards any leave granted by the employer in addition to the maternity leave referred to in Article 8, the Court judges that the disputed clause does not fall within the field of application of this provision (items 56–62).

Secondly, the Court pointed out that the third interlocutory question was aimed, in addition, at establishing if the disputed clause entailed discrimination as regards the right to sick leave and that, consequently, it pointed to Directive 76/207, in particular Article 5(1) concerning working conditions. The Court judges that Article 119 of the Treaty and Directive 75/117 are not affected. It considers that, in the light of the preceding, it is appropriate to examine the third interlocutory question solely insofar as the clause in the employment contract mentioned refers to supplementary maternity leave granted by the employer to female workers. In this regard, the Court observed that the principle of non discrimination set out in Article 5 of Directive 76/207 does not require a women to be able to exercise her right of supplementary maternity leave granted by her employer and her right to sick leave simultaneously. As a result, the Court concluded that, for a female worker on maternity leave to be able to benefit from sick leave, she may be required to definitively put an end to the supplementary maternity leave granted to her by the employer (item 63–65).

Question 4

The Court pointed out that, in the fourth question, the national judge was seeking, in substance, to know if Article 119 of the Treaty, as stipulated in Directive 75/117, and Directives 76/207 or 92/85, prevented an employment contract clause from limiting the period of acquisition of rights of annual leave to the minimum period of 14 weeks of maternity leave which the female workers must be allowed under Article 8 of Directive 92/85 and stopping the acquisition of these during any period of supplementary maternity leave granted by the employer (item 67).

Firstly, the Court observed that the acquisition of annual holiday rights constitutes a right linked to the employment contract of workers within the meaning of Article 11(2)(a) of Directive 92/85, that from this provision we can deduce that such a right must solely be ensured during the minimum period of 14 weeks maternity leave allowed under Article 8 of Directive 92/85 and that, in the event, the duration of this leave is fixed in the United Kingdom at 14 weeks (item 68–70).

Secondly, the Court stated that the methods of acquiring these rights of annual leave are an integral part of working conditions in accordance with the meaning of Article 5(1), of Directive 76/207 and, therefore, cannot also be raised under Article 119 of the Treaty or Directive 75/117. It pointed out that, as is evident from the record, all the EOC workers, male and female, who took unpaid leave ceased to acquire rights of annual holiday during that period, and it judged, therefore, that there was no direct discrimination. It then recalled that there was indirect discrimination when the application of the national measures, whilst formulated in a neutral fashion, in practice disadvantaged a higher number of women than men (see, in particular, orders dated 2 October 1997, *Gerster*, C-1/95. [1997] ECR. p I-5253, item 30, and Kording, C-100/95, [1997] ECR. I-5289, item 16). In this regard, the Court pointed out that, as was indicated in the referral jurisdiction, many more women than men take unpaid leave in the course of their career because they take supplementary maternity leave; as a result the disputed clause applies, as a fact, to a higher percentage of women than men. The Court considers, however, that the greater frequency of the application of such a clause to women results from the exercise of rights of unpaid maternity leave granted by employers in addition to the period of protection granted by Article 8 and Directive 92/85. It finds that the female workers who exercise this right subject to the condition that the acquisition of rights of annual holiday leave are stopped during the period of the unpaid leave cannot be considered to be disadvantaged in comparison to male workers. Indeed, it goes on to state that the unpaid supplementary maternity leave constitutes a specific advantage, going beyond the protection provided for in Directive 92/85 reserved to women, as a result the stoppage of the acquisition of annual holiday rights during this leave does not entail less favourable treatment of women (item 72–79).

Question 5

The Court points out that, in the fifth question, the national judge sought, in substance, to know if Article 119 of the Treaty, as detailed in Directive 75/117, and Directives 92/85 or 76/207, prevented an employment contract clause limiting, in the framework of an occupational scheme entirely financed by the employer, the acquisition of pension rights during maternity leave in the period during which the woman is paid remuneration provided for in the employment contract or national legislation (item 81).

The Court observes that the acquisition of pension rights within the framework of an occupational scheme entirely financed by the employer is a part of the rights linked to workers' employment contracts within the meaning of Article 11(2)(a) of Directive 92/85, and that, as previously pointed out in the order (item 69), such rights must, in accordance with the provisions, be ensured during the period of at least 14 weeks of maternity leave to which workers are entitled under Article 8 of Directive 92/85. It judges, therefore, that, if Member States have, in conformity with Article 11(4) of Directive 92/85, the power to subject the right to remuneration or adequate allowance referred to in Article 11(2)(b) to the condition that the worker concerned fulfil the qualifying conditions for the right to these benefits provided by the national legislation, such a power does not exist in relation to the rights tied to an employment contract within the meaning of Article 11(2)(a). Finally it considers that, as the clause referred to in the fifth interlocutory question runs contrary to Directive 92/85, there are no grounds for interpreting Article 119 of the Treaty, as detailed in 75/117 and Directive 76/207 (item 82–86)

The Court held:

1) *Article 119 of the EC Treaty, first Article of the EEC Council Directive 75/117, dated 10 February 1975, relating to the rapprochement of the laws of Member States relating to the application of the principles of equality of remuneration between male and female workers, Article 11 of the EEC Council Directive 92/85, dated 19 October 1992, concerning the implementation of*

measures aimed at promoting the improvement of the health and safety of pregnant, confined or nursing employees at work (tenth particular Directive within the meaning of Article 16(1) of Directive 89/391/EEC), did not prevent a clause in an employment contract from making payment during maternity leave referred to in Article 8 of Directive 92/85 of remunerations higher than the payments provided for by national legislation on matters of maternity leave subject to the condition that the female worker undertake to return to work within one month at most of childbirth, under penalty of having to repay the difference between the amount of the remuneration which had been paid to her during the maternity leave and that of the said payments.

2) *Article 8 of Directive 92/85 and Article 5(1) of EEC Council Directive 76/207, dated 9 February 1976, relating to the implementation of the principle of equality of treatment for men and women as regards access to employment, occupational training and promotion, and working conditions, does not prevent a clause in an employment contract obliging a female employee who had indicated an intention to start her maternity leave in the sixth week preceding the week of the anticipated birth, who is on sick leave with health problems linked to pregnancy immediately before this date and who gives birth during the sick leave, from bringing forward the start date for the maternity leave when this second date is later than the first.*

3) *An employment contract clause which prohibits a woman from taking sick leave during the period of 14 weeks maternity leave which a female worker must, as a minimum, be allowed under Article 8(1) of Directive 92/85 unless deciding to return to work and putting a definitive end to the maternity leave is not compatible with the provisions of Directive 92/85. On the other hand, an employment contract clause which prohibits a woman from taking sick leave during supplementary maternity leave granted to her by the employer unless she decides to return to work and put a definitive end to the maternity leave is compatible with the provisions of Directives 76/207 and 92/85.*

4) *Directives 92/85 and 76/207 do not prevent a clause in an employment contract limiting the period of acquisition of rights of annual holiday leave to the minimum 14-week period of maternity leave which female workers must be allowed under Article 8 of Directive 92/85 and stopping the acquisition of these rights during any period of supplementary maternity leave granted by an employer.*

5) *Directive 92/85 prevents a clause in an employment contract limiting, within the framework of an occupational scheme financed entirely by the employer, the acquisition of pension rights during maternity leave referred to under Article 8 of this Directive in the period in which the woman is paid the remuneration provided for by this contract or national legislation.*

Case C-66/96
HANDELS- OG KONTORFUNKTIONÆRERNES FORBUND I DENMARK, ACTING FOR BERIT HØJ PEDERSEN AGAINST FÆLLESFORENINGEN FOR DENMARKS BRUGSFORENINGER AND DANSK TANDLÆGEFORENING AND KRISTELIG FUNKTIONÆR-ORGANISATION/DANSK HANDEL & SERVICE
Date of judgment:
19 November 1998
Reference:
Compilation 1989, I-7327
Content:
Article 119 of the Treaty — Directives 75/117/EEC, 76/207/EEC and 92/85/EEC — Pregnancy — Remuneration — Working incapacity — Troubles current with pregnancy or medical recommendation — Circumstances of sacking

1. Facts and procedure

Both appellants had experienced an abnormal course of pregnancy before the three months preceding the anticipated time of their confinement. Mrs Høj Pedersen and Andresen had then been declared totally unfit for work and ceased to be paid their salaries by their employer, who invited them to claim the daily compensation provided for by Law No 852 om dagpenge ved sygdom eller fødsel, dated 20 December 1989 (a Danish law relating to a daily compensation in cases of sickness or confinement). Mrs Pedersen considered herself to be only partially unfit for work. As a result, she proposed to her employer that she return to work on reduced hours, and he refused. The individual concerned was then informed that somebody had been hired to replace her on a full time basis and that her salary would no longer be paid; she was, as a result, also invited to claim benefits for her early maternity leave. It then appeared at the time of the hearing that a question subsisted as to Mrs Sørensen's state of fitness.

2. Questions referred to the Court

Does EU law and in particular Article 119 of Directive 75/117/EEC, Directive 76/207/EEC and Directive 92/85/EEC, prevent national legislation which exempts an employer from paying salaries to pregnant workers when:

1) this absence is due to the fact that pregnancy appreciably aggravates an illness which is not, in other respects, linked to pregnancy;

2) this absence is due to sickness caused by pregnancy;

3) this absence is due to the fact that pregnancy takes a pathological course and that the carrying out of professional work carries a risk to the health of the woman or foetus;

4) this absence is due to timely troubles in the course of a normal pregnancy which would not, in other respects, make a woman unfit for work;

5) this absence is explained by medical recommendation to take care of the foetus, but on the assumption that this medical recommendation is not based on a true pathological condition or particular risk to the foetus;

6) this absence is due to the fact that the employer, solely on account of the pregnancy, considers itself unable to employ the pregnant worker even where she is not unfit for work;

and that, in situations 1 to 3 and 6, the State guarantees the pregnant worker daily compensation at the same rates as those she would be paid on sick leave, whilst in the case of 4 and 5, the State does not pay daily compensation and when there is, moreover, by virtue of national legislation, an obligation on the employer to pay the whole of the sick pay.

3. The judgment of the Court

First, second and third hypotheses

The Court points out that, in the question posed, the jurisdiction of the referral was first as to whether Article 119 of the Treaty as well as Directives 75/117 and 92/85 prevent a national legislation under which a pregnant woman who, before the start of her maternity leave, becomes unfit for work as a result of a pathological condition linked to her pregnancy, confirmed by a medical certificate, is not entitled to payment of the whole of her salary by the employer but to daily compensation paid by a local collective whilst, in cases of unfitness for work caused by illness confirmed by a medical certificate, the worker is, in principle, entitled to payment of the whole of their salary by the employer (item 28).

As a preliminary, the Court recalls that Directive 75/17 is addressed essentially at facilitating the concrete application of the principle of equality of pay contained in Article 119 of the Treaty and, as a consequence, it does not affect any of the contents and scope of this principle as defined by this last provision (order dated 3 December 1987. *Newstead*. 1992/85. Rec.p. 4753, item 20). The Court also observes that the circumstance that the facts at the origin of the case in point occurred essentially before the period of transposition of Directive 92/85 but before its adoption does not prevent the jurisdiction of the referral putting the question to the Court on its interpretation (see, in this regards, orders dated 18 December 1997. *Inter-Environnement Wallonie*. C-129/96. [1997] ECR.p. I-7411, and dated 8 October 1987. *Kolpinghuis Nijmegen*, 80/86, [1997] ECR. p. 3969) (items 29–30).

The Court then recalls the jurisprudence pursuant to which a salary payable by an employer during the period of the worker's sick leave was within the notion of remuneration set out in Article 119 of the Treaty (order dated 13 July 1989, Rinner-Kühn, 171/88, [1989] ECR. p. 2743) as well as the jurisprudence pursuant to which the troubles and complications which can arise in pregnancy, which can involve incapacity for work, highlight the risks inherent in pregnancy and are part of the specificity of the condition (order dated 30 June, Brown, I-4185, item 22) (items 32–33).

The Court states that, in this instance, it is recorded in the judgment that each worker has, in principle, a right, under the legislation in question in the case in point, to retain the whole of her salary in the event of unfitness for work. It judges that the fact that a women is deprived before the start of her maternity leave of the whole of her salary when the unfitness for work of which she is the victim results from a pathological state linked to her pregnancy must be regarded as founded essentially on pregnancy and therefore discriminatory. According to the Court, this would be the case unless the amounts paid to employees as daily compensation corresponded to the amount of their remuneration. If that were the case, the Court added that it would be up to the jurisdiction of the referral to check if the circumstance for the provision of the daily compensation by a local collective is not of a nature to engender a discrimination contrary to Article 119 of the Treaty. The Court concluded that the application of the legislative provisions, such as those in the case in point, in the substantive dispute comprised a discrimination against the female workers contrary to Article 119 of the Treaty and Directive 75/117 (items 34–37).

Replying to the two additional arguments of the respondents in question, the Court, on the one hand, observed that Article 11 of Directive 92/85 did not admit, in its paragraph 3, the application of a ceiling determined by the national legislation except for remuneration or allowances paid to the workers in the framework of maternity leave such as is otherwise defined in Article 8 of the same directive and, on the other hand, considered that the willingness to ensure an allocation of risk and economic cost tied to pregnancy, between the pregnant worker, the employer and society does not justify the aforementioned discrimination on the grounds of sex within the

meaning of the Court's jurisprudence (see order dated 6 February 1996, *Lewark*, C-457/93, [1996] ECR. p. I-243, item 31) (items 38–40).

Fourth and fifth hypotheses

The Court pointed out that, in its question, the referring jurisdiction sought to know if Article 119 of the Treaty and Directive 75/117 prevented a national legislation that provides that a pregnant woman who, before the start of her maternity leave, is absent from work either due to troubles deriving from pregnancy, when she is not otherwise unfit for work, or a medical recommendation for the care of the foetus, which is not based on a true pathological state or particular risks to the foetus, is not entitled to payment of her salary by the employer when any worker in a state of incapacity for work on account of sickness has this right in principle (see item 42)

The Court noted that, in contrast to the three hypotheses set out by the referring jurisdiction, the pregnant worker is absent from work before the start of her maternity leave not on account of a pathological state or particular risks to the foetus giving rise to work incapacity evidenced by a medical certificate, but by reason either of troubles derived from pregnancy, or a straightforward medical recommendation, without there being, in any of these situations, incapacity for work. Consequently, according to the Court, diminution, or even loss of salary which the employee sustains due to such absence not caused by unfitness for work, cannot be regarded as essentially based on the fact of her pregnancy, but more on the employee's choice not to work (items 48–49).

Sixth hypothesis

Finally, the Court observes that the national court is seeking to establish whether it is contrary to Directives 76/207 and 92/85 to provided that an employer may send home a woman who is pregnant, although not unfit for work, without paying her salary in full, when he considers that he cannot provide work for her.

The Court first drew attention to the fact that, according to Article 5 of Directive 76/207, men and women must benefit from the same working conditions, including conditions for dismissal. It judged that, when legislation such as that in question exclusively affects female workers, this constitutes discrimination, contrary to this provision. According to the Court, it is true that, in reserving Member States the right to maintain or introduce provisions aimed at protecting women in relation to 'pregnancy and maternity', Article 2(3), of Directive 76/207 recognises the legitimacy, regarding the principle of equality of treatment between the sexes, of the biological protection of women in the course of their pregnancy and thereafter (judgment dated 14 July 1994, *Webb*, C-32/93, [1994[ECR, p. I-3567, item 20). Nevertheless, the Court noted that legislation such as that forming the substantive case is not to be taken up outside the field of application of this provision. The Court noted that it transpired from the judgment that Danish legislation was not aimed so much at protecting the pregnant woman's biological condition as at preserving the employer's interests (items 52–56).

As regards Directive 92/85, the Court noted that Articles 4 and 5 set up an information and assessment process for activities which are likely to present a risk to the health and safety or have an effect on the worker's pregnancy, confinement or breast feeding. It drew attention to the fact that this procedure could lead to a temporary adjustment being made by the employer in her work conditions and/or working hours, and, where such an adjustment is not feasible, to a change of role, and that it is only when such a change is not feasible that the worker is excused from work for the whole of the period necessary for the protection of her health and safety, in accordance with national legislation or practice. According to the Court, the judgment referred shows that legislation such as that at issue in the main proceedings does not meet the substantive or formal conditions of Directive 92/85, relieving the worker from carrying out her paid work. In this regard, the Court found, firstly, that the employee's maternity

leave is in the interests of the employer and, secondly, that this decision could be taken by the employer without first investigating the possibility of making adjustments to the working conditions and/or working hours of the employee or the possibility of changing her role (items 57–58).

The Court (Sixth Chamber) held:

It is contrary to Article 119 of the EC Treaty and Council Directive 75/117/EEC, dated 10 February 1975, on the approximation of the legislation of Member States relating to the application of the principle of equality of pay for men and women, for national legislation to provide that a pregnant woman who, before the beginning of her maternity leave, is unfit for work by reason of a pathological condition connected with her pregnancy, as attested by a medical certificate, is not entitled to receive full pay from her employer but benefits paid by a local authority, when in the event of incapacity for work on grounds of illness, as attested by a medical certificate, a worker is in principle entitled to receive full pay from his or her employer.

Article 119 of the Treaty and Directive 75/117 do not preclude a national legislation providing that a pregnant woman who, before the start of her maternity leave, is absent from work either with problems connected with pregnancy, when she is not otherwise unfit for work, or a medical recommendation for the protection of the unborn child, not based on any actual pathological state or any special risks to the unborn child, is not entitled to payment of her salary by the employer when any worker unfit for work on account of sickness does have this right in principle.

Council Directive 76/207/EEC, dated 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, occupational training and promotion, and working conditions, and Council Directive 92/85/EEC, dated 19 October 1992, on the implementation of measures to promote the improvement of health and safety of pregnant, confined or breast feeding workers (tenth Directive, within the meaning of Article 16(1) of Directive 89/391/EEC), precludes a national legislation providing that an employer can send a worker home without paying her full salary when it considers that it cannot employ her even though she is not unfit for work.

Case C-326/96
B. S. LEVEZ/T. H. JENNINGS (HARLOW POOLS) LTD
Date of judgment:
1 December 1998
Reference:
Compendium 1989, I-7835
Content:
Article 119 of the Treaty — Directive 75/117/EEC — National legislation limiting the right to pay arrears to the two years preceding the institution of proceedings — Principle of equivalence and effectiveness

1. Facts and procedure

In the United Kingdom, by virtue of the Equal Pay Act 1970 (a law on equality of pay, hereafter the ('EPA')), all contracts of employment are deemed to have a clause on equality. THE EPA provides that in proceedings brought for breach of an equality clause, a woman is not entitled to claim arrears of remuneration or damages for more than the two years immediately preceding the date of instituting her proceedings (hereafter the 'disputed rule') It is clear from the judgment referred that the EPQ does not allow the Industrial Tribunal to increase this period. Nevertheless, according to the information provided to the United Kingdom Government, a person in the position of the appellant could bring proceedings in the County Court claiming both under the EPA and the tort of deceit of her employer.

In February 1991, Mrs Levez, was employed as manageress of a betting agency belonging to Jennings Ltd. Her salary was £ 10 000 pounds sterling a year. In the following December, she was appointed manager of another of the defendant's agencies, taking over from a man who had been paid a salary of £ 11 400 pounds sterling. According to the referred judgment, it was not disputed that Mrs Levez and her male predecessor were both employed to perform the same work. Nevertheless Mrs Levez's salary was only raised to £ 10 800 pounds sterling per year with effect from 30 December 1991, her employer having falsely told her that her male predecessor had been paid this. It was only from April 1992 that Mrs Levez had a salary rise up to £ 11 400 pounds sterling. After leaving her job at Jennings Ltd in March 1993, Mrs Levez discovered that she had been paid a salary which was inferior to her male predecessor's up until April 1992. As a result, she brought a claim on 17 September 1993 under the EPA before the Industrial Tribunal. It decided that she was entitled to a salary of £ 11 400 pounds sterling, starting from the date on which she had begun her duties, being 18 February 1991, and ordered Jennings Ltd to pay her the corresponding salary arrears. However, Jennings Ltd asserted that having regard to the two-year limitation period set by the rule in question, the Tribunal could not award remuneration arrears for the period prior to 17 September 1991 and asked the president of the Industrial Tribunal to review the dates referred to in the decision. Mrs Levez gave notice of appeal against the Industrial Tribunal's decision, maintaining that the decision to amend the dates from which pay arrears were to be paid to 17 September 1991 was contrary to EU law. She claimed that she was entitled to equal remuneration from the date she started working for Jennings Ltd, which was 18 February 1991.

2. Questions referred to the Court

1) Is it compatible with Community law to apply to a claim for equal remuneration for equal work on the grounds of sex discrimination, a rule of national law limiting the period for which the appellant is entitled to claim arrears of remuneration or damages for breach of the principle of equality to two years before the date of the institution of proceedings, when:

   a) this rule of national law applies to all claims for equal remuneration without discrimination on the grounds of sex, but to no other claim;

b) the rules which apply, in this respect, are more favourable to the claimants for other claims in relation to employment rights, such as claims for breach of employment contract, pay discrimination on the grounds of race, unlawful deduction of wages, and discrimination based on sex other than on matters of pay;

c) the national court has no power to increase the period beyond two years, whatever the circumstances, even if the claimant had delayed in starting her claim because the employer had deliberately given her false information as to the level of pay received by men carrying out the same work as her.

2) Having regard, in particular, to the Court's established case law pursuant to which the rights conferred by the direct effect of a Community law are to be exercised in accordance with the terms determined by national law, provided amongst others things, that these terms are not less favourable than those which relate to similar internal legal actions, how is the expression 'similar internal legal actions' to be interpreted in the context of a claim for equal pay, in circumstances where the terms set by national legislation implementing the principle of equal pay differ from those provided for by other national legislation on employment rights, including those relating to breaches of employment contracts, discrimination on the grounds of race and unlawful deductions from wages and sex discrimination other than in respect of pay?

3. The judgment of the Court

The Court stated that, in the light of the information provided, the first question referred by the national court must be construed as being whether Community law precludes the application of a rule of national law which limits the period for which a worker is entitled to arrears of remuneration or damages for infringement of the principle of equal pay to the two years preceding the date of institution of proceedings, being a period which cannot be increased, even when the delay in instituting the claim was due to the fact that the employer had deliberately provided incorrect information as to the level of pay received by a worker of the opposite sex carrying out similar work.

The Court recalled the case law relating to principles of equivalence and effectiveness. As a result it deemed that national legislation limiting the right to recover arrears of remuneration to two year years before the institution of an action was not in itself open to criticism. Nevertheless, the Court observed that, in this case, it was clear from the judgment referred that the appellant delayed the introduction of a claim because of the incorrect information supplied by her employer in December 1991 as to the level of remuneration received by the male worker carrying out the equivalent job. The Court found that, in this regard, when an employer supplies a worker with incorrect information about the level of pay received by workers of the opposite sex carrying out equivalent work, the said worker is not in a position to be aware of the existence or significance of discrimination. The Court added that, in these circumstances, by invoking the rule in question, the employer could deprive the employee of the opportunity of bringing the legal action provided for by Directive 75/117/EEC with a view to enforcing the principle of equal pay (see mutatis mutandis, judgment dated 17 October 1989, Danfoss. 109/88 [1989] ECR. p 3199, paragraph 13. The Court concluded, finally, that to allow an employer to apply a national legislation such as the rule in question would be, in the circumstances of the case in point, manifestly incompatible with the principle of effectiveness. Indeed, the Court noted that the application of the said rules in the circumstances so described is such as to make it practically impossible or excessively difficult to recover arrears of remuneration for discrimination founded on sex. It is clear to the Court that the result would be to encourage the breach of a

Community right by an employer whose deceit was the cause of the delay in the employee's action to enforce the principle of equal pay. The Court found, moreover, that it does not appear that the application of the rule in question in the circumstances of this case could be reasonably justified by the principles of legal certainty or the proper conduct of proceedings (items 18-33).

On the second question, the government of the United Kingdom had maintained that Mrs Levez could, in the proceedings brought in the County Court, have sought reparation for the whole of the loss suffered as a result of the fact that her employer's deceit had prevented her from instituting proceedings under the EPA, and that she could, in such proceedings, have invoked both the Act and her employer's deceit without the rule in question having any application. In the light of the information, the Court considers this question may be understood as being whether EU law precludes the application of the rule in question, even when other remedies are available but are likely to entail procedural rules or other conditions which are less favourable than other domestic legal actions which may be thought of as similar (items 35-56).

The Court holds that, with regard to the explanations provided by the United Kingdom government, where a worker can enforce their rights under Article 118 of the Treaty and Directive 75/117 before another court, the rule in question is not contrary to the principle of effectiveness. It pointed out that it still remained to determine whether, in the circumstances of the case in point, an action such as this could be brought in the County Court to comply with the principle of equivalence. The Court recalled that it was, in principle, for the national courts to determine if the procedural rules designed to ensure, within domestic law, the safeguard of an individual's legal rights under EU law are in conformity with the principle of equivalence (see, to this effect, judgment dated 10 July 1997, Palmisani, C-261/95, [1997] ECR. p. I-4025, item 33). It judges, however, that, in the light of the appraisal which the national court had to carry out, the Court could provide some principles with a bearing on the interpretation of Community law. The Court, in this regard, considers that the principle of equivalence is not to be interpreted as obliging a Member State to extend its most favourable domestic laws to all actions brought, such as in the substantive proceedings, in the field of employment rights (see, to this effect, the judgment dated 15 September 1998, Edis, C-231/96, [1998] ECR. p. I-4951, item 36). It stated that, in order to assess whether the principle of equivalence has been complied with in this case, the national court, which alone has direct knowledge of the procedural rules in the field of employment law, must examine both the purpose and the essential principles of domestic remedies of a supposedly similar nature (see, mutatis mutandis, judgment dated 14 December 1995, *Van Schijndel and Van Veen*, C-430/93 and C-431/93, [1995] ECR. p. I-4705, item 19) (items 37–44).

As regards the substantive proceedings, the Court stated that it would be appropriate to examine if, to enforce fully the rights which derive from Community law before the County Court, an employee in Mrs Levez' situation must incur additional expenses and delay, in comparison to a claimant who, basing their claim on a domestic right which could be considered similar, could embark on a simpler, and in principle, less costly action in the Industrial Tribunal (item 51).

The Court held:

1) *Community law precludes the application of a rule of national law which limits the period for which a worker is entitled to arrears of remuneration or damages for infringement of the principle of equality of pay to the two years preceding the date of institution of proceedings, being a period which cannot be increased, when the delay in instituting the claim was due to the fact that the employer deliberately provided incorrect information as to the level of pay received by the worker of the opposite sex carrying out similar work to her.*

2) Community law precludes the application of a rule of national law which limits the period for which a worker is entitled to arrears of remuneration or damages for infringement of the principle of equal pay to the two years preceding the date of institution of proceedings, even where another remedy is available, if the latter remedy entails procedural rules or conditions less favourable than those provided for in actions of a similar nature. It is for the national court to establish if this is the case.

Case C-167/97
REGINA/SECRETARY OF STATE FOR EMPLOYMENT, EX PARTE NICOLE SEYMOUR-SMITH AND LAURA PEREZ
Date of judgment:
9 February 1999
Reference:
Compendium 1999, I-623
Content:
Article 119 of Treaty — Directive 76/207/EEC — Compensation for unfair dismissal — Definition of remuneration — Field of application of Article 119 and the Directive —Claim on statistics — Indirect discrimination — Justification — Objectives of employment promotion

1. Facts and procedure

In the United Kingdom, Article 54 of the Employment Protection (Consolidation) Act 1978 (a consolidated law on the protection of employment, hereafter the '1978 Law') provides that all employees to whom the law applies have the right not to be unfairly dismissed by their employer. Under Article 64, paragraph 1, of the 1978 Law, Article 54 does not apply to an employee unless he has been employed in a continuous fashion for a minimum period of two years ending on the effective date of the dismissal (hereafter the 'rule in question'). Under Section 68, paragraph 1, of the 1978 Law, when an Industrial Tribunal finds that a claim for unfair dismissal is well founded, it sets out to the claimant the measures that can be adopted for his reinstatement or re-engagement, and the circumstances in which they can be ordered and asks him if he wishes the Industrial Tribunal to make such an order. Under paragraph 2 of the same provision, if, in the proceedings relating to an unfair dismissal, the Industrial Tribunal finds a claim well founded, but cannot order any reinstatement or re-engagement, it awards damages for the unfair dismissal. The damages granted for unfair dismissal are comprised of two elements: a base and a compensatory award. The base award corresponds to the remuneration of which the employee is deprived on account of his dismissal. The compensatory award corresponds to the amount that the Industrial Tribunal considers is just and equitable taking account of all the circumstances, having regard to the loss suffered by the worker as a result of the dismissal, to the extent that the loss is caused by the employer.

Mrs Seymour-Smith started work on 1 February 1990 as secretary to Christo & Co, and was dismissed on 1 May 1991. On 26 July 1991, she referred her case to the Industrial Tribunal on the grounds that she had been unfairly dismissed by her former employers. Mrs Perez started work for Matthew Stone-Restoration on 19 February 1990 and was dismissed on 25 March 1991. On 9 June 1991, she referred a claim for unfair dismissal to the Industrial Tribunal against her former employers. It appeared from the case files in the main proceedings that the claims of the two claimants seeking to establish the unfair nature of these dismissals and so to recover compensation had been thrown out by the Industrial Tribunal on the grounds that they did not meet the requirement for two years employment under the rule in question. The claimants in question made an application in parallel for 'judicial review' to contest the legality of the rule in question.

2. Questions referred to the Court

1) Do the damages awarded in a case for breach of the right not to be unfairly dismissed as provided for by national legislation such as the Employment Protection and (Consolidation) Act 1978 constitute 'remuneration' within the meaning of Article 119 of the EC Treaty?

2) If the answer to the first question is in the affirmative, do the conditions which determine if the worker has the right not to be unfairly dismissed fall within the scope of Article 119 or those or Directive 76/207?

3) What are the legal criteria for establishing if a measure adopted by a Member State af-

fects men and women differently to the extent that it amounts to indirect discrimination for the purposes of Article 119 of the EC Treaty, except where this is shown to be based on objectively justified factors other than sex?

4) When must these legal criteria be applied to a measure adopted by a Member State? In particular, at which of the following dates, or at what other date, must the criteria be applied to the measure in question:

   a) the date of the measure's adoption?

   b) the date the measure comes into force?

   c) the date of the employee's dismissal?

5) What are the legal conditions for establishing the existence of an objective justification for the purposes of indirect discrimination within the meaning of Article 119 of the EC Treaty, in support of a measure adopted by a Member State in application of its social policy? In particular, what are the components that the Member State must show to support the grounds of justification that it asserts?

3. The judgment of the Court

On the first question, the Court first pointed out that, in accordance with established law, the definition of remuneration, within the meaning of Article 119, second paragraph of the Treaty, comprises any benefit whether in cash or in kind, current or future, provided it is paid, even indirectly, by the employer to the worker in return for the latter's employment (see, in particular, judgment dated 9 February 1982, *Garland*, 12/81, {1982] ECR.p. 359, item 5, and dated 17 December 1990, Bosman, C-262/88, [1990] ECR. p. I-1889, item 12). It also noted that it would appear from the case law that the fact that certain benefits are paid after the cessation of the employment relationship does not exclude them from being able to be characterised as remuneration as remuneration within the meaning of Article 199 of the Treaty (judgment, Barber aforementioned, item 12). As regards, in particular, compensation granted by the employer to the worker on cessation of work, the Court has already determined that this constitutes a different form of remuneration, to which the worker has a right by reason of his employment, but which is paid to him at the time of cessation of the employment relationship, with the aim of facilitating his adaption to the new circumstances resulting from it (see *Barber*, cited above, item 13, and dated 27 June 1990, *Kowalska*, C-33/89,[1990] ECR. p. I-2591, item 10) (items 23–25).

In this case, it is appropriate for the Court to emphasise that the compensation granted to the worker for unfair dismissal, which is comprised of a base award and a compensatory award designed in particular to grant the worker what they should have received if the employer had not illegally put an end to the employment relationship., The Court stated that the base award is directly attributable to the remuneration that would have been payable to the employee in the absence of the dismissal, and the compensatory award covers the loss suffered by the employee from the fact of the dismissal and includes all expenses reasonably incurred by him as a result of his dismissal and subject to conditions, the loss of any benefits he would reasonably have hoped to get if he hadn't been dismissed. Therefore, according to the Court, the compensation for unfair dismissal is paid to the worker in view of the employment which they had and would have continued to have in the absence of the unfair dismissal. The Court concluded that this compensation therefore fell into the definition of remuneration within the meaning of Article 119 of the Treaty. It added that this finding would not be invalidated purely due to the fact that the compensation in the substantive case is awarded on the basis of a legal decision made in accordance with the applicable legislative provisions. Indeed, as already stated, in this regard, it is unimportant that the right to compensation is provided for another

source other than the employment contract and, in particular, by law (see, to this effect, judgment, *Barber*, cited above, item 16, items 26–29)

On the second question, the Court pointed out that, when the claim is for damages, the condition provided for in the rule in question relates to access to a form of remuneration to which Article 119 and Directive 75/117 apply. It noted that, in this case, the claims made by the claimants in the substantive proceedings before the Industrial Tribunal where not aimed at the possible consequences of an employment term, i.e. not to be unfairly dismissed, but at compensation in itself. Therefore, it deems this matter to fall within Article 119 of the Treaty and not Directive 76/207. It would be otherwise if the claim was for reinstatement or re-engagement of the dismissed worker. In such a hypothesis, the conditions provided for by national law relating to working conditions or access to employment would fall within Directive 76/207 (items 35–37).

The Court considered it appropriate, at this point, to reply to the fourth question by which the national court was in substance asking if the legality of a rule such as the rule in question must be assessed at the date of its adoption, or of its coming into force, or of the employee's dismissal (item 42). Here, it emphasised that the requirements of EU law must be complied with at all relevant times, whether this is at the adoption of the measure, its implementation, or its application to the case in point. However, it must be recognised that the point at which the legality of a rule such as the rule in question must be assessed by the national judge could vary dependant on the different legal and factual circumstances So, when it is alleged that the national authority which adopted the act lacked authority, the legality of the said act must, in principle, be assessed at the time of its adoption. On the other hand, where it involves the application to an individual situation of a national measure which has been legally adopted, it may be relevant to assess whether this was still in conformity with EU law at the time of its application. As regards statistics in particular, the Court deems that it may be relevant to take into account not only the statistics available at the date of the adoption of the act, but also later ones which are likely to provide indications of its repercussions for male and female workers (items 45–49).

On the third question, Article 119 of the Treaty sets out the principle of equality of remuneration between men and women for the same work, and that this principle precludes not only the application of provisions constituting direct discrimination on the ground of sex, but also the application of provisions which maintain differences in treatment between men and women in application of the criteria not based on sex, when these differences in treatment cannot be explained by factors objectively justifying and unrelated to any discrimination on the grounds of sex (see judgment dated 15 December 1994, *Helmig* et al., C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93,[1994] ECR. p. I-5727, item 20). Having established that the rule in question does not constitute any direct discrimination based on sex, it is necessary to establish if it can comprise indirect discrimination contrary to Article 119 of the Treaty (items 52–53).

For this, the best method for comparison of statistics is to compare the respective proportions of workers in the male and female workforce who meet or do not meet the requirement for two years employment under the rule in question There is scope, therefore, for determining if the statistical facts available indicate whether the percentage is considerably lower for female than male workers who fulfil the requirement for two years employment under the rule in question, or if the statistical facts available show a split between the male and female workers fulfilling the requirement for two years employment which is less significant but relevant and relatively uniform over a long period. It is also for a national judge to assess if the statistical facts relating to the workforce situation are valid and can be taken into account, that is, if they relate to a sufficient number of individuals, do not express purely fortuitous or conjectural phenomena, and generally appear

significant (see, judgment dated 27 October 1993, *Enderby*, C-127/92, [1993] ECR. p. I-5535, item 17) (items 59–62).

The Court decided that, in this case, it appears from the judgment referred, that in 1985, the year of the introduction of the requirement for two years employment, 77.4 % of male and 68.9 % of female workers met this requirement. At first glance, such statistics do not appear to show that a considerably lower percentage of female than male workers are able to fulfil the condition imposed by the rule in question (items 63–64).

On the fifth question, the United Kingdom government asserts that the risk for employers of being involved in proceedings for unfair dismissal for recently recruited employees is a deterrent to recruitment, hence the extension of the period of employment required to benefit from the protection from dismissal encourages the recruitment of workers. The Court held that it was incontestable that recruitment was a legitimate aim of social policy, but it still had to be established in the light of all the relevant factors and taking account of the possibility of attaining these social policy aims by other means, if such an aim was unrelated to any discrimination based on sex and if the rule in question, as a means of achieving this aim, could even contribute to its realisation. In this regard, the United Kingdom government maintains, on the basis of the judgment dated 14 December 1995, *Nolte* (C-317/93, [1995] ECR. p. I-4625), that a Member State must simply show that it was reasonable to consider that the measure would assist in the realisation of the social policy aim. The Court noted the verity of the notion that, in item 33 of the *Nolte* judgment, it appeared that Member States have wide discretion in the choice of the measures likely to realise the aims of their social and employment policies. However, whilst it is true that the current position under EU is that social policy falls essentially within the remit of Member States, this does not mean that the wide discretion they have in this regard can have the effect of rendering void the implementation of a fundamental principle of EU law such as the equality of remuneration between male and female workers. It stated that mere general assertions as to the suitability of measures aimed at promoting recruitment are not sufficient to show that the aim of the rule in question is unrelated to discrimination based on sex nor to provide evidence enabling a reasonable assessment that the measures chosen were suitable for the realisation of this aim (see 70–76).

The Court held:

1) *The damages awarded by a tribunal in a case for breach of the right not to be unfairly dismissed constitute remuneration within the meaning of Article 119 of the Treaty.*

2) *The conditions which determine whether a worker has a right to recover damages in a case for unfair dismissal fall within Article 118 of the Treaty. On the other hand, the conditions which determine if a worker has a right in a case for unfair dismissal to be reinstated or re-engaged fall within Council Directive 76/207/EEC dated 9 February 1976, relating to the implementation of the principle of equality of treatment between men and women in matters relating to access to employment, occupational training and promotions, and to working conditions.*

3) *It is for the national judge to determine, taking account of all the relevant legal and factual circumstances, the date at which it is appropriate to assess the legality of a rule according to which protection against unfair dismissal does only applies to employees who have worked for a minimum period of two years.*

4) *In order to establish whether a measure adopted by a Member State affects men and women differently to the extent that it amounts to indirect discrimination within the meaning of Article 119 of the Treaty, the national judge must check if the statistical facts which are available indicate that a considerably lower percentage of female workers compared to male workers are in a position to fulfil the conditions imposed by the said*

measure. If this is the case, there is indirect discrimination based on sex, insofar as the measure is not justified by objective factors unrelated to any discrimination on the grounds of sex.

5) *If a considerably smaller number of female workers than male workers are in a position to fulfil the condition for two years employment under the rules described at item 3 of the disposition, it is incumbent on the Member State, as author of the rule presumed to be discriminatory, to show that the rule has a legitimate social policy aim, and that the aim is unrelated to any discrimination based on sex and that it can reasonably be considered that the means chosen are suitable for the realisation of this aim.*

Case C-309/97
ANGESTELLTENBETRIEBSRAT DER WIENER GEBIETSKRANKENKASSE/WIENER GEBIETSKRANKENKASSE
Date of judgment:
11 May 1999
Reference:
Compendium 1999, I-2865
Content:
Article 119 of the Treaty (Article 141 EC) — Directive 75/117/EEC — Workers carrying out the same work — Concept — Exercise of an apparently identical activity on the basis of different professional training and accreditation — Exclusion

1. Facts and procedure

In Austria, the remuneration of workers employed by Austrian social security organisations is fixed by different staff rules (Dienstordnungen), in the form of collective agreements applicable to the different categories of personnel. In this way, psychologists authorised to carry out their profession on a self-employed basis are classed as category F, Grade 1, in the Dienstordnung A (rules of service A, hereafter the 'DOA', which apply to administrative employees, care personnel and dental technicians, whilst doctors authorised to carry out their profession on a self-employed basis as specialists are classified in category B, Grade III of the Dienstordnung B (rules of service B, hereafter the 'DOB'), which apply to doctors and dentists. In addition, the organisations concerned can employ three different categories of psychotherapists. Doctors who have completed their general or specialist training, psychologists accredited with diplomas to practice on a self-employed basis in the health sector and, finally, those who are neither qualified doctors or psychologists, but who have general educational training and specialist training in psychotherapy.

The Angestelltenbetriebsrat der Wiener Gebietskrankenkasse (the staff enterprise committee of the Vienna regional health fund, (hereafter the 'enterprise committee') asked the Arbeits- und Sozialgericht (the tribunal for work and social security matters) for a declaration that applied to relationships arising from employment contracts entered into between the regional fund and psychotherapists who had carried out psychology studies ratified by a doctorate and that those concerned must be classed in the same category as doctors employed as psychotherapists (that is to say, in category B, Grade III). In support of this request, they asserted, in particular, that, on the one hand, this classification by analogy was justified by the training and duties of the psychologists working as psychotherapists who also worked in the sector of therapeutic treatments covered by DOB and, on the other hand, that the majority of practitioners in this lower paid category were women. Arbeits- und Sozialgericht rejected the enterprise committee's claim on the grounds that the Gleichbehandlungsgesetz 1979 (Law on Equal Treatment) did not apply to all forms of differential treatment within professional groups, but simply provided for the equal treatment of men and women at work.

2. Questions referred to the Court

1) When the same duties are carried out for a prolonged period of time (i.e. several salary payment periods) by workers with different accreditations for the exercise of their professions, is the situation one where the terms ''the same work' and 'the same job' within the meaning of Article 199 of the Treaty or Directive 75/117/EEC apply?

2) Is it also relevant to determine, in appreciating whether discrimination exists within the meaning of 119 of the Treaty or Directive 75/117/EEC, whether:

   a) the remuneration is only to be set by the parties to the contract and that they have a choice whether to include the rules from collective agreements in their contracts;

b) the mandatory minimum remuneration is set by the general rules (of the collective agreements) for all workers in the sector; or

c) remuneration is governed in a restrictive and conclusive fashion by the collective agreements.

3) When a collective agreement, through a definitive rule on remuneration, determines different remuneration for the same work or work of equal worth according to professionals' accreditations, must it take account, when forming groups for comparison to establish if there is any possible discriminatory effect of such a measure:

a) the actual workers employed in the employer's company,;

b) the workers employed in the field covered by the collective agreement, or;

c) all workers accredited to carry out the profession?

4) In such a case (second and third questions), must they bear in mind the proportion of men and women in the disadvantaged group only or in both groups?

5) When the duties under consideration which are carried out identically by both groups of professionals only form part of the accredited activities of the professionals, must account be taken of:

a) all workers engaged in the relevant field of reference (undertakings, collective agreements, — see third question) who have this professional accreditation (all specialist doctors and all psychologists);

b) everyone actually suited to perform this activity (doctors specialising in psychology); or

c) only the people who actually carry out the same identical duties?

6) In a situation of identical deployment of staff in a company, can a different training path be thought of as a factor justifying lower remuneration? Can a wider professional qualification be thought to be an objective criterion for different remuneration, independently of its actual use in a business?

Is it determinative, as a result, that:

a) the better paid group of workers can also be called upon to carry out other tasks in the business; or

b) must the actual allocation of such other tasks to them be proved?

Must account be taken in this regard that, under the applicable rules of the collective agreements, there is provision for protection against dismissal?

7) Does it follow from Article 222 of the Treaty or the application by analogy of Article 174 of EC Treaty that a right to remuneration under another collective agreement (concluded by the same parties) which possibly results from Article 119 of the EC Treaty or Directive 75/117/EEC does not exist until the moment when the Court of Justice determines this right?

3. *The judgment of the Court*

On the first question, the enterprise committee having cited the judgment dated 27 October 1993, *Enderby* (C-127/92,[1993] ECR. p. I-5535), the Court started by stating that, in this judgment, it had not taken a view on the issue of the equal worth of the functions performed by the workers belonging to the different categories of professionals and had only replied to the questions put to it starting from the supposition that these func-

tions were of equal worth, without themselves going the validity of such a supposition (see the judgment *Enderby*, cited above, paragraphs 11 and 12). In order, then, to assess if the workers perform the same work, one must investigate if these workers, taking account of all factors, such as the nature of the work, the training and working conditions, can be considered as being in comparable positions (see, to this effect, the judgment dated 31 May 1995, *Royal Copenhagen*, C-400/93, [1995] ECR. p., I-5535, item 17) (items 59–62). So, therefore, when apparently identical activities are performed by different groups of workers who do not have the same professional qualifications or training for carrying out their profession, it is necessary to check if taking account of factors relating to the tasks likely to be entrusted to each of these groups respectively, to the training requirements set for their practice and the working conditions in which they are performed, these different groups or workers do the same work within the meaning of Article 119 of the Treaty. The Court specified that professional training was not therefore the sole factor likely to objectively justify a difference in the remuneration set for workers carrying out the same work (see, to this effect, judgment dated 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark*, *'Danfoss'*, 109/88, [1989] ECR. p. 3199, paragraph 23 but one of a number of criteria for the evaluation of whether the workers were performing the same work or not (items 12–19).

The Court stated that it appears from the judgment referred that, although the psychologists and the doctors employed as psychotherapists by the regional health fund to perform activities which were apparently the same, in treating their patients they used knowledge and skills acquired in very different disciplines, one based on a study of psychology and the other on medical studies. Furthermore, the national court emphasised that, even if the doctors and psychologists actually both do the work of a psychotherapist, the former are also qualified to perform other duties relevant to a field other than those open to the second, who can only do the work of a psychotherapist. In these circumstances, the Court held, it cannot be considered that the two groups of workers, who have received different professional training and who by virtue of the difference in the scope of their qualification resulting from this training and on the basis on which they were recruited are called upon to perform different tasks or functions, are in a comparable situation. This finding is not contradicted by the existence of a single charge rate for psychotherapy treatments, given that such a charge rate could be the result of social policy (items 20–22).

Taking account of the reply given to the first question, the Court considers that there are no grounds for replying to the other questions put by the referring court (item 24).

The Court held:

This is not a case of 'the same work' within the meaning of Article 119, paragraph of the EC Treaty (which has on amendment become Article 14, EC or of Council Directive 75/117/EEC, dated 10 February 1975, relating to the harmonisation of legislation in Member States relating to the application of the principle of equality of remuneration between male and female workers when the same activity is performed over a prolonged period of time by workers accredited with different qualifications for carrying out their professions.

Case C-281/97
ANDREA KRÜGER/KREISKRANKENHAUS EBERSBERG
Date of judgment:
9 September 1999
Reference:
Compendium 1999, I-5127
Content:
Article 119 of Treaty (Article 141 EC) — End of year bonus — Definition of remuneration or unfair dismissal — Definition of remuneration — Exclusion of persons in minor employment from benefit of the bonus — Indirect discrimination — Justification — Employment policy

1. Facts and procedure

Mrs Krüger was employed full time by the defendant in the main case, from 1 October 1990, as a nurse. Her employment relationship was stated in the Bundesangestelltentarifvertrag of 1961 (in Germany, a collective agreement for public sector employees, hereafter 'BAT') After the birth of her child, Mrs Krüger obtained childcare leave, in accordance with Bundeserziehungsgeldgesetz (federal law for the allowance for childcare leave, hereafter 'BErzGG'), as well as a childcare allowance. From 20 September 1995, Mrs Kruger worked in minor employment for the defendant in the main proceedings, within the meaning of Article 8 of IV book of the Sozialgesetzbuch (social code, hereafter 'SGB'), which was defined as a normal week of less than 15 hours' work and normal pay not exceeding a fraction of the monthly baseline reference. Minor employment is exempt from social security contribution obligations.

Mrs Krüger asked her employer for a payment of the special annual bonus for 1995, which is a gratuity paid at Christmas, equivalent to one month's salary, provided for in the Zuwendungs-Tarifvertrag of 1973 (collective agreement providing for the payment of bonuses to employees, hereafter the 'ZTV') The defendant in the main proceedings refused to pay this bonus on the grounds that the ZTV did not apply to people whose employment relationship is governed by BAT and that, pursuant to Article 3n of BAT, people working in minor employment within the meaning of Article 8 of SGB are excluded from the scope of application of this agreement.

2. Questions referred to the Court

Is a standard rule of national law — in this instance comprised of a combination of BAT Article 3n and of Zuwendungs-TV dated 12 October 1973 — compatible with Council Directive 76/207/EEC, relating to the implementation of the principle of equal treatment for men and women as regards working conditions, as well as with Article 119 of the EC Treaty, to the extent that it provides that employees whose work is not subject to obligatory social security insurance do not benefit from the special annual bonus provided for by the applicable collective agreement, in contrast with employees who are subject to obligatory social security insurance? Is this measure compatible with the provisions cited above in particular when employees on childcare leave who are not working receive the special bonus provided for in the collective agreement, at least in the first year?

3. The judgment of the Court

The Court started by examining if Directive 76/207 applies to the main case. It noted that, particularly as a result of the second preamble to the Directive, it does not envisage remuneration within the meaning of Article 119 (see, judgment dated 13 February 1996, *Gillespie e.a.* C-342/93, [1996] ECR I-475, item 24). The Court was conscious, in this regard, of case law on the concept of remuneration, within the meaning of Article 119, second paragraph of the Treaty (see judgment dated 9 February 1982, *Garland e.a.* C-12/81, [1982] ECR 359, item 5, and dated 17 May 1990, *Barber*, C-262/88, [1990] ECR. p. I-1889, item 12, and dated 9 February 1999, C-167/97, [1999] ECR. p. I-623, item 23), and concluded that an end of year bo-

nus paid by the employer to the worker pursuant to a law or collective agreement is paid by virtue of the latter's employment, so as to constitute remuneration within the meaning of Article 119 and does not, therefore, fall within Directive 76/207 (items 13–17).

As to Article 119 of the Treaty, the Court referred to case law on indirect discrimination based on sex (see, in particular, the *Seymour-Smith and Perez* judgment cited above, item 52). It was also conscious that the mandatory prohibition on discrimination between male and female workers applies not only to public authorities, but also to all collective agreements governing employees, as well as contracts between individuals (see in particular the judgment dated 7 February 1991, *Nimz*, C-184/89, [1991] ECR p. I-297, item 11). Turning to the refusal to grant a bonus, in the main proceedings, it is established that the exclusion from BAT's scope of application of people working in minor employment within the meaning of Article 8 of SGB does not entail direct discrimination based on sex and that it is necessary, therefore, to examine whether such a measure can be deemed indirect discrimination contrary to Article 199 of the Treaty. In this regard, the Court recalled that, according to established law, Article 119 of the Treaty precluded a national provision or stipulation in a collective agreement which applies independently of the worker's sex but which, in fact, disadvantages a considerably higher percentage of women than men, to the extent that this provision cannot be justified by objective factors which have nothing to do with discrimination based on sex (see, to this effect, the judgment in *Seymour-Smith and Perez*, cited above, paragraph 67, and that dated 13 July 1989, *Rinner-Kühn*, 171/88, [1989] ECR. p. 2743, paragraph 12.) The Court stated, therefore, that the exclusion of persons working in minor employment from a collective agreement which provides for the grant of a special annual bonus constitutes different treatment by comparison with full time workers. It judged that if the national court, which alone is competent to assess the facts, was to state that this exclusion, though applying independently of the worker's sex, applies in practice to a considerably higher percentage of women than men, it would as a consequence, have to decide that the collective agreement concerned constitutes indirect discrimination within the meaning of Article 119 of the Treaty (items 19–26)

As the defendant in the main case asserted that aims of social policy and employment which are objectively unrelated to any discrimination on the grounds of sex justify, in this case, the exclusion of minor employment from the scope of application of the collective agreement, the Court confirmed that current EU law indeed established that social policy fell within the remit of the Member States. It thus stated that it was incumbent on the latter to select measures likely to assist in the realisation of the aims of social policy and employment and that, in exercising this authority, the Member States had broad discretion (see judgment dated 14 December 1995, *Nolte*, C-317/93, {1995] ECR.p. I-4625, item 33, and *Megner and Scheffel*, C-444/93, ECR.p I-4741, item 29). However, the main proceedings concerned a different situation to that in the *Nolte* and *Megner and Scheffel* judgment cited above. Indeed, the case is not about a measure taken by the national legislator under its assessment powers, nor a principle constituting a foundation of the German social security system, but an exclusion of people working in minor employment from the benefit of a collective agreement providing for the grant of a special annual bonus which has the effect, as regards remuneration, that these people are treated differently to those coming under the said collective agreement (items 27–29).

The Court (Sixth Chamber) held:

Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty, replaced by Articles 136 EC to 142 EC) must be interpreted as meaning that the exclusion by a collective agreement of people working for less than 15 hours a week on employed activities and normally paid less than a fraction of the base monthly refer-

ence remuneration, and thereby exonerated from obligatory social security insurance, from benefitting from a special annual bonus as provided for in the said collective agreement which applies irrespective of the workers sex, but affects in fact a considerably higher percentage of women than men, constitutes indirect discrimination on the basis of sex.

Case C-249/97
GABRIELE GRUBER/SILHOUETTE INTERNATIONAL SCHMIED GMBH & CO KG
Date of judgment:
14 September 1999
Reference:
Compendium 1999, I-5295
Content:
Article 119 of Treaty (Article 141 EC) — Termination payment — Reduced payment on termination after child birth — Indirect discrimination

1. Facts and procedure

In Austria, Article 23, paragraph 1, of the Angestelltengesetz (a law for employees, hereafter 'AngG') provides that, in cases of termination of an employment relationship which has lasted continuously for three years, an employee is entitled to a termination payment. The termination payment under Article 23, paragraph 7, of the Ang G is not, however, payable when the employee himself withdraws from the contract or terminates it before the conclusion of the contractual term without serious grounds for doing so or when he is responsible for his own dismissal before the end of the contractual term. The serious grounds on which an employee can put an end to his contract and receive the whole of the termination payment under Article 23, paragraph 1, of the AngG are set out in Articles 26 of the AngG and again at 82 of the Gewerbeordnung 1859 (the code on industrial employment legislation, hereafter 'GewO 1859') which applies to blue collar workers.

Article 26 of the AngG is worded as follows:

'The following are, in particular, considered to be serious grounds which justify the premature departure of an employee:

1) it is impossible to carry out the occupational duties, or to do so would be a threat to health or morality;

2) the employer has wrongfully reduced or withdrawn the remuneration to which the employee is entitled or has harmed the employee, in the case of payment in kind, through unwholesome or insufficient food or insalubrious accommodation, or a breach of other important contractual provisions;

3) the employer's refusal to comply with its obligations as regards the protection of an employee's life and health and with regard to morality;

4) the employer, a relation of the employer or a colleague commits an act of a serious wrongdoing against the employee, or a member of their family, which is an outrage to morality or damaging to reputation.'

Article 82 again of the GewO 1859 cited above:

'A worker can cease work before the expiry of the contractual term and without notice:

a) if the worker cannot carry out his work without demonstrable injury to health;

b) if the employer is guilty of maltreating or grossly offending the worker or a member of his family;

c) if the employer or a member of his family incites the worker or a member of his family to behaviour which is unlawful or contrary to morality;

d) if the employer wrongfully refuses to pay him the agreed salary or comply with other important contractual provisions;

e) if the employer is not in a position to pay him his salary or refuses to do so.'

Article 23, paragraph 3, of the AngG, provides that female workers have a right, if the employment relationship has lasted for a continuous period of five years, to half the termination payment

due under Article 23, paragraph1, when they resign before the expiry of the term of the contract after the birth of a living child during the period of protection referred to in Article 5, paragraph 1, of the Mutterschutzgesetz (a law for maternal protection).

Mrs Gruber worked for Silhouette International Schmied GmbH & Co KG, hereafter 'Silhouette') from 23 June 1986 to 13 December 1995 as a blue collar employee. She is a mother of two children born on 1 October 1993 and 19 May 1995. With both children, she took two years' parental leave, so that, in the autumn of 1993, she came under the maternity leave regime period (with protection both before and after birth) rather than under that of parental leave. Faced with difficulties in organising childcare for her two children because of a lack of facilities and although she expressed a real wish to resume her paid duties, she terminated her employment contract on 16 November 1995, in order to look after her children. After her resignation on these grounds, Silhouette paid Mrs Gruber the termination payment provided for by Article 23, paragraph 3, of AngG. Asserting her resignation was based on serious grounds on account of the lack of nursery facilities for at least three years in her residential locality in the Upper Austria region, Mrs Gruber brought a case contesting the reduction in her termination payment. In the body of the main proceedings, she claimed that she was entitled to payment of the whole of the termination payment under Article 23, paragraph 1, of the AngG, on the grounds that the national provisions which limited her rights constituted indirect discrimination against female workers, prohibited by Article 119 of the Treaty.

2. Questions referred to the Court

1) Is it compatible with Article 119 of the EC Treaty that, in most cases it is women who must end their employment relationship to look after their children due to a lack of nursery facilities and that these women who, whilst fulfilling the supplementary requirements (length of employment by the company), only receive a maximum of half the termination payment owed for the actual duration of their employment (Article 23, paragraph 3, of the AngG), whilst men maintain the right to the termination payment on the basis of their full period of work?

2) Does the fact that, in Austria, nurseries are, to a large extent, operated by public services or with their financial support, play a role in this respect?

3. The judgment of the Court

The Court pointed out that, in its first question, the national court was asking if, in substance, Article 119 of the EC Treaty precluded national law granting workers who bring an end to their employment relationship prematurely in order to look after their children due to a lack of nursery facilities, termination payments which are reduced in comparison to those paid for the same length of actual employment to workers who resign on serious grounds when the majority of workers receiving the reduced termination payment are women (paragraph 21).

The Court indicated, as a preliminary, that the issue of whether the termination payment fell within the definition of remuneration within the meaning of Article 119 of the Treaty was not contested. It also observed that the notion that this cannot be a case of direct discrimination based on sex was not contested, as the reduced termination payment provided for in Article 23 of the AngG is made in the same conditions for female and male workers who cease their employment relationship after the birth of a child. It deemed it necessary, therefore, to determine if the application of provisions such as those in Article 23 of the AngG in circumstances such as those put forward by the referring court constitute an indirectly discriminatory measure against female workers (items 22–24).

The Court considered established law stating there is an indirect discrimination when the application of a national measure, although formu-

lated in a neutral way, in fact disadvantages a far higher percentage of women than men (see in particular, the judgment dated 2 October 1997, *Gerster*, C-1/95. [1997] ECR.p I-5253 item 30) as well as the case law pursuant to which Article 119 of the Treaty precludes the application of provisions which maintain different treatment for men and women workers by the application of criteria which are not based on sex when these differences cannot be explained by objectively justified factors unrelated to discrimination on the basis of sex (see in particular, the judgment in *Seymour-Smith and Perez*, C-167/97 [1999] ECR.p I-623, item 52). It is therefore necessary to examine in the first place if the application of Article 23, paragraph 3, disadvantages a worker such as Mrs Gruber in relation to other workers who find themselves in an identical situation or one analogous to hers (paragraphs 25–27).

The Court noted that, in this regard, two different arguments had been supported. According to the first, advanced by Mrs Gruber and the Commission, the groups to be compared are workers resigning for maternity reasons and those resigning on serious grounds. In this projection, a disadvantage exists for the first group, who only receive half the termination payment granted to the second. This reasoning would lead, then, to a consideration that resignation for maternity reasons is equivalent to serious grounds within the meaning of Article 26 of the AngG, giving right to a full termination payment as provided for under Article 23, paragraph 1, of this law. Silhouette and the Austrian government, on the other hand, argue that the groups to be compared are workers who resign for maternity reasons and those who resign on serious grounds or who voluntarily bring an end to the employment relationship for personal convenience. In this projection, there would not be a disadvantage, with the first group having a right to a termination payment, whereas the second would not receive any. It follows that Article 23, paragraph 3 of the AngG which gives right to a limited termination payment could constitute an exceptional provision according favourable treatment to the workers concerned (items 28–30).

Whether these arguments appear well founded depends on whether the purpose and cause of the situation of workers who resign to look after children is similar to those of the situation of workers who resign on serious grounds within the meaning of Article 26,of the AngG and 82 and of the GewO 1859. Now it seems the common characteristics in the examples given in Article 26 of the AngG and 82 and of the GewO 1859 bear a relation to the company working conditions or the employer's conduct, in which the continuation of work is made impossible and no worker ought to be expected to maintain his employment relationship even in the notice period normally provided for on resignation. In these conditions, the situations previously referred to have a purpose and a reason different from those of a worker such as Mrs Gruber, and it follows that an exclusion of a worker such as Mrs Gruber from the benefit of Article 23m, paragraph 1 of AngG does not constitute an indirectly discriminatory measure (items 31–34).

With regard to the second question, it suffices to state that the issue of whether granting a reduced termination payment to workers terminating their employment relationship early to look after children due to lack of childcare facilities constitutes discrimination within the meaning of Article 119 of the Treaty is not dependant on whether they are privately or publicly run (item 37).

The Court held:

1) *Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty being replaced by Articles 136 EC to 1143 EC) does not preclude national law which grants workers who bring an end to their employment relationship prematurely in order to look after their children because of a lack of nursery facilities termination payments lower than those received for the same length of actual employment by workers who resign on serious grounds relating to working conditions within the company and the conduct of the employer.*

2) the fact that, in the Member States concerned, nurseries are, to a large extent, operated by public services or with their financial support, has no effect on the answer to the first question.

Case C-218/98
OUMAR DABO ABDOULAYE E.A./REGIE NATIONALE DES USINES RENAULT SA
Date of judgment:
16 September 1999
Reference:
Compendium 1999, I-5723
Content:
Article 119 of the Treaty (Article 141 EC) — Allowance at outset of maternity leave — Concept of pay — Female and male workers in a comparable situation — Compensation for occupational disadvantages, for female workers taking maternity leave, arising from their distancing from work

1. Facts and procedure

The appellants in the main case are male workers in the national State-owned Renault SA works (hereafter 'Renault') who assert that Article 18 of the agreement for social benefits for employees of this company (hereafter the 'Agreement') is incompatible with the prohibition on discrimination sanctioned by Article 119 of the Treaty. Pursuant to Article 18 of the agreement, 'at the start of maternity leave, the pregnant woman is granted a payment of 7 500 FF'. According to the appellants in the main case, although the birth of a child only affects a woman from a strictly physiological point of view, this is, at the very least, a social event which affects the whole family, including the father who, in being deprived of the allowance, is subject to unlawful discrimination.

2. Questions referred to the Court

Does the principal of equal pay between men and women set out in Article 119 of the Treaty of Rome and subsequent legislation authorise payment of the sum of 7 500 FF at the outset of maternity leave solely to the pregnant woman, to the exclusion of the child's father, it being specified that:

- this allowance and its payment are provided for in Article 18, in detail, of the collective agreement dated 5 July 1991 relating to the social benefits of employees of the company Renault;

- that, under Article 19, paragraph 2, of the said agreement the employees must continue to be paid their salaries during maternity leave?

3. The judgment of the Court

The Court recalled the established case law on the concept of remuneration, within the meaning of Article 119, second paragraph of the Treaty (see, judgment dated 4 February 1992, *Garland* e.a. C-360/90, [1992] ECR I-3589, items 14 and 15, see, also judgments dated 27 June 1990, *Kowalska*, C-33/89, [1990] ECR. p. 2591, item 11, and dated 17 May 1990, *Barber*, C-262/88, [1990] ECR. p. I-1889, item 12, and dated 13 February1999, *Gillespie e.a*, C-342/93, [1996] ECR. p. I-475, item 13); the Court deemed that, being based on the employment relationship, the allowance which employers paid female workers from the start of their maternity leave was such that the allowance in the main proceedings constitutes remuneration, within the meaning of Article 119 of the Treaty and Directive 75/117. The fact that such a payment is not made periodically and is not indexed to salary does not mean that it does not constitute remuneration within the meaning of Article 119 of the Treaty (see judgment dated 9 February 1982, *Garland*, 12/81,[1982] ECR. p. I-359, item 9) (items 12–15).

According to case law, the principle of equal pay, as with all general principles of non-discrimination of which this is an individual expression, presupposes that male and female workers benefitting are in comparable situations (see *Gillespie e.a,* cited above, items 16 to 18). The compatibility of a payment such as the case in point with Article 119 of the Treaty also depends on the question of whether female workers are in a comparable situation to male workers (items 16–7).

The Court noted that, in its answer to the question put by the Court on this point, Renault re-

ferred to several occupational disadvantages faced by female workers, resulting from their distancing from work due to maternity leave. Thus, firstly, during maternity leave, a woman cannot be put forward for promotion. On her return, the length of the occupational experience which she can claim will be reduced by the duration of her absence. Secondly, pregnant women cannot claim increases in salary tied to their personal performance. Thirdly, female workers cannot take part in training. Finally, new technology means that the work place is constantly evolving, so getting a female worker returning from maternity leave up to speed is more complicated (items 18–19).

The Court concluded that Article 119 of the Treaty does not preclude the payment of an allowance such as that in the main proceedings being made to female workers only, since this is designed to compensate for occupational disadvantages, such as those invoked by Renault.. Indeed, in this case, male and female workers are in different situations, which means any breach of the principle of equal pay as ratified in Article 119 of the Treaty is excluded. It is for the national court to assess if this is the case (items 20–21).

The Court (Fifth Chamber) held:

The principle of equality of remuneration under Article 119 of the EU Treaty (Articles 117 to 120 of the EU Treaty, having been replaced by Articles 136 to 143) is not contrary to the payment of an allowance to female workers taking maternity leave only, insofar as this allowance is designed to compensate for the professional disadvantages which result from these employees' absence from work.

Case C-333/97
SUSANNE LEWEN/LOTHAR DENDA
Date of judgment:
21 October 1999
Reference:
Compendium 1999, p. I-7243
Content:
Article 119 of Treaty (Article 141 EC) — Directives 92/85/EEC and 96/34/EEC — Christmas bonus — Definition of remuneration — Exclusion from benefit of the bonus of women on parental leave — Distinction dependant on whether qualification or not for retroactive bonus pay.

1. Facts and procedure

In Germany, Articles 3 and 6 of Mutterschutzgesetz (a law for the protection of mothers, hereafter the 'MuSchG') provides:

'Article 3 (prohibition on pregnant women working)

1) A woman must be prevented from carrying out an activity if a medical certificate states that the life or health of the woman or child are threatened by the continuation of that activity.

2) Expectant mothers must not be employed in the last six weeks before the baby is due, unless they expressly declare that they are willing to work. They can change their minds at any time with regard to this declaration.

Article 6 (prohibition on pregnant women working)

1) Women must not be employed in the eight week period following childbirth. In cases of premature child birth or multiple births, this period is twelve weeks'.

Childcare leave (or parental leave) is governed by the Gesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub — Bundeserziehungsgeldgesetz (federal law for the allowance for childcare leave, hereafter 'BErzGG'). Parental leave which can be taken on a voluntary basis irrespective of gender starts, at the earliest, pursuant to Article 15, paragraph 2 of the BErzGG, at the end of the mother's protective period, and lasts, as a maximum, until the end of the child's third year. During this period, the employee's employment contract is suspended. A male or female employee on parental leave does not get paid a monthly salary, but receives, pursuant to Articles 1 onwards of the BErzGG, an allowance called 'childcare allowance', which is paid by the State in accordance with income.

Mrs Lewen was employed from 1 September 1990 by Mr Denda in his business, Denda Zahntechnik. Mr Denda also employs male workers. The plaintiff in the main proceedings, who became pregnant at the start of 1996, worked from 1 January to 8 April 1996 and from 15 to 18 April 1996. She was on leave from 9 to 12 April 1996, and from 19 April to 15 May 1996. On 16 May 1996, the six week mother's protective period under Article 3, paragraph 2, of the MuSchG started, the birth being due on 27 June 1996. The plaintiff's daughter was born on 12 July 1996. According to Article 6, paragraph 1, of the MuSchG, the protective period ended on 6 September 1996. From 7 September 1996, Mrs Lewen has, at her request, been on parental leave, lasting until 12 July 1999.

In the course of the years preceding 1996, the plaintiff received, on 1 December each year, a Christmas bonus of one month's salary. On this occasion, the defendant in the main proceedings made the plaintiff sign the following declaration:

'Christmas bonus

The bonus is a one-off social benefit, paid voluntarily, for this Christmas only and may be withdrawn at any time. Consequently, the payment does not create any future right either as regards the bonus itself or its amount, method of payment or constituent parts.

Furthermore, the Christmas bonus is expressly granted subject to the condition that you do not terminate your employment contract before 1 July of the coming year and that there are no grounds for dismissing you without notice. The same applies in the event of discontinuance of the employment contract. In application of the restriction, the bonus must be repaid in its entirety upon your departure.

Acceptance of the bonus is deemed acceptance of the above terms.'

In her application before the court of referral, Mrs Lewen obtained an order for the defendant in the main proceedings to pay her a Christmas bonus for the year 1996 amounting to 5 500 DEM.

2. Questions referred to the Court

1) Does a bonus paid for Christmas constitute pay, within the meaning of Article 119 of the EC Treaty or within Article 11(2)(b) of Directive 92/85/EEC, for work completed in the course of the year the bonus was granted, even if the bonus is paid by the employer mainly or exclusively as an encouragement for future work and/or loyalty to the business? Must the bonus be characterised as remuneration when the employer has not announced, before the start of the year the bonus is granted, that he intends to pay this the following Christmas solely for future work, amongst other terms excluding workers whose contracts have been suspended at the time of payment of the bonus and thereafter?

2) Is the fact that an employer excludes women who, at the time the bonus is paid, are on childcare leave from the benefit of any of the bonus, without taking into account the work carried out through the course of the year in which it is paid or the periods when work has been prohibited for protection of the mother, contrary to Article 119 of the EC Treaty, to Article 11(2) of Directive 92/85 and to clause 2, item 6, of the annex to the Directive 96/34/EC (which is yet to be implemented)?

3) If the answer to the second question is in the affirmative:

   Is it contrary to Article 119 of the EC Treaty or Article 11(2)(b) of Directive 92/85/EEC, clause 2, item 6, of the annex to the Directive 96/34/EC that the employer, at the time the bonus is granted, takes into account the following periods, so as to reduce the benefit proportionally:

   - periods of parental leave
   - periods when work is prohibited for the mother's protection?

3. The judgment of the Court

With regard to the first question, the Court referred to the following established case law on the concept of remuneration, within the meaning of Article 119, second paragraph of the Treaty (see, judgment dated 25 May 1971, *Defrenne*, 80/70, [1971] ECR p. 445, item 6; of 9 February 1982, *Garland*, 12/81, [1982] ECR. p. 359, item 10, and dated 17 May1990, *Barber*, C-262/88, [1990] ECR. p. I-1889, item 20). For the purpose of Article 119, the reasons leading to payment by the employer of the bonus are of little importance, provided that the allowance is granted by reason of the employment. According to the Court, it follows that a Christmas bonus such as that in question in these proceedings, even if paid voluntarily or paid mainly or exclusively as an encouragement for future work and/or loyalty to the business, constitutes remuneration within the meaning of Article 119 of the Treaty (items 19–21).

As regards the concept of remuneration within the meaning of Article 11(2)(b) of the Directive 92/85, the Court called to mind that the provision was aimed at ensuring an income at the level prescribed by Article 11(3) of this Directive for female workers during their maternity leave, and that this

income should be paid in the form of an allowance, remuneration or a combination of the two (see the judgment dated 27 October 1998, *Boyle e.a.*, C-411/96, [1998] ECR. p. I-6401, items 31 to 33). As the bonus in question was not designed to ensure a certain level of income during maternity leave for female workers, the concept of remuneration within the meaning of Article 11(2)(b) of Directive 92/85 (items 22–23) bore no relevance.

With regard to the second question, the Court firstly stated that, being mandatory, the prohibition on discrimination between male and female workers applies not only to public authorities, but also to all collective agreements governing employees, as well contracts between individuals (see in particular the judgment dated 7 February 1991, *Nimz*, C-184/89, [1991] ECR p. I-297, item 11, and dated 9 September 1999, *Bosman*, C-281/97, [1999] ECR. p. I-5127, item 20). This prohibition also applies to unilateral actions taken by employers in relation to the personnel they employ. Secondly, the finding that a benefit such as the Christmas bonus in question fell within the concept of remuneration in the broad sense of Article 119 of the Treaty did not necessarily imply that it must be thought of as retroactive remuneration for work carried out in the course of the year of its grant. According to the Court, this is a question of fact which falls within the remit of the national court to decide on the basis of national law (items 26–27).

The Court considered that, in order to provide a useful response to the question, there was scope, with regard to the uncertainties as to the correct designation of the bonus under national law, to consider first the supposition whereby the payment of the bonus, as an exceptional allowance paid voluntarily by the employer at Christmas, does not constitute a retroactive remuneration for work carried out and is not conditional on the worker being at work at the time it is granted (item 29).

In this regard, the Court stated, firstly, that a voluntary payment of a Christmas bonus made by the employer to a worker when on childcare leave does not fall within Article 11(2), of Directive 92/85 nor of clause 2, item 6, of the annex to Directive 96/34. Secondly, the Court found that, for the purposes of Article 119 of the Treaty, such a practice by the employer is not directly discriminatory, insofar as it applies to both male and female workers alike and that it is necessary to consider the issue of whether this constitutes indirect discrimination. The Court referred to the case law on indirect discrimination based on sex (see, in particular, the judgment in *Boyle.e.a*. cited above, item 76). It recognises that women take childcare leave far more often than men. It notes that a worker benefitting from childcare leave granted by legislation carrying a childcare allowance payable by the State is in a specific situation which cannot be compared to that of a man or a woman who is working, because this leave is by way of a suspension of the contract and, consequently, of the obligations incumbent upon the employer and employee. The employer's refusal to pay a Christmas bonus as a voluntary exceptional allowance does not, in the view of the Court, constitute discrimination within the meaning of Article 119 of the Treaty, when the grant of this allowance is not conditional on the worker being at work at the time it is granted (items 30–38).

The Court then came to the national court's qualification, in the light of national law, of the bonus in question as retroactive remuneration for work done in the course of the year the bonus is granted. The Court noted that it was otherwise in this case. In these circumstances, it stated that an employer's refusal to grant a bonus, even proportionally reduced, to workers on childcare leave who had worked during the year it was granted, solely due to the fact that their contract was suspended at the time it was granted, put them at a disadvantage in comparison to those whose contract was not in suspension at the time of grant and who were paid the bonus as remuneration for work carried out in the course of the year. Such a refusal therefore constituted discrimination within the meaning of Article 119 of the Treaty, given that female workers are more likely to be on childcare leave than male

workers at the time a bonus is granted, as previously established in this judgment. The Court added that the periods of mothers' protection (prohibition of work) must be categorised as periods worked. Indeed, to exclude the mother's periods of protection from being periods worked for the purposes of granting a bonus aimed at retroactively remunerating work undertaken discriminates against female workers in their sole capacity as employees since, if they had not been pregnant, the same periods would have been counted as periods worked (items 39–42).

With regard to the third question, the Court reiterated that, firstly, the payment of a bonus during an employee's childcare leave, as an allowance granted voluntarily at Christmas, did not fall within Article 11(2) of Directive 92/85 nor of clause 2, item 6, of the annex to Directive 96/34. Secondly, as a result of the answer to the second question, the fact that an employer, when granting a Christmas bonus such as the one in the main proceedings, does not take account of work completed in the course of the year it is granted and of the periods when, for the mother's protection, she is prohibited from working, is discriminatory under Article 119 of the Treaty. It found that Article 119 of the Treaty precludes the employer, at the time a bonus is granted, reducing the benefit proportionally in relation to the periods of the mother's protection. On the other hand, it would not be prevented from reducing the allowance proportionately for periods of childcare leave, given that, as stated earlier in the judgment, the situation of workers on childcare leave could not be compared to that of men and women who are working (items 46–49).

The Court (Sixth Chamber) held:

1) *A Christmas bonus such as that in issue in the main proceedings, constitutes remuneration within the meaning of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty having been replaced by Articles 136 EC to 143 EC) even if paid voluntarily or paid mainly or exclusively as an encouragement for future work and/or loyalty to the business. On the other hand, it does not fall into the definition of remuneration within the meaning of Article 11(2)(b) of Council Directive 92/85/EEC dated 19 October 1992, relating to the implementation of measures aimed at promoting the improvement of health and safety of pregnant, confined or breast feeding employees (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391).*

2) *Article 119 of the Treaty precludes an employer entirely excluding female workers on childcare leave from benefitting from the payment of a voluntary bonus as a Christmas allowance, without taking into account actual work completed in the year the bonus is granted, or periods corresponding to the mother's protection (when she is prohibited from working), when such a bonus is aimed at retroactively remunerating work carried out that year.*

   On the other hand, neither Article 119 of the Treaty, nor Article 11(2) of Directive 92/85, nor clause 2, item 6 of the annex to Council Directive 96/34 dated 3 June 1996, relating to the framework agreement on childcare leave concluded by UNICE, CEEP and ETUC preclude a refusal to pay a bonus to a woman on childcare leave when the grant of this allowance is only conditional upon the worker being at work at the time it is granted.

3) *Article 119 of the Treaty, Article 11(2)(b) of Directive 92/85/EEC and clause 2, item 6, of the annex to Directive 96/34/EC do not preclude an employer, at the time a Christmas bonus is granted to a woman on childcare leave, from taking into account periods of childcare leave so as to reduce the benefit proportionally.*

   On the other hand, Article 119 of the Treaty precludes the employer, at the time a Christmas bonus is granted, reducing the benefit proportionally, by the periods for the mother's protection (when she is prohibited from working).

Case C-273/97
ANGELA MARIA SIRDAR v. THE ARMY BOARD AND SECRETARY OF STATE FOR DEFENCE
Date of judgment:
26 October 1999
Reference:
ECR [1999]. I-7403
Content:
Directive 76/207/EEC Article 2(2) — Access to employment in the armed forces — Public security of Member States — Subject to the rules of Community law — Exclusion of women from the British Royal Marines — Justification — Margin of discretion given to national authorities — Proportionality

1. Facts and procedure

In the United Kingdom, the responsible authorities in the Royal Marines have a policy of excluding women from service on the basis that their presence would be incompatible with the requirement of 'interoperability', that is to say the necessity for every marine, whatever his specialisation, to be capable of fighting in a commando unit.

Ms Sirdar had been a member of the British army since 1983 and had been serving as a chef in a commando unit of the royal artillery since 1990 when she was notified, in February 1994, that she was to be made redundant, effective from February 1995. In July 1994, Ms Sirdar received an offer of a transfer into the Royal Marines, who needed chefs, in a letter which specified that, in order to obtain her transfer, she would have to go before an initial selection board and then undertake commando training. However, when the responsible authorities in the Royal Marines became aware that she was a woman and realised that the offer had been made to her in error, they informed Ms Sirdar that her application could not be accepted because of the policy of excluding women from this regiment.

2. Questions referred to the Court

1) Are the policy decisions adopted by a Member State, during peace time and/or in preparation for war, as regards access to employment, professional training, working conditions or deployment into the armed forces, decisions which are taken for the purpose of ensuring combat efficiency, outside the scope of the EC Treaty and/or its subordinate legislation, in particular Council Directive 76/207/EEC?

2) Are the decisions taken by a Member State in preparation for war and during peace time concerning recruitment, training and deployment of soldiers to marine commando units of its armed forces, units destined for close combat with enemy forces in case of war, outside the scope of the EC Treaty or its subordinate legislation when these decisions are taken for the purpose of ensuring the combat efficiency of these units?

3) Does Article 224 of the EC Treaty, correctly interpreted, authorise Member States to exclude from the scope of Council Directive 76/207/EEC sex-based discrimination in relation to access to employment, professional training and working conditions, including conditions regarding redundancy in the armed forces, in peace time and/or in preparation for war for the purpose of ensuring combat efficiency?

4) Can the policy adopted by a Member State of excluding all women, in peace time and/or in preparation for war, from service as interoperable Marines be excluded from the scope of Directive 76/207/EEC by means of Article 224? If so, what guidelines or criteria should be applied to determine if the said policy can validly be excluded from the scope of Directive 76/207/EEC by virtue of Article 224?

5) Can the policy adopted by a Member State of excluding all women, in peace time and/or in

preparation for war, from service as interoperable Marines, be justified by virtue of Article 2(2) of Council Directive 76/207/EEC?

6) If so, what criteria should a national court apply when examining whether or not the application of such a policy is justified?

3. Court ruling

On the first and second questions, the Court notes that it is for Member States, which have to adopt measures appropriate to ensuring their internal and external security, to take decisions relating to the organisation of their armed forces. The Court considers, however, that it does not follow that these decisions must be completely outside the scope of Community law. The Court, in fact, recalls that the Treaty only provides derogations, applicable in situations which may affect public security, in Articles 36, 48, 56, 223 (which became, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and 224, which concern exceptional and clearly defined scenarios. It could not, according to the Court, be deduced that there is a general exception inherent in the Treaty that excludes any measure taken with regard to public security from the scope of Community law. The Court judges that to recognise the existence of such an exception, outside the specific conditions provided in the Treaty, would risk harming the binding nature and uniform application of Community law (to this effect, see the ruling of 15 May 1986, *Johnston*, (Case C-222/84 [1986] ECR 1651, paragraph 26) (paragraphs 15–16).

The Court notes that the concept of public security, in the meaning of the Articles cited above, covers both the internal security of a Member State, as in the case in question in the principal ruling in Johnston, cited above, and its external security (to this effect, see the rulings of 4 October 1991, *Richardt and 'Les Accessoires Scientifiques'*, Case C-367/89 [1991] ECR I-4621, paragraph 22, and of 17 October 1995, *Lewen*, Case C-83/94 [1995] ECR I-3231, paragraph 26). The Court observes that furthermore some of the derogations provided for by the Treaty only concern rules relating to the free circulation of goods, persons and services and not to the social provisions of the Treaty under which the principle of equal treatment of men and women, on which Ms Sirdar relies, falls. The Court recalls that, in accordance with well-established case law, this principle has a general application and that the Directive applies to employment relations in the public sector (see the rulings of 21 May 1985, *Commission v. Germany*, Case C-248/83 [1985] ECR 1450 paragraph 16, and of 2 October 1997, *Gerster* Case C-1/95 [1997] ECR I-5253, paragraph 18). It follows, according to the Court, that there is no general exception to the implementation of the principle of equal treatment of men and women as regards methods of organising the armed forces motivated by the protection of public security, apart from the potential application of Article 224 of the Treaty, which concerns an exceptional situation and is the object of the third and fourth questions (see the ruling in *Johnston*, cited above, paragraph 27) (paragraphs 17–19).

On the fifth and sixth questions, which the Court examined before the third and fourth questions, the Court asks whether, by virtue of Article 2(2) of Directive 76/207, the Member States have the ability to exclude from the scope of said Directive professional activities for which, by reason of their nature or the conditions under which they are carried out, gender constitutes a determining factor, always remembering that, as a derogation from an individual right laid down by the Directive, this provision must be strictly interpreted (see *Johnston*, cited above, paragraph 36). The Court rules that a Member State may, in certain cases, restrict certain activities and the relevant professional training to men or to women, and recalls that in such a case, Member States are obliged, as is clear from Article 9(2) of the Directive, to periodically examine the activities in question with a view to deciding whether, in the light of social development, the derogation from the general regime of the Directive can still be maintained (*Johnston*, cited above, paragraph 37). The Court recalls that as well as determining the scope

of any derogation from an individual right, such as the equal treatment of men and women, the principle of proportionality must be respected, which is one of the general principles of Community law. This principle demands that the derogations do not exceed the limits of what is appropriate and necessary for attaining the desired aim and requires the principle of equal treatment to be reconciled, as far as possible, with the demands of public security which determine the conditions under which the activities in question are to be carried out. The Court adds that the national authorities always have a certain margin of discretion, according to the circumstances, when they adopt measures that they deem necessary for guaranteeing the public security of a Member State (see the ruling in *Leifer et al.*, cited above, paragraph 35) (paragraphs 23–27).

Applying these criteria to the circumstances of the present case, the Court observes that, as has been raised previously in the ruling, the refusal to employ the plaintiff in the main proceedings as a chef is motivated by the total exclusion of women from this regiment, for the reason of the aforementioned rule of 'interoperability' instituted with the purpose of ensuring combat efficiency. In this regard, according to the Court, it is evident from the dossier that, according to the findings already made by the referring court, the organisation of the Royal Marines differs fundamentally from that of other units of the British armed forces, in that they represent the 'arrowhead'. The Court notes that this is a small unit whose personnel are intended to serve on the front line, and that it is established that, within this regiment, chefs are indeed also called upon to serve as commandos on the front line, that all members of the regiment are employed and trained to this end and that there is no exception to this rule at the time of recruitment. The Court concludes that, under these circumstances, exercising the margin of discretion at their disposal with regard to the possibility of maintaining the exclusion in question, taking social development into consideration, the competent authorities were entitled, without abusing the principle of proportionality, to consider that the specific conditions under which assault units such as the Royal Marines serve, and in particular the rule of 'interoperability' to which they are subject, justified their composition remaining exclusively male (paragraphs 28–31).

The Court considers that, in light of the response to the fifth and sixth questions, it is not necessary to respond to the third and fourth questions (paragraph 33).

The Court hereby rules:

1) *Decisions taken by Member States regarding access to employment, professional training and working conditions in the armed forces with the purpose of ensuring combat efficiency are not, as a general rule, outside the scope of Community law.*

2) *The exclusion of women from service in special combat units such as the Royal Marines can be justified, by virtue of Article 2(2) of Council Directive 76/207/EEC of 9 February 1976, relating to the implementation of the principle of equal treatment of men and women regarding access to employment, to professional training and promotions, and working conditions, by reason of the nature of the activities in question and the conditions under which they are carried out.*

Case C-187/98
EU COMMISSION v. HELLENIC REPUBLIC
Date of judgment:
28 October 1999
Reference:
ECR [1999]. I-7713
Content:
Breach — Article 119 of the Treaty (Article 141 EC) — Directives 75/117/EEC and 79/7/EEC — Family and marriage allowances — Old-age pensions — Failure to abolish discriminatory conditions retroactively — Collective employment agreements and the role of Member States — Failure of the constitutional principle of equality

1. Facts and procedure

By application lodged at the Court registry on 18 May 1998, the Commission brought, by virtue of Article 169 of the EC Treaty (now Article 226 EC), an appeal aiming to establish that, by failing to abolish, with retroactive effect from the date of entry into force in Greece of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), Article 3 of Council Directive 75/117/EEC of 10 February 1975, concerning the approximation of the laws of Member States relating to the application of the principle of equal pay for men and women, and Article 4(1) of Council Directive 79/7/EEC of 19 December 1978, relating to the progressive implementation of the principle of equal treatment of men and women in matters of social security, regulations that impose particular conditions on married female workers that they do not impose on married male workers, in respect of granting family or marriage allowances to employees which are taken into account for determining their income for the purposes of calculating pension rights, the Hellenic Republic has failed to fulfil its obligations under the said provisions of Community law.

The Commission claims that the majority of the collective agreements in Greece contained provisions that were discriminatory against married female workers in respect of the payment of family and marriage allowances. As an example, it states that, in accordance with Article 8(1)(a) of the staff rules of the Dimossia Epicheirissi Ilektrimou (public electricity company, hereafter referred to as 'DEI'), married female workers in the company only had the right to receive marriage allowances if their spouses could not support themselves, and family allowances if support of the children was principally the responsibility of the mother. According to the Commission, this discrimination had been abolished effective from 1 October 1983 insofar as marriage allowances have been granted to married female staff of the DEI since that date, in accordance with the special collective agreement of 27 September 1983, concluded between the general union of DEI staff and the DEI. However, that agreement does not have retroactive effect. Furthermore, the aforementioned allowances are taken into account in determining the amount of pension to be paid by the Idrima Koinonikon Asfalisseon (general social security institution for salaried workers) and the failure to pay the said allowances therefore would have had a decisive influence on the calculation of the amount of pension.

2. Court ruling

Recalling its case-law on the concept of remuneration within the meaning of Article 119, second paragraph of the Treaty (see especially the ruling of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECR I-623 paragraph 23), the Court judges firstly that family and marriage allowances such as those in question in the present case come under this concept. The Court further observes that Article 4(1) of Directive 79/7 prohibits all discrimination on grounds of sex in matters of social security, whether directly or indirectly by reference in particular to marital or family status, in particular as concerns the scope of social security schemes and the conditions of access to these schemes. However, the Court notes, as the Commission has rightly pointed out, that the imposition of discriminatory conditions in relation to the payment

of family and marriage allowances also has an effect on the social security pensions payable to workers in the future. The Court concludes, on these points, that in the present case, the collective agreements providing for the grant of family and marriage allowances exclusively to married male workers constitute direct discrimination on grounds of sex, contrary to Article 119 of the Treaty and Article 4(1) of Directive 79/7 (40–44).

The Court states that, as regards the legal status of collective agreements in Greece and the autonomy which social partners enjoy when negotiating the said conventions, it is clear from the case-law that Member States may leave the implementation of the principle of equal pay in the first instance to social partners (ruling of 30 January 1985, *Commission v. Denmark* Case C-143/83 [1985] ECR 427, paragraph 8). The Court recalls, however, that this possibility does not discharge them from the obligation of ensuring, through appropriate legislative, regulatory or administrative provisions, that all workers in the Community can benefit from the full protection provided for by the Directive. The State guarantee must, according to the Court, cover all cases where effective protection is not assured by other means, whatever the reason, and in particular when the workers in question are not unionised, the sector in question is not subject to a collective agreement or such an agreement does not fully guarantee the principle of equal pay (ruling on *Commission v. Denmark*, cited above, paragraph 8). However, the Court notes that in the present case, neither the collective agreements in question nor Greek legislation provide for the retroactive abolition of such discrimination against married female workers. In respect of this, the Court recalls that Member States are required, by virtue of Article 4 of Directive 75/117, to take necessary measures to ensure that provisions occurring in collective agreements which are contrary to the principle of equal pay may be declared null and void or amended. The Court adds that the fact that the Greek government does not take part in the negotiation of collective agreements does not absolve it of its obligation to adopt such complementary provisions as may be necessary to ensure compliance with the requirements of Community rules (paragraphs 46–50).

Finally, the Court considers that, as regards the guarantee of equal rights accorded to Greek citizens under the Greek constitution, the Greek government cannot escape its obligation to adapt its national legislation to the requirements of Community law by relying on the direct effectiveness of the relevant constitutional provisions. The Court observes that, admittedly, it has already ruled that the categorical affirmation, in Germany's Basic Law, of the equality of men and women in law, as well the express exclusion of all sex-based discrimination and the affirmation of equal access to employment in public service of all German nationals, in terms intended to be directly applicable, combined with the existence of a system of judicial remedies, constitutes an adequate guarantee of the implementation, in the domain of public administration, of the principle of equal treatment laid down in Directive 76/207 (see the ruling in *Commission v. Germany*, cited above, paragraph 18). However, the Court notes that the legal context of the two cases is radically different. Indeed, in *Commission v. Germany*, cited above, the Commission had not established, nor even undertaken to demonstrate, that *discrimination on grounds of sex*, whether in law or in fact, existed in the German public sector; and it was accepted that the objective of Directive 76/207 had already been achieved in Germany as regards employment in the public service, since the Directive came into force in that Member State. The Court notes that in the present case, however, discriminatory conditions for the grant of family and marriage allowances continue to have consequences for the remuneration of married female workers, as well as for the calculation of their pensions. Even if the provisions of the Greek Constitution are directly applicable, the Court concludes, the relevant special Greek rules do not satisfy the requirements laid down by the case-law of the Court according to which the principles of legal certainty and protection of individuals requires an unequivocal wording which would give the

persons concerned a clear and precise understanding of their rights and obligations and would enable the courts to ensure that these rights and obligations are respected (see the ruling in *Commission v. Denmark*, cited above, paragraph 10) (paragraphs 51–54).

The Court (Sixth Chamber) hereby rules that:

1) *By failing to abolish, with retroactive effect from the date of entry into force in Greece of Articles 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), Article 3 of Council Directive 75/117/EEC of 10 February 1975, concerning the approximation of the laws of Member States relating to the application of the principle of equal pay between male and female workers, and Article 4(1) of Council Directive 79/7/EEC of 19 December 1978, relating to the progressive implementation of the principle of equal treatment of men and women in matters of social security, regulations which impose conditions on married female workers which are not imposed on married male workers, in respect of the grant to employees of family or marriage allowances which are taken into account for determining their income for the purposes of calculating pension rights, the Hellenic Republic has failed to fulfil its obligations under the said provisions of Community law.*

2) *The Hellenic Republic is ordered to pay the costs.*

Case C-382/98
THE QUEEN v. SECRETARY OF STATE FOR SOCIAL SECURITY, EX PARTE JOHN HENRY TAYLOR
Date of judgment:
16 December 1999
Reference:
ECR [1999] I-8955
Content:
Directive 79/7/EEC Article 3(1) and 7(1)(a) — Grant of a winter fuel payment — Scope of the Directive — Protection against the risk of old age — Link with pensionable age

1. Facts and procedure

In the United Kingdom, the Social Fund Winter Fuel Payment Regulations 1998 (hereafter referred to as 'The Regulations') were adopted on 8 January 1998, pursuant to the Social Security Contributions and Benefits Act 1992 (act relating to social security contributions and payments, hereafter referred to as 'the Act of 1992'). Regulation 2 provides that the following two categories of persons are entitled to the winter fuel payment, which is made from the Social Fund:

- under Regulation 2(2), persons in receipt of income support or income-based jobseekers' allowance (both means-tested benefits) and in receipt of one of a number of benefits which are only payable to persons who have reached a certain minimum age or who live with persons who have reached that age (60 years and above in all cases);

- under Regulation 2(5), persons falling within the categories set out in Regulation 2(6), namely men aged 65 and over and women aged 60 and over who are entitled to one of the benefits listed in Regulation 2(6). Some of these benefits are means-tested and others are not, such as the State retirement pension.

Under Regulation 3(1), persons falling within the first category are entitled to a fuel payment of £50 per year. Those falling within the second category are entitled to a payment of £20, or of £10 if they live with a person who is also entitled to a payment.

Under the combined provisions of Regulation 1, Article 44 of the Act of 1992 and Schedule 4 to the Pensions Act 1995, a retirement pension for the purposes of Regulation 2(6) is a State retirement pension payable which becomes payable when a claimant satisfying the relevant contribution conditions reaches the age of 65 for a man and 60 for a woman.

Mr Taylor, born 3 June 1935, who was employed by the Post Office before his retirement, paid social security contributions during the whole of his working life. In 1998, aged 62 years, he was receiving a Post Office pension. If he had been a woman, he would have received a State pension. He claims to be the victim of unlawful discrimination on the grounds of his sex in that he was refused a winter fuel payment of £20, to be made by the State, introduced by the Regulations. It is agreed that, in the same circumstances, a woman of the same age would have received this allowance.

2. Questions referred to the Court

1) Is a winter fuel payment made under Regulations 2(5), 2(6) and 3(1)(b) of the Social Fund Winter Fuel Payment Regulations 1998 within the scope of Article 3 of Directive 79/7/EEC?

2) If the answer to the first question is affirmative:

   a) Is Article 7(1)(a) of Directive 79/7/EEC applicable in this particular case?

   b) In particular, is it impossible for the respondent to rely on Article 7(1)(a) of Directive 79/7/EEC when the Social Security Contributions and Benefits Act 1992 under which the Social Fund Winter Fuel Payment Regulations were made came

into force after 23 December 1984, the latest possible date for the Directive to be fully transposed into national law?

3. Court ruling

Recalling the case-law according to which, in order to fall within the scope of Directive 79/7, a benefit must constitute all or part of a statutory scheme protecting against one of the risks listed in Article 3(1) of the Directive, or a form of social aid with the same objective, and be directly and effectively linked to the protection against one of those risks (see the rulings of 4 February 1992, *Smithson*, Case C-243/90 [1992] ECR I-467, paragraphs 12 and 14; of 16 July 1992, *Jackson and Cresswell* Case C-63/9 and C-64/91, [1992] ECR I-4737 paragraphs 15 and 16, and of 19 October 1995, *Richardson* Case C-137/94 [1995] ECR I-3407, paragraphs 8 and 9), the Court notes, on the first question, and indeed it has not been contested by any party, that the benefit in question in the main proceedings is part of a statutory scheme insofar as it is provided for by an enabling act, namely the Act of 1992, and implemented by a regulatory provision, namely the Regulations (paragraphs 14-15).

The Court therefore examines whether this benefit is directly and effectively linked to the protection against any of the risks listed in Article 3(1) of the Directive. On this point, the Court notes that the objective pursued by the Social Fund is not relevant for the purpose of determining whether the benefit in question in the main proceedings is aimed at one of the risks listed in the Directive, since it concerns a fund from which benefits of an extremely varied nature are taken. According to the Court, it is therefore necessary to examine the regulation aimed at the benefit in question in the main proceedings, namely the Regulations. In this respect, the Court emphasises that the Regulations contain two distinct definitions of persons who are able to receive the benefit, the first in Regulation 2(2), the second in Regulation 2(5) and Regulation 2(6), and that, insofar as the question asked refers only to the second definition which is independent of the first, it is necessary to examine this definition in isolation and to verify whether the benefit, whose objective is determined contingent on the people the second definition is aimed at, comes under the scope of Article 3(1) of the Directive. The Court therefore notes that it is clear from Regulation 2(5) and (6) that the benefit can be granted to elderly people, even if they are not experiencing financial or material difficulties. The Court judges that it follows that the protection against a lack of financial means cannot be considered to be the objective of the Regulations. On the other hand, the Court observes that the benefit in question in the main proceedings can only be granted to persons who have achieved the minimum age of 60 for women and 65 for men, namely the statutory age of retirement. According to the Court, the benefit therefore tends to protect against the risk of old age mentioned in Article 3(1) of the Directive. The Court adds that the fact that the applicant for the benefit must also be a beneficiary of one of the benefits listed in Regulation 2(6) does not alter this observation. Indeed, these benefits are of a varied nature and only some of them are intended to protect against insufficient pecuniary means. The Court concludes that, insofar as the grant of the winter fuel payment to any of the categories of persons referred to is always subject to the materialisation of the risk of old age, it is necessary to consider that the payment protects directly and effectively against this risk (paragraphs 16–25).

Regarding the first part of the second question, the Court begins by recalling that, according to accepted case-law, the application of different ages, according to sex, to a benefit scheme other than the old-age and retirement pension scheme cannot be justified unless the discrimination to which the difference in age gives rise is objectively necessary to avoid disrupting the financial equilibrium of the social security system or to guarantee consistency between the retirement pension scheme and the other benefit scheme (see the ruling of 30 March 1993, *Thomas et al*. C-328-91 [1993] ECR I-1247, (paragraph 12)) (paragraph 28).

As regards the condition relating to the preservation of the financial equilibrium of the social security system, the Court recalls that it has already noted that the grant of relevant benefits from non-contributory schemes to persons in respect of whom certain risks have materialised, regardless of the right of these persons to an old-age pension by virtue of completed contribution periods, does not have a direct influence on the financial equilibrium of contributory pension schemes (see the ruling in *Thomas et al.,* cited above, paragraph 14). The Court also notes that the participants in the proceedings before the Court have acknowledged that the argument relating to financial equilibrium could not apply to non-contributory benefits, such as those in question in the main proceedings. The Court concludes that, in these conditions, it must be recognised that eliminating discrimination has no impact on the financial equilibrium of the social security system as a whole (paragraphs 29–31).

As regards consistency between the retirement pension scheme and the other benefit schemes, the Court examined whether the unequal ages laid down for the grant of the benefit in question in the main proceedings are objectively necessary. In this respect, the Court notes that, if the benefit is intended to protect against the risk of old age and must only be paid to those above a certain age, it does not follow that this age must necessarily coincide with the legal age of retirement and, and as a result, be different for men and women. The Court concludes, therefore, that a discrimination such as that in question in the main proceedings is not necessary linked to the difference between the retirement age for men and women, and is therefore not covered by the derogation provided for under Article 7(1)(a) of the Directive (paragraphs 32–35).

The Court considers that in light of the answer given to the first part of the second question, there is no need to reply to the second part of this question (paragraph 37).

The Court (Sixth Chamber) hereby rules:

1) *Article 3(1) of Council Directive 79/7/EEC of 19 December 1978, relating to the progressive implementation of the principle of equal treatment of men and women in matters of social security, must be interpreted as meaning that a winter fuel payment, such as that made under Regulations 2(5), 2(6) and 3(1) of the Social Fund Winter Fuel Payment Regulations 1998 is covered by that Directive.*

2) *The derogation provided for under Article 7(1)(1) of Directive 79/7 does not apply to a benefit such as that made under Regulations 2(5), 2(6) and 3(1) of the Social Fund Winter Fuel Payment Regulations 1998.*

Case C-285/98
TANJA KREIL v BUNDESREPUBLIK DEUTSCHLAND
Date of judgment:
11 January 2000
Reference:
ECR [2000] I-69
Content:
Directive 76/207/EEC Article 2(2) — Access to employment in the armed forces — Public security of Member States — Scope of Community law — Exclusion of women from armed units of the Bundeswehr — Justification — Margin of discretion given to national authorities — Proportionality

1. Facts and procedure

Pursuant to Article 12a of the Grundgesetz für die Bundesrepublik Deutschland (Basic law for the Federal Republic of Germany):

'1) Men who have attained the age of 18 years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defence organisation.

[...]

4) If, while a state of defence exists, civilian requirements in the civilian public health and medical system or in the stationary military hospital organisation cannot be met on a voluntary basis, women between 18 and 55 years of age may be assigned to such services by or pursuant to a law. They may on no account do armed service.'

Access for women to military posts in the Bundeswehr are governed in particular by Article 1(2) of the Soldatengesetz (Law on Soldiers) and by Article 3a of the Soldatenlaufbahnverordnung (Regulation on Soldiers' Careers), according to which women may enlist only as volunteers and only in the medical and military-music services.

Ms Kreil, who has been trained in electronics, applied for voluntary service in the Bundeswehr in 1996, requesting duties in maintenance (weapons electronics). Her request was rejected by the Bundeswehr's recruitment centre and then by its head staff office, on the ground that the law bars women from serving in military positions which involve the use of arms.

2. Questions referred to the Court

Do the third sentence of Article 1(2) of the Soldatengesetz (Law on Soldiers), in the version of 15 December 1995 (Bundesgesetzblatt I, p. 1737) as last amended by the Law of 14 December 1997 (BGBI I, p. 2846), and Article 3a of the Soldatenlaufbahnverordnung (Regulation on Military Careers), in the version published on 28 January 1998 (BGBI I, p. 326), under which women who enlist as volunteers may only be engaged in the medical and military-music services and are excluded in any event from armed service, infringe Council Directive 76/207/EEC of 9 February 1976, in particular Article 2(2) of that Directive?

3. Court ruling

The Court follows very similar reasoning on this question to that followed in the ruling of 26 October 1999, *Sirdar* (Case C-273/97 [1999] ECR I-7403) (paragraphs 15–25).

Having reached the stage where it must verify if, in the circumstances of the present case, the measures taken by the national authorities, in exercising the margin of discretion which is allowed them, really follow the objective of guaranteeing public security and if they are appropriate and necessary to reaching this objective, the Court notes that the refusal to employ the applicant in the main proceedings in the unit of the Bundeswehr forces where she wanted to be employed, has as its foundation the provisions of German law which totally exclude women from military positions which involve the use of arms and which only allow them access to the health

and military-music services. The Court rules that, in view of its scope, such an exclusion, which applies to almost all military positions in the Bundeswehr, cannot be regarded as a derogating measure justified by the specific nature of the positions in question or by the specific conditions under which the activities are carried out. However, according to the Court, the derogations provided for in Article 2(2) of Directive 76/207 can only apply to specific activities (see, to this effect, the ruling of 30 June 1988, *Commission v. France*, Case C-318/86 [1988] ECR 3559, paragraph 25) (paragraphs 26–27).

The Court adds that, for all that, having regard to the very nature of armed forces, the fact that persons serving in those forces may be called upon to use arms cannot in itself justify the exclusion of women from access to military posts. The Court observes that, as the German government explained, in the services of the Bundeswehr which are accessible to women, basic training in the use of arms, to enable personnel in those services to defend themselves and help others, is provided. The Court concludes that, in these conditions, even taking account of the margin of discretion available to them as regards the possibility of maintaining the exclusion in question, national authorities could not, without contravening the principle of proportionality, consider as a general position that the composition of all armed units in the Bundeswehr must remain exclusively male (paragraphs 28–29).

Finally, the Court considers that, as regards the possible application of Article 2(3) of the Directive, upon which the German government also relies, this provision, as the Court held in paragraph 44 of the ruling of 15 May 1986, *Johnston* (Case C-222/84, ECR 1651), is intended to protect, on the one hand, a woman's biological condition and, on the other hand, the particular relationship between a woman and her child. It does not therefore allow women to be excluded from a certain type of employment on the ground that they should be given greater protection than men against risks which are distinct from women's specific needs of protection, such as those expressly mentioned (paragraph 30).

The Court hereby rules:

Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational education and promotion, and working conditions, precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military positions involving the use of arms and which allow them access only to the medical and military-music services.

Case C-207/98
SILKE-KARIN MAHLBURG v. LAND MECKLENBURG-VORPOMMERN
Date of judgment:
3 February 2000
Reference:
ECR [2000] I-549
Content:
Directive 76/207/EEC Article 2(3) — Refusal to employ a pregnant woman on the ground of a statutory prohibition on employment attaching to the condition of pregnancy — Prohibition — Financial consequences

1. Facts and procedure

In Germany, Article 3 of the Mutterschutzgesetz of 24 January 1952 (Law on the Protection of Mothers, BGBl. I, p. 315) provides:

'1) Pregnant women must not work if, as attested by a medical certificate, the life or health of the mother or child is in danger if the mother continues to work.

[...]'

Article 4 of the Mutterschutzgesetz, which lists other prohibitions on employment, states:

'1) Pregnant women must not be assigned heavy physical work or tasks exposing them to the harmful effects of substances, harmful radiation, dust, gas or vapours, heat, cold or humidity, vibrations or noise.

2) In particular, pregnant women must not be assigned

1. tasks which require regular lifting, moving or carrying, without mechanical help, of loads of more than 5 kg or, occasionally, loads of more than 10 kg. If heavier loads must be lifted, moved or carried, with mechanical help, the physical effort required of the pregnant woman must not be greater than that required for the tasks referred to in the first sentence,

[...]

3. tasks which require frequent and significant bending or stretching or continual crouching or bending

[...]

6. tasks which expose them to a particular risk, as a result of pregnancy, of contracting an occupational illness or which, as a result of this risk, pose a greater danger to the pregnant woman or the foetus.

[...]

8. tasks which expose them to a greater risk of accidents, especially from sliding or falling.

[...]'

From 26 August 1994 to 21 August 1995, Ms Mahlburg was employed as a nurse by the Rostock University Heart Surgery Clinic under a fixed-term contract. On 1 June 1995, she applied for two posts for an indefinite period which had previously been advertised internally. The posts were to be filled immediately or as soon as possible.

On 1 June 1995, the date on which she applied for the posts, the applicant in the main proceedings was pregnant. On 13 July 1995, the applicant in the main proceedings informed her employer thereof in writing. Following this letter, the defendant in the main proceedings, in order to comply with the Mutterschutzgesetz, transferred her to another internal post. From then until the end of her fixed-term contract, the applicant in the main proceedings was no longer employed as a nurse in the operating theatre, but employed on other nursing activities, that is to say activities carrying no risk of infection.

On 18 September 1995, the defendant in the main proceedings decided not to take Ms Marlburg's application further, for the following reason:'

'The two posts were described as being for operating theatre nurses; the decision not to appoint pregnant women to these posts does not constitute discrimination on the ground of pregnancy, but reflects legal requirements. Articles 3 to 5 of the Mutterschutzgesetz expressly prohibit employers from employing pregnant women in areas where they would be exposed to the harmful effects of dangerous substances. As a result of these legal prohibitions, your application to the post of operating theatre nurse could not be taken into consideration'.

2. Questions referred to the Court

Does the fact that an employer refuses to employ, in a vacant post, a candidate who is qualified to carry out the activities required, on the grounds that she is pregnant and that a prohibition under the Mutterschutzgesetz would prevent her, for the duration of her pregnancy, from occupying at the outset a post intended to be for an indefinite period, constitute unlawful sex-based discrimination within the meaning of Article 2(1) of Directive 76/207/EEC of 9 February 1976?

3. Court ruling

The Court notes that, unlike in the Dekker case (ruling of 8 November 1990, *Dekker* Case C-177/88 [1990] ECR I-3941), the unequal treatment is not based directly on the female worker's pregnancy but as a result of a statutory prohibition on employment attaching to that condition (paragraphs 20–21).

In this respect, the Court first notes that it has held that the dismissal of a pregnant woman, recruited for an indefinite period, cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The Court recalls that, although the availability of the employee is necessarily an essential precondition, for the employer, for the proper performance of the work, the protection afforded by Community law to a woman during pregnancy and after childbirth must not depend on whether her presence at work during maternity is essential to the proper running of the undertaking in which she is employed. Any contrary interpretation would, according to the Court, render ineffective the provisions of Directive 76/207 (ruling of 14 July 1994, *Webb* Case C-32/93, ECR I-3567, (paragraph 26)) (paragraph 24).

The Court next notes that a statutory prohibition on night-time work by pregnant women, in principle compatible with Article 2(3) of the Directive, cannot, however, serve as a basis for terminating an existing employment contract for an indefinite period (see, to this effect, the ruling of 5 May 1994, *Habermann-Beltermann*, Case C-421/92 [1994] ECR I-1657, paragraphs 18 and 25). In effect, the Court recalls, such a prohibition takes effect only for a limited period in relation to the whole duration of the contract (ruling in *Habermann-Beltermann*, cited above, paragraph 23) (paragraph 25).

Finally, the Court emphasises that it held in the ruling of 30 April 1998, *Thibault* (Case C-135/95 [1998] ECR I-2011, paragraph 26) that the exercise of rights conferred on women under Article 2(3) of the Directive cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions and that, in that light, the Directive aims to pursue substantive and not formal equality (paragraph 26).

The Court concludes that it follows from this case-law that the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment, so that it is not permissible for an employer to refuse to employ a pregnant candidate on the ground that a prohibition on work arising on account of the pregnancy would prevent her from being employed at the outset and for the duration of the preg-

nancy in the post of unlimited duration to be filled (paragraph 27).

Observations having been put forward at the hearing regarding the financial consequences which could result from an obligation to employ pregnant women, notably for small and medium-sized undertakings, the Court recalls that it has already ruled that a refusal to employ a woman on account of her pregnancy cannot be justified on the grounds relating to the financial loss that an employer who appointed a pregnant woman would suffer for the duration of her maternity leave (Dekker, cited above, paragraph 12). The same conclusion must be drawn, according to the Court, as regards the financial loss caused by the fact that the woman appointed cannot occupy the post concerned for the duration of her pregnancy (paragraphs 28–29).

The Court (Sixth Chamber) hereby rules:

Article 2(1) and (3) of Council Directive 76/207/EEC of 9 February 1976 relating to the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, precludes a refusal to appoint a pregnant women to a post for an indefinite period on the ground that a statutory prohibition on employment attaching to this condition prevents her for the duration of the pregnancy from being employed in that post from the outset.

Case C-50/96
DEUTSCHE TELEKOM AG v. LILLI SCHRÖDER
Date of judgment:
10 February 2000
Reference:
ECR [2000] I-743
Content:
Article 119 of the Treaty (Article 141 EC) — Protocol concerning Article 119 of the Treaty — Supplementary occupational retirement pensions — Exclusion of part-time workers — Retroactive membership — Time limitation on invoking the direct effect of Article 119 of the Treaty — Relationship with national law establishing a principle of equality — Economic and social aims of Article 119 of the Treaty — Fundamental rights

1. Facts and procedure

Article 3(1) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, hereafter 'the GG') provides:

'1. All persons shall be equal before the law.'

Under Article 24 of the Tarifvertrag für Arbeiter der Deutschen Bundespost (Collective agreement for Deutsche Bundespost workers), workers must be affiliated to the Versorgungsanstalt der Deutschen Bundespost (Deutsche Bundespost Pensions Institution, hereafter the 'VAP') under the conditions laid down in the current version of the Tarifvertrag über die Versorgung der Arbeitnehmer der Deutschen Bundespost (Collective Agreement concerning Pensions for Employees of the Deutsche Bundespost, hereafter 'the pensions agreement').

Until 31 December 1987, Article 3 of the pensions agreement provided:

'An employee shall be affiliated to the VAP as provided for in its statute and complementary provisions where ... his or her average weekly working hours under his or her contract of employment are equivalent to at least half of the weekly hours required to be regularly worked by a corresponding full-time employee ...'

That Article was amended as follows with effect from 1 January 1988:

'An employee shall be affiliated to the VAP as provided for in its statute and complementary provisions where ... his or her average weekly working hours under his or her contract of employment are not less than 18 hours.'

By a collective agreement of 22 September 1992, Article 3 of the collective pensions agreement was again amended with retroactive effect from 1 April 1991 and now has the following wording:

'An employee shall be affiliated to the VAP as provided for in its statute and complementary provisions where ... he or she is employed in an activity which is not simply negligible within the meaning of Article 8(1) of Book IV of the Sozialgesetzbuch [Social Security Code].'

Ms Schröder was employed on a part-time basis by Deutsche Telekon AG (hereafter 'Deutsche Telekom'), first under fixed-term contracts from 9 August 1974 to 19 May 1975, then under a contract of indefinite duration from 20 May 1975 to 31 March 1994, on which date she retired. Since 1 April 1994, she has received an old-age pension under the statutory scheme. As a part-time worker, Ms Schröder was initially excluded from membership of the VAP. After the amendment of Article 3 of the collective pensions agreement with effect from 1 April 1991, she was affiliated to the VAP from that date until the cessation of her employment. Ms Schröder instituted proceedings before the Arbeitsgerich (Labour Court) Hamburg, seeking an order that Deutsche Telekom pay her, with effect from 1 April 1994, a supplementary retirement pension of an amount equivalent to that which she would have received if she had been affiliated to the VAP throughout the pe-

riod from 20 May 1975 to 31 March 1994. She claimed that the exclusion of part-time workers from entitlement to a supplementary pension constituted discrimination prohibited by Article 119 of the Treaty. Evidence produced in the national court showed that in 1991, 95 % of part-time employees at Deutsche Telekom were women.

2. Questions referred to the Court

1) Does the exclusion, by a provision laid down without consideration of sex, of part-time workers whose weekly working hours are less than 18 hours from eligibility for a supplementary retirement pension paid within the framework of a private occupational pension scheme, constitute indirect discrimination against women, within the meaning of the case-law of the Court on Article 119 of the EC Treaty, where around 95 % of workers affected by the exclusion are women?

2) If Question 1 is to be answered in the affirmative, do the Protocol concerning Article 119 of the Treaty establishing the European Community (the 'Barber Protocol') and the rule of non-retroactivity contained therein also apply to cases of indirect discrimination against women in a situation such as that described in Question 1?

3) If Question 2 is answered in the affirmative, does the rule of non-retroactivity contained in the Protocol concerning Article 119 of the Treaty establishing the European Community (the 'Barber Protocol') prevail over German constitutional law (Article 3(1) of the GG), which excludes non-retroactivity in the case described in Question 1?

4) Does the retroactivity, permitted by German constitutional law pursuant to the application of Article 3(1) of the GG, in a case such as that described in Question 1, constitute an unlawful circumvention of the rule of non-retroactivity contained in the Protocol concerning Article 119 of the EC Treaty where, in comparable circumstances and also having the same objective of equal treatment in occupational pension schemes, national law, by contrast with Community law, operates retroactively in favour of employees, in particular women who are indirectly discriminated against?

5) If Question 4 is answered in the affirmative, does the application of Article 2(1) of the Beschäftigungsförderungsgesetz of 26 April 1985, which purports to allow retroactivity up to 26 April 1985, constitute an unlawful circumvention of the rule of non-retroactivity contained in the Protocol concerning Article 119 of the EC Treaty (the 'Barber Protocol')?

6) Does the retroactivity, permitted pursuant to Article 3(1) of the GG, in a case such as that described in Question 1, constitute a breach of Community law from the standpoint of disproportionate discrimination by nationals against the German undertakings affected, and in light of an interpretation of national law or of a principle of Community law, carried out under the requirements of Community law, and does Community law prevail in that respect over national law?

3. Court ruling

On the first question, the Court, having noted that the parties agree that the first question should be answered in the affirmative, recalls that, according to settled case-law, a pension scheme of the type in question in the main proceedings, which is essentially a function of the employment of the person concerned, is connected to the pay of that person and comes within the scope of Article 119 of the Treaty (see in particular, to that effect, *Bilka*, Case C-170/84, 13 May 1986, ECR 1607, paragraph 22, *Barber*, C-262/88, 17 May 1990, ECR. I-1889, paragraph 28, and *Beune*, Case C-7/93, 28 September 1994, ECR I-4471, paragraph 46). It is also clear from the case-law of the Court that, in order to establish if a measure affects men and women

differently to such a degree that it amounts to indirect discrimination within the meaning of Article 119 of the Treaty, the national court must verify whether the statistics available indicated that a considerably smaller percentage of women than men is able to fulfil the condition imposed by that measure. If that is the case, there is indirect sex-based discrimination, unless that measure is justified by objective factors unrelated to any sex-based discrimination (see Case C-167/97 *Seymour-Smith and Perez*, of 9 February 1999, ECR I-623, paragraph 65) (paragraphs 26–28).

On the second question, where, according to the Court, the court of referral is essentially asking whether, where the exclusion of part-time workers from an occupational pension scheme constitutes discrimination prohibited by Article 119 of the Treaty, the possibility of relying on the direct effect of that article is limited in time, the Court recalls the pertinent reasons for its judgments of 8 April 1987, *Defrenne II* (Case C-43/75, [1987] ECR 455, paragraphs 40, 74 and 75), *Barber* (cited above, paragraphs 44 and 45), and of 6 October 1993, *Ten Oever* (Case C-109/91 [1993] ECR I-4879, paragraph 20). The Court observes that the temporal limitation intended by these rulings is also contained in the Protocol concerning Article 119 of the Treaty establishing the European Community (hereafter 'the Protocol') attached to the EC Treaty. The Court holds, however, that it is clear from the rulings of 28 September 1994, *Vroege* (Case C-57/98 [1994] ECR I-4541, paragraphs 20 to 27) and *Fisscher* (Case C-128/93 [1994] ECR I-4583, paragraphs 17 to 24, and of 11 December 1997, *Magorrian and Cunningham* (Case C-246/96 [1997] ECR I-7153, paragraphs 27 to 35), that the limitation in time of the effects of Article 119 resulting from both the *Barber* judgment, cited above, and the Protocol, concerns only those kinds of discrimination which, because of the transitional derogations provided for by Community law and capable of being applied with regards to occupational pensions, employers and pension schemes could reasonably have considered to be permissible (see the ruling of 14 October 1996, *Dietz*, Case C-435/93 [1996] ECR I-5223, paragraph 19). However, the Court notes, as far as the right to join an occupational pension scheme is concerned, the Court has stated that there was no reason to suppose that the occupational bodies concerned could have been mistaken as to the applicability of Article 119 of the Treaty (*Magorrian and Cunningham*, cited above, paragraph 28). In effect, according to the Court, it has been clear since the *Bilka* judgment, cited above, that any sex-based discrimination in recognition of that right infringes Article 119 of the Treaty. The Court estimates that, as the judgment in *Bilka*, cited above, did not provide for any limitation in time, the direct effect of Article 119 can be relied upon to retroactively claim equal treatment in relation to the right to join an occupational pension scheme, since 8 April 1976, the date of the judgment in *Defrenne II*, cited above, which recognised for the first time the direct effect of that article (judgments cited above, *Dietz*, paragraph 21, and *Magorrian and Cunningham*, paragraph 30) (paragraphs 30–38).

On the third, fourth and fifth questions, which the Court considered together, and which it understands as seeking to ascertain whether the limitation in time of the possibility of relying on the direct effect of Article 119 of the Treaty, resulting from *Defrenne II*, cited above, precludes national provisions which lay down a principle of equality by virtue of which, in circumstances such as those in question in the main proceedings, part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme, the Court estimates, in light of *Defrenne II*, cited above, that the limitation of the possibility of relying on the direct effect of Article 119 of the Treaty was not intended in any way to exclude the possibility, for the employees concerned, of relying on national provisions laying down a principle of equality. In effect, according to the Court, when these provisions exist, the principle of legal certainty inherent in the Community legal order, which can lead the Court, under exceptional circumstances, to limit the possibility of relying on a provision which it has interpreted, has no application. The Court adds that it

is immaterial, in that regard, that the national provisions in question were not interpreted in a manner consonant with Article 119 of the Treaty until after the date of the judgment in *Defrenne II*, cited above, since that interpretation is capable of being applied, if necessary, to situations which arose and became established before that date. In effect, it is not for the court to pronounce as to the application in time of rules of national law (paragraphs 42–49).

The Court points out that, by the first part of the sixth question, the court of referral is essentially asking whether Community law, in particular the principle of non-discrimination on grounds of nationality and Article 119 of the Treaty, precludes provisions of a Member State which lay down a principle of equality by virtue of which, in circumstances such as those of the main proceedings, part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme, in view of the risk of distortions of competition between economic operators of the different Member States to the detriment of the employers established in the first Member State. The Court also notes that, if that is the case, the court of referral is asking, in the second part of the question, whether the national court responsible for applying the provisions of Community law, within the limits of its jurisdiction, has an obligation to ensure the full effect of those provisions, if need be declining to apply any contrary provision of national law (paragraph 51).

Concerning Article 119 of the Treaty, the Court observes that it has certainly considered, in paragraphs 8 to 11 of *Defrenne II*, cited above, that it pursues a twofold purpose, both economic and social. The Court, however, notes that in subsequent case-law, it has repeatedly held that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure (see, to that effect, rulings of 15 June 1978, *Defrenne III*, Case C-149/77 [1978] ECR 1365, paragraphs 26 and 27; of 20 March 1984, *Razzouk and Beydoun v. Commission*, Case C-75/82 and Case C-117/82, ECR 1509, paragraph 16; and of 30 April 1996, P. v. S., C-13/94, ECR I-2143, paragraph 19). The Court considers that, in light of that case-law, it must be concluded that the economic aim pursued by Article 119 of the Treaty and consisting of the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constituted the expression of a fundamental human right. In those circumstances, the Court concludes, the fact that, prior to *Defrenne II*, cited above, the principle of equal pay for male and female workers could not be relied upon against employers established in Member States other than the Federal Republic of Germany, either under national legislation or by virtue of the direct effect of Article 119 of the Treaty, does not affect the application of national rules ensuring observance of that principle in the Federal Republic of Germany (paragraphs 53–58).

The Court considers that, in view of this answer, it is not necessary to reply to the second part of the sixth question, relating to the primacy of Community law over national law (paragraph 60).

The Court (Sixth Chamber) hereby rules:

1) *The exclusion of part-time workers from an occupational pensions scheme, such as that in question in the main proceedings, constitutes discrimination prohibited by Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) if that measure affects a considerably higher percentage of female workers than male workers and is not justified on objective grounds unrelated to sex-based discrimination.*

2) *In a case where the exclusion of part-time workers from an occupational pension scheme constitutes indirect discrimination prohibited by Article 119 of the Treaty, the possibility of relying on the direct effect of that article is limited in time in the sense that the periods of service of these*

workers are only to be taken into account from 8 April 1976, the date of the judgment in Defrenne II (43/75), for the purposes of their retroactive membership of such a scheme and the calculation of the benefits to which they are entitled, except in the case of workers or their dependents who have, before that date, initiated legal proceedings or introduced an equivalent claim.

3) *The limitation in time of the possibility of relying on the direct effect of Article 119 of the Treaty, resulting from the judgment in Defrenne II, cited above, does not preclude national provisions which lay down a principle of equality by virtue of which, in circumstances such as those of the main proceedings, part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme.*

4) *Community law, in particular the principle of non-discrimination on grounds of nationality and Article 119 of the Treaty, does not preclude provisions of a Member State which lay down a principle of equal treatment by virtue of which, in circumstances like those of the main proceedings, part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme, notwithstanding the risk of distortions of competition between economic operators of the different Member States to the detriment of employers established in the first Member State.*

Joined Cases C-234/96 and C-235/96
DEUTSCHE TELEKOM AG/AGNES VICK AND UTE CONZE
Date of judgment:
10 February 2000
Reference:
ECR [2000] I-799
Content:
Article 119 of the Treaty (Article 141 EC) — Protocol concerning Article 119 of the Treaty — Supplementary occupational retirement pensions — Exclusion of part-time workers — Retroactive membership — Time limitation on invoking the direct effect of Article 119 of the Treaty — Relationship with national law establishing a principle of equality and prohibiting discrimination against part-time workers

1. Facts and procedure

Article 3, paragraph 1, of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, hereafter 'the GG') provides:

'1. All persons shall be equal before the law.

Article 2, paragraph 1, of the Gesetz über arbeitsrechtliche Vorschriften zur Beschäftigungsförderung (Law laying down provisions of employment law designed to promote employment) prohibits employers from treating part-time workers differently from full-time workers, unless objective reasons justify a difference in treatment.

Under Article 24 of the Tarifvertrag für Arbeiter der Deutschen Bundespost (Collective agreement for workers of Deutsche Bundespost), workers must be affiliated to the Versorgungsanstalt der Deutschen Bundespost (Deutsche Bundespost Pensions Institution, hereafter called the 'VAP') under the conditions laid down in the current version of the Tarifvertrag über die Versorgung der Arbeitnehmer der Deutschen Bundespost (Collective Agreement concerning Pensions for Employees of Deutsche Bundespost, hereafter 'the pensions agreement').

Until 31 December 1987, Article 3 of the pensions agreement provided:

'An employee shall be affiliated to the VAP as provided for in its statute and additional provisions where ... his or her average weekly working hours under his or her contract of employment are equivalent to at least half of the normal weekly hours required ... to be worked by a corresponding full-time employee ...'

That Article was amended as follows with effect from 1 January 1988:

'An employee shall be affiliated to the VAP as provided for in its statute and additional provisions where ... his average weekly working hours under his contract of employment are not less than 18 hours.'

By a collective agreement of 22 September 1992, Article 3 of the pensions agreement was again amended with retroactive effect from 1 April 1991 and now has the following wording:

'An employee shall be affiliated to the VAP as provided for in its statute and additional provisions where ... he is employed in an activity which is not simply negligible within the meaning of Article 8(1) of Book IV of the Sozialgesetzbuch [Social Security Code].'

Mrs Vick was employed on a part-time basis by Deutsche Bundespost Telekom, later Deutsche Telekom AG (hereafter 'Deutsche Telekom'), first for 24 hours a week between 1 July 1971 and 30 September 1972, then for 16 hours a week between 1 October 1972 and 30 June 1991, on which date she retired. Since 1 July 1991, she has received an old-age pension under the statutory scheme. Mrs Vick was affiliated to the VAP from 1 July 1971 to 30 September 1972. Following the reduction in her weekly working hours on 1 Octo-

ber 1972, her membership was terminated and her share of contributions paid to the VAP was reimbursed to her.

Ms Conze was employed on a part-time basis by Deutsche Bundespost Telekom, initially for 24 hours a week between 13 September 1971 and 30 April 1972, then for 16 hours a week from 1 May 1972. She was still working for Deutsche Telekom at the time of this ruling. Mrs Conze was affiliated to the VAP from 13 September 1971 to 30 April 1972. Following the reduction in her weekly working hours on 1 May 1972, her membership was terminated. After the amendment of Article 3 of the pensions agreement with effect from 1 April 1991, she was re-affiliated to the VAP as of that date.

Mrs Vick instituted proceedings before the Arbeitsgericht Hamburg, seeking an order that Deutsche Telekom pay her, with effect from 1 July 1991, a supplementary retirement pension of an amount equivalent to that which she would have received if she had been affiliated to the VAP since 1 July 1971, together with interest. Mrs Conze also instituted proceedings against Deutsche Telekom before the Arbeitsgericht Hamburg with the aim of receiving compensation for the loss of the supplementary pension that she would have received if she had been affiliated to the VAP between 1 January 1983 and 31 March 1991. Both claimed that the exclusion of employees who worked less than 18 hours a week from the right to a supplementary pension constituted discrimination as prohibited by Article 119 of the Treaty.

2. Questions referred to the Court

1) Do Article 119 of the EC Treaty, the Barber Protocol No 2 and the relevant case-law of the Court on this subject, as primary law, have priority over the constitutional law (Article 3 of the Grundgesetz) and the ordinary law (Article 2, paragraph 1, of the Beschäftigungsförderungsgesetz which is the general principle of equal treatment in labour law) in force in the Federal Republic of Germany, with the consequence that, where the factual requirements are fulfilled for a claim under Article 119 of the EC Treaty on the grounds of indirect gender discrimination in connection with an occupational old age pension scheme because of unfavourable treatment of part-time workers, benefits can be claimed even under constitutional or ordinary rules of national law, only on the same restrictive conditions as apply to a coincident Community law claim under Article 119 of the EC Treaty, so that, in divergence from the legal assessment otherwise applicable under national law, even on the basis of grounds of claim under national law, benefits are payable only for periods of employment after 17 May 1990, subject to the exception for employees who have initiated legal proceedings or introduced an equivalent claim before that date?

2) Is the answer to the preceding question the same if, on the basis of concurrent national law, the right to equal treatment already exists for the simple reason that there is objectively unjustified unfavourable treatment owing to part-time employment, without it being relevant whether there is also indirect sex discrimination resulting from treatment which is proportionately more unfavourable to female workers?

3. Court ruling

On the first question, the Court followed an argument very similar to that used in its response to questions 1 to 5 in the case of *Deutsche Telekom AG/Lilli Schröder* (paragraphs 31–51).

The Court observed that, by its second question, the court of referral essentially sought to ascertain whether the fact that the relevant national provisions prohibit all discrimination against workers by reason of the fact that they work on a part-time basis, and not by reason of their sex, affected the answer to be given to the first question. In answer to that question, the Court noted that provisions prohibiting other forms of dis-

crimination may, in certain circumstances, contribute to ensuring that the principle of equal pay for men and women workers is applied in accordance with the obligations incumbent on the Member States. The Court emphasised that this is the case particularly where national provisions prohibit discrimination in relation to pay against part-time workers, a group which often comprises a higher proportion of female workers than male workers. The Court ruled furthermore that in view of the answer given to the first question, the fact that the relevant national provisions are based on a prohibition of other forms of discrimination cannot *a fortiori* lead to any limitation of their application in time solely because of the limitation in time of the possibility of relying on the direct effect of Article 119 of the Treaty resulting from *Defrenne II* (judgment of 8 April 1976, Case C-43/75 [1976] ECR I-455 (paragraphs 52–55).

The Court (Sixth Chamber) hereby rules:

1) *The limitation in time of the possibility of relying on the direct effect of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), resulting from 8 April 1976 judgment in Case C-43/75, Defrenne v Sabena, does not preclude national provisions which lay down a principle of equality by virtue of which, in circumstances like those of the main proceedings, all part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme.*

2) *The fact that the relevant national provisions prohibit all discrimination against workers by reason of the fact that they work on a part-time basis, and not by reason of their sex, does not affect the answer to the first question.*

Joined Cases C-270/97 and C-271/97
DEUTSCHE POST AG/ELISABETH SIEVERS AND BRUNHILDE SCHRAGE
Date of judgment:
10 February 2000
Reference:
ECR [2000] I-929
Content:
Article 119 of the Treaty (Article 141 EC) — Protocol concerning Article 119 of the Treaty — Supplementary occupational retirement pensions — Exclusion of part-time workers — Retroactive membership — Time limitation on invoking the direct effect of Article 119 of the Treaty — Relationship with national law establishing a principle of equality — Economic and social aims of Article 119 of the Treaty — Fundamental rights — Conforming interpretation of national law

1. Facts and procedure

Article 3, paragraph 1, of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, hereafter 'the GG') provides:

'1. All persons shall be equal before the law.'

Under Article 24 of the Tarifvertrag für Arbeiter der Deutschen Bundespost (Collective agreement for workers), Deutsche Bundespost workers must be affiliated to the Versorgungsanstalt der Deutschen Bundespost (Deutsche Bundespost Pensions Institution, herein after the 'VAP') under the conditions laid down in the current version of the Tarifvertrag über die Versorgung der Arbeitnehmer der Deutschen Bundespost (Collective Agreement concerning Pensions for Employees of the Deutsche Bundespost, hereafter 'the pensions agreement').

Until 31 December 1987, Article 3 of the pensions agreement provided:

'An employee shall be affiliated to the VAP as provided for in its statute and implementing provisions where ... his or her average weekly working hours under his or her contract of employment are equivalent to at least half of the weekly hours required ... to be regularly worked by a corresponding full-time employee ...'

That Article was amended as follows with effect from 1 January 1988:

'An employee shall be affiliated to the VAP as provided for in its statute and additional provisions where ... his average weekly working hours under his contract of employment are not less than 18 hours.'

By a collective agreement of 22 September 1992, Article 3 of the pensions agreement was again amended with retroactive effect from 1 April 1991 and now has the following wording:

'An employee shall be affiliated to the VAP as provided for in its statute and implementing provisions where ... he is employed in an activity which is not simply negligible within the meaning of Article 8(1) of Book IV of the Sozialgesetzbuch [Social Security Code].'

Ms Sievers was employed on a part-time basis by Deutsche Bundespost, later Deutsche Post AG (hereafter 'Deutsche Post') from 16 September 1964 to 28 February 1988, on which date she retired. Since 1 March 1988, she has received an old-age pension under the statutory scheme. Because of her working hours, which were always less than 18 hours a week, except for a period from 1963 to 1964 when she worked 18 hours a week, Ms Sievers was never affiliated to the VAP.

Ms Schrage was employed on a part-time basis by Deutsche Bundespost, first under fixed-term contracts, between which there were periods of non-employment, from 1 April 1960 to 30 September 1980, and then continuously from 1 October 1981 to 31 March 1983, on which date she retired. Since 1 April 1993, she has received an old-age pension

under the statutory scheme. Because of her working hours, which were always between 8 and 13 hours a week, Ms Schrage was never affiliated to the VAP.

Ms Sievers instituted proceedings before the Arbeitsgericht Hannover seeking an order that Deutsche Post pay her, as from her retirement, a supplementary retirement pension of an amount equivalent to that which she would have received if she had been affiliated to the VAP throughout the period of her employment relationship. Ms Schrage also instituted proceedings against Deutsche Post before the Arbeitsgericht Hannover for the same purpose. Both claimed that the exclusion of part-time workers who worked less than 20 hours, later 18 hours, a week from entitlement to a supplementary pension constituted discrimination prohibited by Article 119 of the Treaty.

2. Questions referred to the Court

1) a) Does Community law require precedence of application or validity (under Article 5(2) and Article 189 of the EC Treaty) over national provisions which could or would be applicable, by way of concurrence of claims, to the same factual situation and with the same aim of supporting claims to equal treatment in occupational pension schemes, such as, for example, in Germany the employment law principle of equal treatment generally or, specifically, Article 2, paragraph 1, of the Beschäftigungsförderungsgesetz (Employment Promotion Law) 1985?

   b) In the case of such a conflict, where Community law confers benefits under occupational pension schemes only if and in so far as they are attributable to periods of employment subsequent to 17 May 1990, whereas the national provisions regulate the same factual situation differently in that they do not exclude retroactive effect, does the precedence of Community law apply generally?

   c) Does such precedence exist only if the economic objective of Article 119 of the EC Treaty that co-exists with the social objective, namely the creation of equal competitive opportunities, is specifically affected?

2) Does at least the Community law principle that national law is to be interpreted in a manner consistent with EC law require national provisions on equal treatment in the matter of benefits paid under occupational pension schemes to be interpreted and applied in accordance with the requirements and limitations (prohibition of retroactive effect) of Community law?

3. Court ruling

On the first question, the Court followed an argument very similar to that used in its response in the case of *Deutsche Telekom AG v Lilli Schröder* (paragraphs 33–60).

On the second question, the Court noted that according to legal precedent, national judges are required to interpret their national law as far as possible in the light of the wording and purpose of the relevant Community provisions, in particular Article 119 of the Treaty, in order to achieve the result pursued by these (see to that effect, in particular, judgment of 4 February 1988, Case 157/86 *Murphy et al* [1988] ECR I-673 (paragraph 11), and judgment of 13 November 1990, Case C-106/89 *Marleasing* [1990] ECR I-4135 (paragraph 8). The Court therefore ruled that it was clear from the answers given to the first question that Community law, in particular Article 119 of the Treaty, seeks to implement the principle of equal pay for men and women workers and does not preclude national provisions which are conducive to compliance with that principle (paragraphs 62–63).

The Court (Sixth Chamber) hereby rules:

1) The limitation in time of the possibility of relying on the direct effect of Article 119 of the EC

Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), resulting from 8 April 1976 judgment in Case C-43/75 Defrenne v Sabena, does not preclude national provisions which lay down a principle of equal treatment by virtue of which, in circumstances like those of the main proceedings, all part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme.

2) *Article 119 of the Treaty does not preclude provisions of a Member State which lay down a principle of equal treatment by virtue of which, in circumstances like those of the main proceedings, all part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme, notwithstanding the risk of distortions of competition between financial operators of the various Member States to the detriment of employers established in the first Member State.*

3) *National judges are required to interpret their national law as far as possible in the light of the wording and purpose of the relevant Community provisions, in particular Article 119 of the Treaty, in order to ensure application of the principle of equal pay for men and women workers.*

Case C-158/97
GEORG BADECK AND OTHERS, INTERVENERS: HESSISCHE MINISTERPRÄSIDENT AND LANDESANWALT BEIM STAATSGERICHTSHOF DES LANDES HESSEN
Date of judgment:
28 March 2000
Reference:
ECR [2000] I-1875
Content:
Directive 76/207/EEC (Article 2(4) — Equal opportunities — Civil service employment — National measures for the promotion of women (positive action)

1. Facts and procedure

In Germany, the Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung (Law of the Land of Hesse on equal rights for women and men and the elimination of discrimination against women in the civil service, hereafter 'the HGlG') was adopted on 21 December 1993 (GBVBI. I, p. 729). The HGlG's aim is the equal access of women and men to posts in the civil service through the adoption of advancement plans relating to conditions of access, work and career for women, with binding targets.

On 28 November 1994, 46 members of the Landtag of Hesse applied to the Staatsgerichtshof to review whether various positive action measures in favour of women provided for by the HGlG were compatible with the constitution of the Land of Hesse. The appellants also considered that the HGlG was contrary to Directive 76/207.

2. Questions referred to the Court

Does Article 2(1) and (4), of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, training and promotion, and working conditions (OJ 1976 L 39, p. 40), preclude national rules under which:

1) in cases of under-representation under Article 3(1) and (2), of the HGlG selection decisions under Article 10 of the HGlG, where a woman and a man applicant have equal qualifications, must always, because of the binding nature of the targets in the women's advancement plan under Article 5(3) and (4) of the HGlG, be in favour of the woman in the individual case, at least if that is necessary for fulfilling the targets and no reasons of greater legal weight are opposed;

2) the binding targets of the women's advancement plan for posts in the academic service to be filled for fixed terms and for academic assistants must, under Article 5(7) of the HGlG, provide for at least the same proportion of women as the proportion of women among graduates (paragraph 7, first sentence), holders of higher degrees (paragraph 7, second sentence) or students (paragraph 7, third sentence) in the discipline in question;

3) in trained occupations in which women are under-represented, under Article 7(1) of the HGlG, women are to be taken into account to the extent of at least one half in allocating training places, except in the case of training procedures in which the State exclusively provides training;

4) in sectors in which women are under-represented, under Article 9(1) of the HGlG, at least as many women as men, or all the women applicants, are to be called to interview if they satisfy the conditions laid down by law or otherwise for appointment to the post or the office to be conferred;

5) in making appointments to committees, advisory boards, boards of directors and supervisory boards and other collective bodies, under Article 14 of the HGlG at least half the members should be women?

3. Court ruling

By way of introduction, the Court noted the judgments of 17 October 1995, Case C-450/93 *Kalanke v Bremen* [1995] ECR I-3051, paragraph 16, and of 11 November 1997, Case C-409/95 *Marschall* [1997] ECR I-6363, paragraphs 26–30 and 33. Based on this case-law, the Court ruled that measures aimed at prioritising the promotion of female candidates in sectors of the civil service where women are under-represented must be considered as compatible with Community law when they do not give automatic and unconditional priority to female candidates with qualifications equal to their male competitors and when applications are considered objectively, by taking into account the individual personal circumstances of each candidate. The Court ruled that the national court is responsible for determining whether these conditions are met on the basis of an examination of the scope of the provision at issue. However, under the case-law, the Court has jurisdiction to supply the national court with an interpretation of Community law on all such points as may enable that court to determine that issue of compatibility for the purposes of the case before it (see, *inter alia*, judgment of 12 July 1979 *Grosoli* (Case 223/78 [1979] ECR I-2621, paragraph 3) and judgment of 25 June 1997 *Tombesi and Others* (Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 [1997] ECR I-3561, paragraph 36)) (paragraphs 17–25).

In answer to the first part of the preliminary question, the Court noted that, under the relevant provisions of the HGlG, the selection procedure for candidates first of all assesses the candidates' aptitude, qualifications and professional performance (qualification) with respect to the requirements of the post to be filled or the office to be conferred. It noted that, for the purposes of that assessment, certain positive and negative criteria are taken into account. Thus capabilities and experience which have been acquired by carrying out family work are to be taken into account in so far as they are relevant to the suitability, performance and capability of candidates, whereas seniority, age and the date of last promotion are to be taken into account only in so far as they are of importance in that respect. Similarly, the family status and income of a candidate's partner are immaterial and part-time work, leave and delays in completing training as a result of looking after children or parents in need of care must not have a negative effect. The Court noted that such criteria, although formulated in terms which are neutral as regards gender and thus also capable of benefiting men, in general favour women, and that they are manifestly intended to lead to an equality which is substantive rather than formal by reducing the inequalities which may occur in practice in social life (paragraphs 30–32).

The Court next pointed out that it is only if a female candidate and a male candidate cannot be distinguished on the basis of their qualifications that the woman must be chosen where that proves necessary for complying with the objectives of the advancement plan in question and no reasons of greater legal weight are opposed. It observed that it appeared from the answer provided by the Ministerpräsident (Prime Minister of the Land of Hesse) to a written question put by the Court that those reasons of greater legal weight which justify overriding the rule of advancement of women concern five groups of people (former civil servants who left their jobs due to family work or who for the same reason were not able to apply for permanent engagement in the public service after their preparatory service, people who for reasons linked to family work undertook part-time work and who wish to resume full-time work, former temporary soldiers, meaning those who voluntarily served for a limited period longer than compulsory military service (with a minimum of 12 years), severely disabled people and the long-term unemployed). The Court concluded that the priority rule introduced by the HGlG is not absolute and unconditional in the sense of paragraph 16 of *Kalanke*, as cited previously, where the Court ruled that a national rule which automatically gives priority for promotion to female candidates with qualifications equal to those of their male competitors in sectors where

there are fewer women than men in the relevant job role involves discrimination on the basis of gender. The Court added that it is for the national court to assess, in the light of the above, whether the rule at issue in the main proceedings ensures that applications are the subject of an objective assessment which takes account of the specific personal situations of all candidates (paragraphs 33–37).

On the second part of the preliminary question, the Court ruled that it appears from the order for referral that the HGlG limits the application of the principle of 'recruitment of the best' in the same way with respect to selection as with respect to all the selection decisions which have to be made taking into account the targets of the women's advancement plan. It noted that in any case this provision can influence a selection decision only where the candidates have equal qualifications. The Court again noted that the special system for the academic sector at issue does not fix an absolute ceiling, but fixes one by reference to the number of persons who have received appropriate training, which amounts to using an actual fact as a quantitative criterion for giving preference to women. It follows, in the Court's opinion, that the existence of such a special system for the academic sector encounters no specific objection from the point of view of Community law (paragraphs 41–43).

On the third part of the preliminary question, the Court noted that as appears from the statement of motivation behind the relevant provision of the HGlG, the Hesse legislature, by introducing a 'strict result quota' ('Ergebnisquote') as regards professional training to facilitate equal access for women and men to qualified posts, intended to establish a balanced allocation of training places, at least in the public service. However, in the view of the Court, that intention does not necessarily entail total inflexibility. The Court noted that effectively the regulation in question clearly provides that if, despite appropriate measures for drawing the attention of women to the training places available, there are not enough applications from women, it is possible for more than half of those places to be taken by men (paragraphs 50–51).

The Court took the view that since the quota applies only to training places for which the State does not have a monopoly, and therefore concerns training for which places are also available in the private sector, no male candidate is definitively excluded from training. Taking an overall view of training (both public and private sectors), the provision at issue therefore merely improves the chances of female candidates in the public sector, the Court noted. The Court considered that the measures laid out are thus measures which are intended to eliminate the causes of women's reduced opportunities of access to employment and careers, and moreover consist of measures regarding vocational orientation and training. It ruled that this type of action is therefore among the measures authorised by Article 2(4) of the Directive, which are intended to improve the ability of women to compete on the labour market and to pursue a career on an equal footing with men (paragraphs 53–54).

On the fourth part of the preliminary question, the Court clarified that the provision at issue in the main proceedings does not imply an attempt to achieve a final result — appointment or promotion — but affords women who are qualified additional opportunities to facilitate their entry into working life and a career. It noted next that it appears from the referral order that such a provision, although laying down rules on the number of interviews to be given to women, also provides that a preliminary examination of the candidatures must be made and that only qualified candidates who satisfy all the conditions required or laid down are to be called to interview. In the Court's view, this is consequently a provision which, by guaranteeing where candidates have equal qualifications that women who are sufficiently qualified are called to interview, is intended to promote equal opportunity for men and women within the meaning of Article 2(4), of the Directive (paragraphs 60–62).

On the fifth part of the preliminary question, the Court considered that it appears from the referral order and from the statement of reasons that the HGlG regulation in question, which concerns the composition of collective bodies, is not compulsory, in that it is a non-mandatory provision which recognises that many bodies are established by legislative provisions and that full implementation of the requirement of equal membership of women on those bodies would in any event require an amendment to the relevant law. Moreover, the Court noted that this regulation does not apply to offices for which elections are held, and that for such offices it would require the relevant statutory bases to be amended. Finally, it noted that since this provision is not mandatory, it permits, to some extent, other criteria to be taken into account (subparagraph 65).

The Court hereby rules:

Article 2, paragraphs 1 and 4, of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions does not preclude a national rule which

- *in civil service sectors where women are underrepresented and in cases where male and female candidates have equal qualifications, gives priority to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that applications are the subject of an objective assessment which takes account of the specific personal situations of all candidates;*

- *prescribes that the binding targets of the women's advancement plan for temporary posts in the academic sector and academic assistant posts must stipulate a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline;*

- *in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly over training, allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women;*

- *where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required are called to interview in sectors in which they are underrepresented;*

- *relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women.*

Case C-236/98
JÄMSTÄLLDHETSOMBUDSMANNEN/ÖREBRO LÄNS LANDSTING
Date of judgment:
30 March 2000
Reference:
ECR [2000] I-2189
Content:
Article 119 of the Treaty (Article 141 EC) — Directive 75/117/EEC — Comparison between the pay of a midwife and that of a clinical technician — Taking into account a supplement for shift work and a reduction in working hours

1. Facts and procedure

The Jämställdhetsombudsmannen (Swedish equal opportunities ombudsman, hereafter the 'JämO') appealed to the Arbetsdomstolen (employment tribunal) on behalf of two midwives and claiming a payment for them from the Örebro läns landsting (Örebro County Council, hereafter the 'Landsting'), that is, the damages and interest for pay discrimination for the period between 1 January 1994 and 30 June 1996 plus the difference between their pay and the higher pay received by an clinical technician working at the same regional hospital, on the grounds that they performed work of equal value.

The collective agreement Allmänna Bestämmelser 95 regulates pay supplements for anti-social working hours. These pay supplements vary according to the time of day worked and whether they are worked on a Saturday or a national holiday. The midwives received supplements on a regular basis, unlike the clinical technician, who did not work hours entitling him to it.

The midwives work according to a three-shift system. The roster is drawn up for periods of 15 weeks. The JämO argues that midwives on the delivery ward are the only group of workers in the Swedish healthcare sector who work on a shift basis.

2. Questions referred to the Court

1) Under Article 119 of the Treaty of Rome and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, must a supplement for anti-social working hours be included in a pay comparison as part of a pay discrimination claim? What difference does it make that the supplement for anti-social working hours varies each month depending on work schedules?

2) In answering the first question, should significance be attached to the fact that as part of their job, midwives must regularly work hours which entitle them to pay supplements for anti-social working hours, whereas clinical technicians do not regularly work during times which would entitle them to supplements?

3) In determining whether supplements for anti-social working hours should be included in pay comparisons as part of pay discrimination claims, must significance be attached to the fact that under national law pay supplements are included in basic pay for the purpose of determining pensions, sick pay, damages and other earnings-related payments?

4) Must a reduction in working time, representing the difference in standard working time between daytime work and work under a continuous three-shift system, be taken into account when a pay comparison is made as part of pay discrimination claims, in accordance with Article 119 of the Treaty of Rome and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women? If the answer is yes: what significance does it have that under the collective agreement the lower standard working time of a continuous three-shift regime is considered as full-time work? If reduced working hours are to be given a

particular value, is that value to be regarded as part of the fixed monthly pay or as special compensation which should be included in the pay comparison?

5) In answering the fourth question, is significance to be attached to the fact that the midwives, but not the clinical technician, perform shift work which under the terms of the collective agreement includes entitlement to reduced working hours?

3. Court ruling

The Court noted that by its first three questions, which it was appropriate to consider together, the national court essentially asked whether the anti-social hours supplement must be taken into consideration when calculating the salary used as the basis for a pay comparison for the purposes of Article 119 of the Treaty and Directive 75/117. In this regard, it was first of all established whether the anti-social hours supplements awarded to workers under the Allmänna Bestämmelser 95 collective agreement fell under Article 119 of the Treaty and therefore under Directive 75/117. The Court ruled that this is indeed the case. It pointed out that the supplement at issue in the main proceedings constitutes a form of pay to which the worker is entitled due to his employment, and that the supplement is paid to the worker for performing duties at anti-social hours and to compensate him for the resultant disruption and inconvenience. As to the manner in which salaries are negotiated at the level of the Landsting, the Court added that it is established law that, by reason of its mandatory character, Article 119 of the Treaty applies not only to provisions of law and regulations but also to collective agreements and individual contracts of employment (judgment of 15 December 1994, *Helmig and Others,* Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93, and C-78/93 [1994] ECR I-5727, paragraph 18) (paragraphs 35–41).

The Court then ascertained whether pay supplements for anti-social hours should be taken into account when comparing midwives' pay with that of clinical technicians. On this point, the Court noted that because the anti-social hours supplement varies from month to month according to the shift when the hours in question were worked, it is difficult to make a meaningful comparison between, on the one hand, a midwife's salary and supplementary allowance taken together and on the other hand the basic salary of the comparator group. The Finnish Government observed that the more different employees' duties are, the more difficult it is not only to compare the various pay elements but also to assess the equivalence of the work, and that in such a case, it might be possible to evaluate the demands imposed by the duties concerned, in particular by employing a non-discriminatory method for that purpose. In that connection, the Court must point out that it is not called upon in these proceedings to rule on questions relating to the concept of work of equal value. It pointed out that it is for the national court, which alone has jurisdiction to assess the facts, to determine, in the light of facts relating to the nature of the work carried out and the conditions in which it is carried out, whether the work can be deemed to be of equal value (judgment of 31 May 1995, *Royal Copenhagen* (Case C-400/93 [1995] ECR I-1275, paragraph 42)). Should that be the case, the Court found that a comparison of the midwives' basic monthly salary with that of the clinical technicians showed that the midwives are paid less. In the Court's view it followed that, in order to establish whether it is contrary to Article 119 of the Treaty and to Directive 75/117 for the midwives to be paid less, the national court must verify whether the statistics available indicate that a considerably higher percentage of women than men work as midwives. If so, there is indeed indirect gender-based discrimination unless the measure in point is justified by objective factors unrelated to any gender-based discrimination (see judgment of 9 February 1999, *Seymour-Smith and Perez* (C-167/97 [1999] ECRI- I-623, paragraph 65)), which is for the national court to determine. The Court noted that where there is a prima facie case of discrimination, it is for the employer to demonstrate that there are objective

reasons that justify the difference in pay. In the Court's view, workers would effectively be deprived of the means of securing compliance with the principle of equal pay before national courts if evidence establishing a prima facie case of discrimination did not have the effect of imposing on the employer the onus of proving that the difference in pay is not in fact discriminatory (see judgment of 27 October 1993 *Enderby* [1993] Case C-127/92, ECR I-5535, paragraph 18) (paragraphs 42–53).

The Court considered that by its fourth and fifth questions, which it was appropriate to consider together, the national court was essentially asking whether the reduction in working time awarded in respect of work performed according to a three-shift roster as compared to normal working time for day work, or the value of that reduction, are to be taken into consideration in calculating the salary which serves as the basis for a pay comparison for the purpose of Article 119 of the Treaty and Directive 75/117. In this respect, the Court firstly ascertained whether the reduction in working time provided for under the Allmänna Bestämmelser 95 collective agreement fell under Article 119 of the Treaty and, consequently, under Directive 75/117. On this point, the Court reiterated a previous judgment where it had decided that merely because determination of some working conditions may have pecuniary consequences, this is not sufficient reason to bring them into the scope of Treaty Article 119, which is based on the close connection which exists between the nature of the services provided and the amount of remuneration (see judgment of 15 June 1978 *Defrenne III* Case 149/77 [1978] ECR 1365, paragraph 21). Consequently, in the Court's view, the reduction in working time relates to working conditions and therefore falls under Directive 76/207 (see, in this sense, *Seymour-Smith and Perez*, above, paragraph 37). However, the Court ruled that any differences that might exist in the hours worked by the two groups whose pay is being compared may constitute objective reasons unrelated to any discrimination on grounds of sex such as to justify a difference in pay. It reiterated that it is for the employer to show that such objective reasons do in fact exist (paragraphs 55–62).

The Court hereby rules:

1) *The anti-social hours pay supplement is not to be taken into account in calculating the salary used as the basis for a pay comparison for the purposes of Article 119 of the Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC) and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. If a difference in pay between the two groups compared is found to exist, and if the available statistical data indicate that there is a substantially higher proportion of women than men in the disadvantaged group, Article 119 of the Treaty requires the employer to justify the difference by objective factors which are unrelated to any discrimination on grounds of sex.*

2) *Neither the reduction in working time, by reference to the standard normal working time for day work, awarded in respect of work performed according to a three-shift roster, nor the value of such a reduction, are to be taken into consideration for the purpose of calculating the salary used as the basis for a pay comparison for the purposes of Article 119 of the Treaty and Directive 75/117. However, such a reduction may constitute an objective reason unrelated to any discrimination on grounds of sex such as to justify a difference in pay. It is for the employer to show such is in fact the case.*

Case C-226/98
BIRGITTE JØRGENSEN/FORENINGEN AF SPECIALLÆGER AND SYGESIKRINGENS FORHANDLINGSUDVALG
Date of judgment:
6 April 2000
Reference:
ECR [2000] I-2447
Content:
Directives 76/207/EEC and 86/613/EEC — Downgrading of medical practices — Indirect gender-based discrimination — Budgetary considerations

1. Facts and procedure

The health system in force in Denmark provides that the fees of doctors who have concluded special agreements with the public body which manages the health insurance scheme are to be paid directly by that body, and in practice this is the case for practically all doctors' fees. Specialised medical practitioners working in a practice can be divided into two categories: firstly, doctors with 'full-time' practices, where all of their professional activity is conducted within their practices. And secondly, doctors with a 'part-time' practice, where they are engaged in another medical activity outside their practice.

An agreement was concluded on 1 June 1990 between the Foreningen af Speciallæger (the Danish association of specialised medical practitioners, hereafter the 'FAS'), on behalf of specialised medical practitioners, and the Sygesikringens Forhandlingsudvalg (the health insurance negotiations committee, hereafter the 'SFU'), on behalf of the health insurance body (hereafter 'the Agreement'). Its objectives were, inter alia, to limit public expenditure on the care provided by specialised medical practitioners. To that end, the Agreement adopted a 'reorganisation scheme', designed to limit the exercise of the activity of part-time specialised medical practitioners. On this latter point, many doctors who in theory worked principally in a hospital and part-time in their practice were effectively criticised for neglecting their hospital work and for working chiefly with a view to ensuring the turnover of their practice. A decision was therefore taken to establish a uniform ceiling for turnover of part-time practices, this being fixed, depending on the speciality, at DKK 400 000 or DKK 500 000 per annum (DKK 400 000 in the case of rheumatology). The reorganisation scheme also set out the criteria to enable practices to be reclassified, on the basis of 1989 turnover, as either part-time practices or full-time practices, in order to determine their new status. Thus, under point 6 of this scheme, practices previously regarded as being full-time practices which in 1989 achieved a turnover falling, according to speciality, within a band between DKK 400 000 and DKK 500 000 or between DKK 500 000 and DKK 600 000 would remain full-time practices and would, by virtue of that fact, not be subject to the annual ceiling of DKK 400 000 or DKK 500 000 in respect of fees paid by the social security body. In the event of sale, however, they would be converted to part-time practices.

Ms Jørgensen, a rheumatologist who is a member of the FAS, is subject to the Agreement in so far as she receives fees from the health insurance body. Since she had no other medical activity outside her practice and since in 1989 her practice achieved a turnover of DKK 424 016, she came within point 6 of the reorganisation scheme. After the entry into force of the Agreement, her practice has remained a full-time practice and thus she has retained the possibility of increasing her turnover. However, if she were to sell her practice, it would be converted to a part-time practice, with the result that the annual level of fees paid by the health insurance body which the purchaser could receive would be limited to DKK 400 000. Ms Jørgensen challenged the application of such a scheme, pointing out that she had always worked in a full-time practice and that a particular reason why her turnover, which she wished to increase to more than DKK 500 000 in future, was not higher was that she had had to devote part of her time to her family

commitments when her children were young. In her view, this measure affected a proportionately greater number of female specialised medical practitioners than male specialised medical practitioners, since it is more often women than men who bring up their children and for that reason achieve a lower turnover.

2. Questions referred to the Court

1) The Court is asked to clarify how an assessment as to whether there is indirect discrimination on grounds of sex should be undertaken in a case concerning equal treatment under Council Directive 76/207/EEC of 9 February 1976 and Council Directive 86/613/EEC of 11 December 1986.

   Since it is supposed that under the settled case law of the Court on equal pay a point-for-point comparison should be made, the Court is asked to clarify whether the comparison of occupational conditions to be undertaken in an equal treatment case should be made by way of an overall assessment of all the surrounding factors or by way of a point-for-point comparison as in equal pay cases.

   It can be assumed in answering the question that the negotiated reorganisation scheme dealt with here, assessed as a whole, is gender-neutral in both its effect and purpose.

   It can further be assumed that the negotiated reorganisation scheme contains provisions which, viewed in isolation, result in a gender bias, inasmuch as it appears that some provisions predominantly affect female specialised medical practitioners whilst other provisions predominantly affect male specialised medical practitioners.

2) If the answer to the first question is yes, the Court is requested to state if considerations relating to budgetary stringency, savings and medical practice planning may be treated as objective and relevant considerations such as to make it acceptable that proportionately more women than men are affected by the provision in question.

3) In view of the applicant's age (she was born in 1939), can the consideration for goodwill which the applicant could obtain on surrendering her practice at retirement age be likened to an employee's pension savings?

4) If the Court replies to the third question in the affirmative, the Court is asked to explain how the answer to the first question is affected by the fact that the disadvantage to which the provision in question gives rise consists in part in lower consideration for goodwill when a practice is relinquished, and thus in reduced pension insurance, having regard to the fact that in paragraph 27 of the judgment in Case C-297/93 (*Grau-Hupka*), it was held that the Member States are not obliged to grant advantages in the matter of old-age pension insurance to persons who have brought up children or to provide benefit entitlements where employment has been interrupted by child-rearing.

3. Court ruling

On the first question the Court recalled that, as explained in paragraphs 34 and 35 of its judgment of 17 May 1990 *Barber* (Case C-262/88 [1990] ECR I-1889) if national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men or women, judicial review would be difficult and the effectiveness of the principle of equal pay would be diminished as a result. Genuine transparency, permitting an effective review, can therefore be assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women, and not only on the basis of a comprehensive assessment of the consideration paid to workers. The Court ruled that the same finding applies, in principle, to all aspects of the principle of equal treatment and not only to those

which have a bearing on equal pay. Indeed, the Court recalled national provisions or rules relating to both pay and social security benefits, and access to employment and working conditions discriminate indirectly against women where, although worded in neutral terms, they work to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex (see, in particular, judgments of 13 July 1989 *Rinner-Kühn* Case 171/88 [1989] ECR I-2743, paragraph 12, and of 30 November 1993 *Kirsammer-Hack* Case C-189/91 [1993] ECR I- I-6185, paragraph 22) (paragraphs 27–29).

Thus, in the Court's view, once it is established that a measure adversely affects a much higher percentage of women than men, or vice versa, that measure will be presumed to constitute indirect discrimination on grounds of sex and it will be for the employer or the person who drafted that measure to demonstrate the contrary. The Court noted that an initial overall assessment of all the elements which might be involved in a scheme or set of provisions of which such a measure may form part would not allow effective review of the application of the principle of equality and might not comply with the rules governing the burden of proof in matters relating to indirect discrimination on grounds of sex. It pointed out, however, that in applying those rules the various elements of the provisions governing a professional activity may only be taken into account individually in so far as they are separable and constitute in themselves specific measures based on their own criteria of application and affecting a significant number of persons belonging to a designated category. The Court pointed out that a situation may only reveal a prima facie case of indirect discrimination if the statistics describing that situation are valid, that is to say, if they affect enough individuals, do not illustrate purely fortuitous or short-term phenomena, and appear, in general, to be significant (see judgment of 27 October 1993, *Enderby* (Case C-127/92 [1993] ECR I-5535, paragraphs 30–33)).

The Court concluded that in the present case, while the contested provision of the reorganisation scheme is based on application criteria which appear to be distinct from those used in the other provisions and affects a particular category of specialised medical practitioners, inasmuch as it governs only full-time practices which in 1989 achieved a certain level of turnover, it was clear from the uncontested facts reproduced at the hearing before the Court that its application affected only 22 specialised medical practitioners, of whom 14 were women, out of a total of 1 680, of whom 302 were women. It concluded that it seems doubtful that such data could be treated as significant, and added that in any event, it is for the court of referral to determine whether or not, having regard to the interpretative criteria provided by the Court, the specific arrangements and conditions for application of the measure at issue in the main proceedings indicate the existence of indirect discrimination on grounds of sex (paragraphs 34–35).

When considering the second question, the Court recalled that although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures that it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes (judgment of 24 February 1994, *Roks and Others* (Case C-343/92 [1994] ECR I- 571, paragraph 35)). Moreover, the Court clarified that to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equality between men and women might vary in time and place according to the state of the public finances of Member States (*Roks and others*, cited above, paragraph 36). The Court ruled, however, that reasons relating to the need to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care are

legitimate and may justify measures of social policy. It recalled that as Community law stands at present, social policy is a matter for the Member States, which enjoy a reasonable margin of discretion as regards the nature of social protection measures and the detailed arrangements for their implementation (see judgments of 7 May 1991 *Commission v Belgium* Case C-229/89 [1991] ECR I-I-2205, paragraph 22; and of 19 November 1992 *Molenbroek* Case C-226/91 [1992] ECR I-5943, paragraph 15). If such measures meet a legitimate aim of social policy, are suitable and requisite for attaining that end and are therefore justified by reasons unrelated to discrimination on grounds of sex, these cannot be regarded as being contrary to the principle of equal treatment (*Commission v Belgium*, cited above, paragraphs 19 and 26, and *Molenbroek*, cited above, paragraphs 13 and 19) (paragraphs 39–41).

In answer to the third question, the Court noted that the clientele is an incorporeal element of a medical practice, so that the price for its transfer cannot in any circumstances be treated as equivalent to benefits paid by way of a retirement pension. In the Court's view, the transfer of a practice is not necessarily linked to the age of the transferor and may occur at any time, whereas a pension is obtained only at a certain age and subject to a certain period of activity and payment of a specific amount of contributions. Furthermore, the Court noted that it is the person taking over the practice who pays the purchase price and not those who normally provide the doctor's remuneration, whether these be his patients, the State or the health insurance body (paragraph 45).

The Court considered that in view of the answer given to the third question, it was unnecessary to answer the fourth question (paragraph 47).

The Court (Sixth Chamber) hereby rules:

1) *In order to determine whether indirect discrimination on grounds of sex exists in a case concerning equal treatment such as the present case, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood must be interpreted as requiring a separate assessment to be made of each of the key conditions governing the exercise of a professional activity laid down in the contested provisions, in so far as those key elements constitute in themselves specific measures based on their own criteria of application and affecting a significant number of persons belonging to a determined category.*

2) *Budgetary considerations cannot in themselves justify discrimination on grounds of sex. However, measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end.*

3) *The price which a doctor may receive for his practice when he ceases work on reaching retirement age cannot be treated as equivalent to the retirement pension of an employed worker.*

Case C-78/98
SHIRLEY PRESTON AND OTHERS V WOLVERHAMPTON HEALTHCARE NHS TRUST AND OTHERS AND DOROTHY FLETCHER AND OTHERS/MIDLAND BANK PLC
Date of judgment:
16 May 2000
Reference:
ECR [2000] I-3201
Content:
Article 119 of the Treaty (Article 141 EC) — Membership of an occupational pension scheme — Exclusion of part-time workers — Principles of effectiveness and equivalence

1. Facts and procedure

In the United Kingdom, the Equal Pay Act 1970 (hereafter the 'EPA') stipulates that every contract under which women are employed is deemed to include an equality clause. Under section 2(4) of the EPA, any claim in respect of the application of an equality clause must, if it is not to be time-barred, be brought within a period of six months following the cessation of the employment to which the claim relates. Section 2(5) of the EPA provides that, in proceedings in respect of failure to comply with an equality clause, a woman shall not be entitled to any payment by way of arrears of remuneration or damages in respect of a period more than two years before the date on which the proceedings were instituted. Since a 1976 amendment, the retroactive limit of two years under section 2(5) of the EPA has also applied to actions to secure equal treatment regarding entitlement to membership of an occupational pension scheme.

Following the judgments in *Vroege* (Case C-57/93 ECR I-4541) and *Fisscher* (Case C-128/93 ECR I-4583) cases, some 60 000 part-time workers in the United Kingdom in both the public and the private sectors commenced proceedings before industrial tribunals. Relying on Article 119 of the Treaty, they claimed that they had been unlawfully excluded from affiliation to various occupational pension schemes. Between 1986 and 1995, the pension schemes in question in the case were amended so as to ensure that part-time workers were entitled to join them. In their actions, the claimants sought recognition of their entitlement to retroactive membership of the relevant pension schemes for the periods of part-time employment completed by them before the foregoing amendments, some of those periods extending further back than 8 April 1976, the date of *Defrenne II* (Case C-43/75 ECR 455) in which the Court held for the first time that Article 119 has direct effect.

2. Questions referred to the Court

Where:

a) a claimant has been excluded from membership of an occupational pension scheme by reason of being a part-time worker; and

b) consequently, has not accrued pension benefits corresponding to the periods of service she has completed for purposes of receiving a pension, payable upon reaching pensionable age; and

c) the claimant alleges that such treatment is indirect gender-based discrimination contrary to Article 119 of the EC Treaty,

the following three questions arise:

1) Is:

   a) a national procedural rule which requires that a claim for membership of an occupational pension scheme (leading to pension rights) which is brought in the Industrial Tribunal be brought within six months of the end of the employment to which the claim relates;

   b) a national procedural rule which provides that a claimant's pensionable service is to

be calculated only by reference to service after a date falling no more than two years prior to the date of her claim (irrespective of whether the date on which pension benefits become payable is before or after the date of the claim)

compatible with the principle of Community law that national procedural rules on breaches of Community law must not make it excessively difficult or impossible in practice for the claimant to exercise her rights under Article 119?

2) In circumstances where:

a) rights under Article 119 must, as a matter of domestic law, be enforced through the medium of a statute which was enacted in 1970, prior to the United Kingdom's accession to the European Community, came into effect on 29 December 1975, and which, prior to 8 April 1976, already conferred a right to equal pay and equality of other contractual provisions;

b) the domestic law contains the procedural rules referred to in question 1 above;

c) other laws prohibiting discrimination in relation to employment and the domestic law of contract provide for different time limits;

i) is the implementation of Article 119 through that domestic law compatible with the principle of Community law that national procedural rules for breaches of Community law must be no less favourable than those which apply to similar claims of a domestic nature?

ii) if not, what are the relevant criteria for determining whether another right of action in domestic law is a domestic action similar to the right under Article 119?

iii) if a national court identifies any such similar claim in accordance with any criteria identified under ii) above, what, if any, are the relevant criteria under Community law for determining whether the procedural rules governing the similar claim (or claims) are more favourable than the procedural rules which govern the enforcement of the right under Article 119?

3) In circumstances where:

a) a female employee has served under a number of separate contracts of employment for the same employer covering defined periods of time and with intervals between the periods covered by the contracts of employment;

b) at the expiration of a contract, there is no obligation on either party to enter into further such contracts; and

c) she initiates a claim within six months of the completion of a later contract (or contracts) but fails to initiate a claim within six months of any earlier contract (or contracts);

is a national procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme that leads to pension rights to be brought within six months of the end of any contract (or contracts) of employment to which the claim relates and which, therefore, prevents service under any earlier contract or contracts from being treated as pensionable service, compatible with:

i) the right to equal pay for equal work in Article 119 of the EC Treaty; and

ii) the principle of Community law that national procedural rules on breaches of Community law must not make it

excessively difficult or impossible in practice for the claimant to exercise her rights under Article 119?

3. Court ruling

As a preliminary observation, the Court recalled its case-law on principles of equivalence and effectiveness (paragraph 31).

On the first part of the first question, the Court observed that as regards the compatibility of time requirements such as that contained in section 2(4) of the EPA, with the Community-law principle of effectiveness, it is settled case-law, and has been since *Rewe*, cited above (paragraph 5) that the setting of reasonable limitation periods for bringing proceedings satisfies that requirement in principle, inasmuch as it constitutes an application of the fundamental principle of legal certainty (judgment of 10 July 1997, *Palmisani* (Case C-261/95 [1997] ECR I-4025, paragraph 28)). The Court added that such a limitation period does not render impossible or excessively difficult the exercise of rights conferred by the Community legal order and is not therefore liable to strike at the very essence of those rights (paragraphs 33–34).

On the second part of the first question, the Court recalled that in its judgment of 11 December 1997, *Magorrian and Cunningham* (Case C-246/96 ECR I-7153), it held that the principle of effectiveness precluded the application of a procedural rule which was essentially identical to the one at issue in these proceedings. It ruled that even though the latter does not totally deprive the claimants of access to membership, the fact nevertheless remains that, just as in *Magorrian and Cunningham*, this procedural rule prevents the entire record of service completed by those concerned before the two years preceding the date on which they commenced their proceedings from being taken into account for the purposes of calculating the benefits which would be payable even after the date of the claim. The Court clarified that this solution was reinforced by the fact that in *Magorrian and Cunningham* the persons concerned sought recognition of their right to retroactive membership of a pension scheme with a view to receiving additional benefits whereas, in this case, the aim of the proceedings was to obtain basic retirement pensions (paragraphs 40–44).

On the first part of the second question, the Court recalled that because, following the accession of the United Kingdom to the Communities, the EPA constitutes the legislation through which the United Kingdom discharges its obligations under Article 119 of the Treaty and, subsequently, under Directive 75/117, it previously concluded that the EPA could not provide an appropriate basis for comparison against which to measure compliance with the principle of equivalence (judgment of 1 December 1998, *Levez (*Case C-326/96 [1998] ECR I-7835, paragraph 48)) (paragraph 52).

On the second part of the second question, the Court recalled that the principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar (*Levez*, cited above, paragraph 41). In order to determine whether the principle of equivalence has been complied with in the present case, the national court — which alone has direct knowledge of the procedural rules governing actions in the field of employment law — must consider both the purpose and the essential characteristics of allegedly similar domestic actions (*Levez*, paragraph 43) (paragraphs 55–56).

On the third part of the second question, the Court recalled the interpretation of elements of Community law it gave in this respect in *Levez*, cited above, for the purpose of the appraisal to be undertaken by the national court. It also recalled that in paragraph 51 it ruled that the principle of equivalence would be infringed if a person relying on a right conferred by Community law were forced to incur additional costs and delay by comparison with a claimant whose action was based solely on domestic law. It also then noted, more

generally, that whenever it fell to be determined whether a procedural provision of national law was less favourable than those governing similar domestic actions, it ruled that the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts (*Levez*, cited above, paragraph 44). It follows, in the Court's view, that the various aspects of the procedural rules cannot be examined in isolation but must be placed in their general context. Moreover, such an examination cannot be carried out subjectively by reference to circumstances of fact but must involve an objective and abstract comparison of the procedural rules at issue (paragraphs 59–62).

On the third question, the Court indicated that this relates to a number of actions before the national court which are distinguished by the fact that the claimants work regularly, but periodically or intermittently, for the same employer, under successive legally separate contracts. In this respect, it ruled that whilst it is true that legal certainty also requires that it be possible to fix precisely the starting point of a limitation period, the fact nevertheless remains that, in the case of successive short-term contracts of the kind referred to in the third question, setting the starting point of the limitation period at the end of each contract renders the exercise of the right conferred by Article 119 of the Treaty excessively difficult. However, the Court noted that where there is a stable relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies, it is possible to fix a precise starting point for the limitation period. In the Court's view, there was no reason why that starting point should not be fixed as the date on which the sequence of such contracts has been interrupted through the absence of one or more of the features that characterise a stable employment relationship of that kind, either because the periodicity of such contracts has been broken or because the new contract does not relate to the same employment as that to which the same pension scheme applies. The Court concluded that a requirement in such circumstances that claims concerning membership of an occupational pension scheme be submitted within the six months following the end of each contract of employment to which the claim relates cannot therefore be justified on grounds of legal certainty (paragraphs 65–71).

The Court hereby rules:

1) *Community law does not preclude a national procedural rule which requires that a claim for membership of an occupational pension scheme (which leads to pension rights) must, if it is not to be time-barred, be brought within six months of the end of the employment to which the claim relates, provided, however, that that limitation period is not less favourable for actions based on Community law than for those based on domestic law.*

2) *Community law precludes a national procedural rule which provides that a claimant's pensionable service is to be calculated only by reference to service after a date falling no more than two years prior to the date of her claim.*

3) *An action alleging infringement of a statute such as the Equal Pay Act 1970 does not constitute a domestic action similar to an action alleging infringement of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).*

4) *In order to determine whether a right of action available under domestic law is a domestic action similar to proceedings to give effect to rights conferred by Article 119 of the Treaty, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics.*

5) *In order to decide whether procedural rules are equivalent, the national court must verify ob-*

jectively and in the abstract whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules.

6) *Community law precludes a procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme (which leads to pension rights) to be brought within six months of the end of each contract (or of all contracts) of employment to which the claim relates where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies.*

Case C-104/98
JOHANN BUCHNER AND OTHERS/SOZIALVERSICHERUNGSANSTALT DER BAUERN
Date of judgment:
23 May 2000
Reference:
ECR [2000] I-3625
Content:
Directive 79/7/EEC (Article 7(1)(a)) — Early receipt of old-age pension on account of incapacity for work — Setting different pensionable ages according to gender — Time limitation on invoking the regulation

1. Facts and procedure

In Austria under the terms of the Bauern-Sozialversicherungsgesetz (farmers' social insurance law, hereafter the 'BSVG') in its version following a 1 September 1996 amendment, an insured person is entitled, in certain circumstances, to receive an early old-age pension on account of incapacity for work at any point after the age of 57 for men and 55 for women. Before 1 September 1996, both men and women were able to claim a pension in such circumstances at any point after the age of 55 years.

It is established that the statutory retirement age in Austria is 60 years for women and 65 years for men.

The claimants in this case, having not reached the age of 57 at the date in question, were refused an early old-age pension on account of incapacity for work.

2. Questions referred to the Court

1) Is Article 7(1)(a) of Directive 79/7/EEC to be interpreted as allowing Member States to determine different pensionable ages only for pension rights which are granted exclusively on the basis of the risk of old age, or is that derogation applicable also to pension rights which indeed are granted only from a specified age but in addition are granted only because of invalidity (incapacity for work)?

2) Are the provisions of Article 7(1)(a) and (2) of Directive 79/7/EEC to be interpreted as allowing a Member State to alter a previously existing identical provision on pensionable age (in this case completion of the 55th year for men and women) after the end of the transposition period, in such a way that a different pensionable age for men and women (in this case completion of the 57th year for men and the 55th year for women) is now determined?

3. Court ruling

The Court noted that by these two questions, which it was appropriate to consider together, the court of referral sought essentially to ascertain whether the derogation introduced in Article 7(1)(a) of Directive 79/7 must be interpreted as applying to a benefit such as the early old-age pension on account of incapacity for which a qualifying age which differs according to gender was introduced into national legislation after expiry of the period prescribed for transposition of the Directive (paragraph 17).

As regards the actual nature of the benefit, the Court noted that although the grant of the benefit at issue is subject to an age condition, the fact remains that this allowance is granted only to persons who are incapable of continuing to work following an illness or other infirmity or weakness of their physical or mental powers. It rules that such a benefit cannot constitute an old-age pension within the meaning of Article 7(1)(a) of the Directive, which is a derogating provision which, according to settled case-law, must be interpreted strictly in view of the fundamental importance of the principle of equal treatment (see, in particular, judgment of 30 March 1993 *Thomas and Others* Case C-328/91 [1993] ECR I-1247, paragraph 8) (paragraphs 19–21).

In those circumstances, the Court considered it necessary to determine whether the determina-

tion of a qualifying age which differs according to sex for entitlement to the benefit at issue in the main proceedings may be regarded as a consequence of the pensionable age set for granting an old-age pension. In that respect, the Court recalled that in accordance with settled case-law, where pursuant to Article 7(1)(a) of the directive a Member State prescribes different pensionable ages for men and women for granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a), is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to that age difference (see in particular *Thomas and Others*, cited above, paragraph 20 and judgment of 11 August 1995, *Graham and Others* (Case C-92/94 [1995] ECR I-2521, paragraph 11) and judgment of 30 January 1997, *Balestra* (Case C-139/95 [1997] ECR I-549, paragraph 33). That will be the case, the Court observed, if those forms of discrimination are objectively necessary to avoid disturbing the financial equilibrium of the social security system or in order to ensure coherence between the system of retirement pensions and that of other benefits (see *Thomas and Others*, cited above, paragraph 12; *Graham and Others*, cited above, paragraph 12; *Balestra*, cited above, paragraph 35) (paragraphs 22–26).

As regards firstly the requirement of preserving the financial equilibrium of the social-security system, the Court observed that it was clear from the order for referral and from the written observations of the Austrian government that the age limit which differs according to sex was applied to the granting of an early old-age pension on account of incapacity for work for reasons of an essentially budgetary nature. In this respect, it recalled that although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures that it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against either sex (judgment of 24 February 1994 *Roks and Others* Case C-343/92 [1994] ECR I-571, paragraph 35). Furthermore, it noted that apart from general considerations of a budgetary nature no argument had been put to the Court to demonstrate any interdependence between social-security systems which might be affected by removal of the discrimination at issue in the main proceedings. In those circumstances, the Court concluded that the removal of such discrimination could not have any serious effect on the financial equilibrium of the social-security system as a whole (paragraphs 27–30).

Secondly, as regards the preservation of coherence between the early old-age pension on account of incapacity for work and the old-age pension, the Court observed that the only link between those two benefits is the fact that the latter replaces the former when the insured person reaches statutory retirement age. Indeed, there is no precise relationship between the minimum qualifying age for the benefit at issue and the statutory retirement age, since the minimum qualifying age for the early old-age pension on account of incapacity for work was set at 55 years for women, that is to say five years before the statutory retirement age, whilst it is 57 years for men, that is to say eight years before the statutory retirement age. In those circumstances, in the Court's view, it cannot be argued that it was objectively necessary to introduce the discrimination at issue in the main proceedings to ensure coherence between the early old-age pension on account of incapacity for work and the old-age pension (paragraphs 31–34).

In view of the foregoing, the Court concluded that discrimination such as that at issue in the main proceedings is not necessarily linked to the difference between the retirement age for men and that for women and it is not therefore covered by the derogation provided for by Article 7(1)(a) of the Directive (paragraph 35).

As the Austrian government had claimed that the removal of the discriminatory measures would have major financial repercussions, the Court

pointed out that it is only in exceptional cases that it may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying upon a provision which it has interpreted with a view to calling in question legal relationships established in good faith (judgment of 2 February 1988, *Blaizot* (Case 24/86 [1988] ECR I-379, paragraph 28) and of 16 July 1992, *Legros and Others* (Case C-163/90 [1992] ECR I-4625, paragraph 30). In the main proceedings, the Court noted firstly that on the date when the national rules were adopted, case-law of the Court already existed concerning the application of Article 7(1)(a) of the Directive which allowed the Austrian Republic to assess the compatibility of the national rules with the Directive (see, in particular, judgment of 7 July 1992, *Equal Opportunities Commission* (Case C-9/91 [1992] ECR I-4297), *Thomas and Others* and *Graham and Others*, both cited above). Secondly, the Court observed that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of such a ruling (see, in particular, judgments of 11 August 1995, *Roders and Others* (Joined Cases C-367/93 to C-377/93 [1995] ECR I-2229, paragraph 48) of 19 October 1995, *Richardson* (Case C-137/94 [1995] ECR I-3407, paragraph 37) and of 13 February 1996, *Bautiaa and Société Française Maritime* (Joined Cases C-197/94 and C-252/94 [1996] ECR I-505, paragraph 55)) (paragraphs 37–41).

The Court hereby rules:

The derogation for which Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security provides must be interpreted as not applying to a benefit such as the early old-age pension on account of incapacity for work for which a qualifying age which differs according to sex was introduced into national legislation after expiry of the period prescribed for transposition of that directive.

Case C-196/98
REGINA VIRGINIA HEPPLE/ADJUDICATION OFFICER AND ADJUDICATION OFFICER v ANNA STEC
Date of judgment:
23 May 2000
Reference:
ECR [2000] I-3701
Content:
Directive 79/7/EEC (Article 7(1)(a)) — Benefits from a workplace accidents and occupational illness scheme — Introduction of a link to retirement age, varied according to sex

1. Facts and procedure

In the UK, the 'reduced earnings allowance' (hereafter the REA) is a weekly cash benefit paid to employees or former employees who have suffered an accident at work or who have been affected by an occupational illness. Until 1986, the REA remained payable even after the beneficiary reached retirement age and began to receive a statutory old-age pension. A succession of legislative measures adopted after 1986 sought to limit payment of the REA to persons still of normal working age. The last significant amendment introduced a 'retirement allowance' (hereafter an 'RA') which replaced the REA for persons who had reached pensionable age and ceased regular employment.

The pensionable age in the United Kingdom is 65 years for women and 60 years for men.

Ms Hepple, Ms Spencer, Ms Stec, Mr Kimber and Mr Lunn claim essentially that the allowances they have received since reaching retirement age — REA or RA, as the case may be — are of a lower amount than that received by a person of the opposite sex in comparable circumstances.

2. Questions referred to the Court

1) Does Article 7 of Council Directive 79/7/EEC permit a Member State to impose unequal age conditions linked to the different pension ages for men and women under its statutory old-age pension scheme, on entitlement to a benefit having the characteristics of the Reduced Earnings Allowance under a statutory occupational accident and disease scheme, so as to produce different weekly cash payments under that scheme for men and women in otherwise similar circumstances, in particular where the inequality:

   a) is not necessary for any financial reason connected with either scheme; and

   b) never having existed before, is imposed for the first time many years after the inception of the two schemes and also after 23 December 1984, the latest date for the Directive to be given full effect under Article 8?

2) If the answer to Question 1 is yes, what are the considerations that determine whether unequal age conditions such as those imposed in Great Britain for Reduced Earnings Allowance from 1988/1989 onwards are necessary to ensure coherence between schemes or otherwise fall within the permitted exclusion in Article 7?

3) If those unequal age conditions are not within the permitted exclusion in Article 7, then does the doctrine of direct effect require the national court (in the absence of national legislation to complying with the Directive) to rectify the inequality by awarding an additional payment to each individual concerned in any week when the payment prescribed under the occupational accident and disease scheme for him or her is lower than for a person of the other sex but in otherwise similar circumstances ('the comparator'), without regard to:

   a) any converse advantage in other weeks when the same individual receives a higher payment than the comparator; and/or

b) the existence or exercise of sex-differentiated options under the pension scheme giving a choice of pension starting age, the effect of which in conjunction with the unequal conditions under the occupational accident and disease scheme may be to cause altered (and unequal) weekly payments under that scheme: in some weeks to the advantage of the individual, in others to the comparator?

Or, should account be taken of these points, on the contrary, and if so what are the principles to be applied in relation to these in giving direct effect to Article 4?

3. Court ruling

The Court pointed out that by these two first questions, which it was appropriate to consider together, the court of referral sought essentially to ascertain whether the derogation introduced in Article 7(1)(a) of Directive 79/7 must be interpreted as applying to a benefit such as the REA, which was introduced into national legislation after the expiry of the period prescribed for transposition of the Directive and is subject to age conditions which differ according to sex (paragraph 19).

The Court ruled that the benefit at issue in the main proceedings does not constitute an old-age pension but might be classifiable, under Article 7(1)(a) of the Directive, as a benefit for which the determination of retirement age might have repercussions. Given these circumstances, the Court indicated that it is necessary to consider whether the Directive prohibits the introduction of further discriminatory measures after expiry of the period prescribed for transposition of the Directive by Member States which have determined different retirement ages according to sex. In that respect, the Court recalled that in accordance with settled case-law, where pursuant to Article 7(1)(a) of the directive a Member State prescribes different pensionable ages for men and women for granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a), is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to that age difference (see in particular *Thomas and Others*, cited above, paragraph 20; judgment of 11 August 1995, *Graham and Others* (Case C-92/94 ECR I-2521, paragraph 11) and judgment of 30 January 1997, *Balestra* (Case C-139/95 [1997] ECR I-549, paragraph 33). That will be the case if those forms of discrimination are objectively necessary to avoid disturbing the financial equilibrium of the social security system or in order to ensure coherence between the system of retirement pensions and that of other benefits (see *Thomas and Others*, cited above, paragraph 12; *Graham and Others*, cited above, paragraph 12; *Balestra*, cited above, paragraph 35) (paragraphs 20–26).

Firstly, as regarded the requirement of preserving financial equilibrium of the social-security system, the Court recalled that it has already held that the grant of benefits under non-contributory schemes to persons in respect of whom certain risks have materialised, regardless of the entitlement of such persons to an old-age pension by virtue of contribution periods completed by them, has no direct influence on the financial equilibrium of contributory pension schemes (see *Thomas and Others*, cited above, paragraph 14). The Court also pointed out that in none of the observations submitted to the Court had it been argued that considerations of financial equilibrium might be applicable to non-contributory benefits, such as those at issue in the main proceedings, and the United Kingdom has even expressly excluded that possibility. In those circumstances, the Court noted that removal of the discrimination at issue in the main proceedings would have no effect on the financial equilibrium of the social-security system of the United Kingdom as a whole (paragraphs 27–29).

Secondly, as regards coherence between the retirement pension scheme and other benefit

schemes, the Court examined whether it is objectively necessary for different age conditions based on sex to apply to the benefit at issue in this case. In that respect, the Court noted that the principal aim of the successive legislative amendments effected from 1986 onwards was to discontinue payment of REA to persons no longer of working age by imposing limitating conditions based on the statutory retirement age. Thus, in the Court's view, as a result of those legislative amendments there is coherence between REA, which is designed to compensate for a decrease in earnings, and the old-age pension scheme. According to the Court, it follows that maintenance of the rules at issue in the main proceedings is objectively necessary to preserve such coherence (paragraphs 30–32).

In view of the foregoing, the Court concluded that discrimination such as that at issue in the main proceedings is objectively and necessarily linked to the difference between the retirement age for men and that for women and it is therefore covered by the derogation provided for by Article 7(1)(a) of the Directive (paragraph 34).

Finally, the Court considered that, having taken into account the response given to the first and second questions, it was not necessary to respond to the third question (paragraph 36).

The Court hereby rules:

The derogation provided for in Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as applying to a benefit, such as the reduced earnings allowance at issue in the main proceedings, which was introduced into national legislation after expiry of the period prescribed for transposition of the Directive and is subject to age conditions which differ according to sex.

Case C-50/99
JEAN-MARIE PODESTA/CAISSE DE RETRAITE PAR REPARTITION DES INGENIEURS CADRES & ASSIMILES (CRICA) AND OTHERS
Date of judgment:
25 May 2000
Reference:
ECR [2000] I-4039
Content:
Article 119 of the Treaty (Article 141 EC) — Supplementary inter-occupational private pension scheme based on defined contributions on a 'pay-as-you-go' basis — Survivor pensions with age conditions that vary according to sex — Benefits payable based on periods of employment undertaken before the *Barber* case

1. Facts and procedure

In France, Article 12(1) of Annex I to the national collective agreement of 14 March 1947 on executives' retirement and pensions (hereafter the '1947 Collective Agreement'), as amended on 9 February 1994 states:

'The widow of a member shall be entitled...

a) in the event of death before 1 March 1994, to a survivor's benefit, from the age of 50, calculated by reference to the number of points corresponding to 60 % of those of the deceased member,

b) in the event of death on or after 1 March 1994, to a survivor's benefit, from the age of 60, calculated by reference to the number of points corresponding to 60 % of those of the deceased member.'

Article 13d(1) of the same annex states:

'The widower of a member shall be entitled...

a) in the event of death before 1 March 1994, to a survivor's benefit, from the age of 65, calculated by reference to the number of points corresponding to 60 % of those of the deceased member...

b) in the event of death on or after 1 March 1994, to a survivor's benefit calculated in accordance with subparagraph (b) of the first paragraph of Article 12.'

Ms Podesta, a senior executive in the pharmaceutical industry, paid contributions towards a supplementary retirement pension to the pension funds for 35 years. Following her death on 3 December 1993, her husband, Mr Podesta, applied to the Caisse de retraite par répartition des ingénieurs cadres & assimilés (CRICA), the Union interprofessionnelle de retraite de l'industrie et du commerce (UIRIC), the Caisse générale interprofessionnelle de retraite pour salariés (CGIS), the l'Association générale des institutions de retraite des cadres (AGIRC) and the l'Association des régimes de retraite complémentaire (Arrco) (hereafter the 'pension funds') as an entitled claimant for payment of the survivor's pension, namely half of the retirement pension due to his wife. The bodies to which he applied refused to grant his application on the ground that he had not yet reached the age of 65, the age prescribed for widowers to be entitled to the reversion of their spouses' retirement entitlement. Mr Podesta claims that the provisions of Annex I to the 1947 Collective Agreement, as amended, under which widowers must have reached the age of 65 in order to be entitled to the reversion of their spouses' retirement pensions, whereas the age fixed for widows is 60, are in breach of the principle of equal pay for men and women.

2. Question referred to the Court

Is Article 119 of the Treaty of Rome, which lays down the principle of equal pay for men and women, applicable to the AGIRC and Arrco supplementary retirement pension schemes and does it prohibit them from discriminating between men and women in respect of the age at which they are entitled to a survivor's pension following the death of their spouse?

3. Court ruling

On the first part of the question, the Court by way of introduction recalled the following points. According to settled case-law, the concept of pay, as defined in Article 119 of the Treaty, does not encompass social security schemes or benefits, in particular retirement pensions, directly governed by legislation (judgments of 17 May 1990, *Barber* (Case C-262/88 [1990], ECR I-1889, paragraph 22) and of 28 September 1994, *Beune* (Case C-7/93 [1994] ECR I-4471, paragraph 44)). On the other hand, benefits granted under a pension scheme, which essentially relates to the employment of the person concerned, form part of the pay received by that person and come within the scope of Article 119 of the Treaty (see, in particular, to that effect judgments of 13 May 1986, *Bilka* (Case 170/84 [1986] ECR I-1607, paragraph 22); *Barber*, cited above, paragraph 28; *Beune*, cited above, paragraph 46; and of 10 February 2000, *Deutsche Telekom* (Joined Cases C-234/96 and C-235/96 [2000] ECR I-799, paragraph 32)). The only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment based on the terms themselves of Article 119 of the Treaty itself (see *Beune*, cited above, paragraph 43; and judgment of 17 April 1997, *Evrenopoulos* (Case C-147/95 [1997] ECR I-2057, paragraph 19)). Finally, a survivor's pension provided for by an occupational pension scheme is an advantage deriving from the survivor's spouse's membership of the scheme and accordingly falls within the scope of Article 119 of the Treaty (*Evrenopoulos*, cited above, paragraph 22) (paragraphs 24–27).

While the pension funds contend that the supplementary retirement pension scheme at issue in the main proceedings does not come within the scope of Article 119 of the Treaty, and by arguing that it is a quasi-statutory scheme which is compulsory for all employees and meets considerations of social policy and not those of a particular occupation, the Court recalled that according to Article 2(1) of the Directive 86/378, as amended by Directive 96/97, the term 'occupational social security schemes' means schemes not governed by Council Directive 79/7, whose purpose is to provide workers, employed or self-employed, in an undertaking or a group of undertakings, in an area of economic activity, an occupational sector or a group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional. Firstly, the Court observed that it is clear from the very wording of that provision that an occupational social security scheme may be characterised by compulsory membership. Next, the Court pointed out that it was clear from the file at issue in the main proceedings that the present case did not involve social security schemes designed for the whole population or all workers. In practice, AGIRC is intended only for executives in undertakings affiliated to a scheme which is itself part of that federation, while Arrco is an association of schemes to which only employees are affiliated. Finally, as regards the argument that the supplementary retirement pension scheme at issue in the main proceedings meets considerations of social policy and not those of a particular occupation, the Court recalled that considerations of social policy, of State organisation, of ethics, or even budgetary concerns which influenced, or may have influenced, the establishment by the national legislature of a particular scheme cannot prevail if the pension concerns only a particular category of workers, if it is directly related to length of service and if its amount is calculated by reference to the last salary (*Beune*, cited above, paragraph 45; and *Evrenopoulos*, cited above, paragraph 21) (paragraphs 30–35).

As the pension funds further contended that the scheme at issue in the main proceedings is a 'pay-as-you-go' scheme, which implies a necessary balance between the amount of the contributions and that of the benefits, the Court considered that the criterion relating to the arrangements for funding and managing a pension scheme does not make it possible to determine whether such a scheme falls within the scope of

Article 119 of the Treaty (*Beune*, cited above, paragraph 38). Moreover, the Court recalled its ruling in *Evrenopoulos* that Article 119 of the Treaty applies to an occupational scheme run on a 'pay-as-you-go' basis (paragraphs 36–38).

Lastly, as the pension funds contended that the scheme at issue in the main proceedings was a scheme based on defined contributions and not defined benefits, which means that the employer has no obligation to guarantee to his former employees a level of benefits which is, or may be, fixed, calculated by reference to the length of service and final salary, the Court noted that, according to the explanations supplied by the pension funds themselves and their brochures annexed to Mr Podesta's pleadings, the benefits granted are related to final salary (paragraphs 39–40).

On the second part of the question, the Court recalled that according to settled case-law, the equal treatment in the matter of occupational pensions required by Article 119 of the Treaty may be relied on in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, the date of the *Barber* judgment (see, to that effect, judgment of 28 September 1994 *Van Den Akker and Others* Case C-28/93 [1994] ECR I-4527) (paragraph 12). It follows that occupational pension schemes were required to achieve equal treatment as from 17 May 1990 (*Van Den Akker and Others*, cited above, paragraph 14) (paragraphs 44–45).

The Court (Fifth Chamber) hereby rules:

Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) applies to supplementary retirement pension schemes, such as that at issue in the main proceedings, and precludes those schemes from discriminating, as from 17 May 1990, between men and women in respect of the age at which their spouse is entitled to a survivor's pension following the death of those employees.

Case C-407/98
KATARINA ABRAHAMSSON, LEIF ANDERSON/ ELISABET FOGELQVIST
Date of judgment:
6 July 2000
Reference:
ECR [2000] I-5539
Content:
Directive 76/207/EEC Article 2(4) — Higher education — Positive discrimination in recruitment — Conditions

1. Facts and procedure

Article 15 of Chapter 4 of the Högskoleförordningen (1993:100) (Swedish Regulation on higher education) as in force before 1 January 1999 (hereafter 'Regulation 1993:100') provides:

'Appointments to teaching posts must be based on merits of a scientific, artistic, pedagogical, administrative or other nature relating to the discipline covered by the post in question and its nature in general. Account must also be taken of the candidate's ability to report on his or her research and development work.

Account must also be taken, when an appointment is made, of objective reasons consistent with the general aims of policies relating to the labour market, equality, social matters and employment.'

Article 15a of Chapter 4 of Regulation 1993:100 establishes a specific form of positive discrimination for cases where a higher educational institution has decided that such discrimination is permissible in the filling of posts or certain categories of posts with a view to promoting equality in the workplace. In such cases, a candidate belonging to an under-represented sex and possessing sufficient qualifications for the post may be chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen, provided that the difference in their respective qualifications is not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments.

Article 3 of the förordningen (1995:936) om vissa anställningar som professor och forskarassistent vilka inrättas i jämställdhetssyfte (Swedish Regulation concerning certain professors' and research assistants' posts created with a view to promoting equality, hereafter 'Regulation 1995:936') provides:

'When appointments are made, the provisions of Article 15a of Chapter 4 of [Regulation 1993:100] shall be replaced by the following provisions.

A candidate belonging to an under-represented sex who possesses sufficient qualifications in accordance with the first paragraph of Article 15 of Chapter 4 of [Regulation 1993:100] must be granted preference over a candidate of the opposite sex who would otherwise have been chosen ('positive discrimination') where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed.

Positive discrimination must, however, not be applied where the difference between the candidates' qualifications is so great that such application would give rise to a breach of the requirement of objectivity in the making of appointments.'

On 3 June 1996, the University of Göteborg announced a vacancy for the chair of Professor of Hydrospheric Sciences. The vacancy notice indicated that the appointment to that post should contribute to promotion of equality of the sexes in professional life and that positive discrimination might be applied in accordance with Regulation 1995:936. On 18 November 1997, the University of Göteborg decided to appoint Ms Fogelqvist to the professorial chair, referring to Regulation 1995:936. Mr Anderson and Ms Abrahamsson appealed against this decision. Mr Anderson contended that the appointment was contrary both to Article 3 of Regulation 1995:936 and to the 17 October 1995 judgment of the Court, *Kalanke v*

Bremen (Case C-450/93 [1995] ECR I-3051). Ms Abrahamsson contended that the selection board's assessment of the candidates had not been balanced and that her scientific output was better than that of Ms Fogelqvist. She nevertheless recognised that Mr Anderson's merits were superior to her own.

2. Questions referred to the Court

1) Do Articles 2(1) and 2(4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions preclude national legislation under which an applicant of the under-represented sex possessing sufficient qualifications for a public post is to be selected in priority over an applicant of the opposite sex who would otherwise have been selected ('positive discrimination') if there is a need for an applicant of the under-represented sex to be selected and under which positive discrimination is not to be applied only where the difference between the applicants' qualifications is so great that it would give rise to a breach of the requirement of objectivity in the making of appointments?

2) If the answer to the first question is yes, is the application of the positive discrimination rule forbidden in such a case even where application of the national legislation is restricted to appointments either to a number of posts limited in advance (as under Regulation 1995:936) or to posts created as part of a special programme adopted by an individual university under which positive discrimination measures may be applied (as under Article 15a of Chapter 4 of Regulation 1993:100)?

3) If the answer to the second question means that such a positive discrimination measure is in any way unlawful, can the rule, based on Swedish administrative precedent and the second paragraph of Article 15(2) of Chapter 4 of Regulation 1993:100, approved by the Överklagandenämnden, that an applicant belonging to the under-represented sex may be given priority over a fellow applicant of the opposite sex, provided that the applicants can be regarded as equal or nearly equal in terms of merit, be regarded as being in any way contrary to Directive 76/207/EEC?

4) Does it make any difference in determining the questions set out above whether the legislation concerns lower-grade recruitment posts in an authority's sphere of activity or the higher posts in that sphere?

3. Court ruling

On the first question, the Court began by noting that in contrast to the national legislation on positive discrimination examined by the Court in its *Kalanke*, cited above, 11 November 1997, *Marschall* (Case C-409/95 [1997] ECR I-6363) and 28 March 2000, *Badeck and Others* (C-158/97 [2000] ECR I-1875) judgments, the national legislation at issue in the main proceedings enables preference to be given to a candidate of the under-represented sex who, although sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex. The Court then recalled its case-law on the criteria considered a legitimate basis for evaluating candidates' qualifications for a post by reference to the requirements of the vacant post or the duties to be performed (see *Badeck*, cited above, paragraphs 31 and 32). It ruled that as regards the selection procedure at issue in the main proceedings, it does not appear from the relevant Swedish legislation that assessment of the qualifications of candidates by reference to the requirements of the vacant post is based on clear and unambiguous criteria such as to prevent or compensate for disadvantages in the professional career of members of the under-represented sex. It considers that, on the contrary, under the rules at issue in the main proceedings a candidate for a public post belonging to the under-represented sex and

possessing sufficient qualifications for that post automatically has priority over a candidate of the opposite sex who would otherwise have been appointed. In this respect, the Court noted that the scope of that condition cannot be precisely determined, with the result that the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and that this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Moreover, the Court pointed out, applications are not subjected to an objective assessment taking account of the specific personal situations of all the candidates. It follows, in the Court's view, that such a method of selection is not such as to be permitted by Article 2(4) of the Directive 76/207 (paragraphs 45–53).

Seeking to determine whether legislation such as that at issue in the main proceedings is justified by Article 141(4) EC, the Court noted that even though Article 141(4) EC allows Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that this provision allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued (paragraphs 54–55).

On the second question, the Court noted that the mere fact of restricting the scope of a positive discrimination measure of the kind in point here is not capable of changing its absolute and disproportionate nature (paragraph 58).

On the third question, the Court recalls *Badeck and Others*, cited above, in which it judged (paragraph 23) that a rule under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex provided that the candidates possess equivalent or substantially equivalent merits must be regarded as compatible with Community law where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates (paragraph 61).

On the fourth question, the Court pointed out that Community law does not in any way make application of the principle of equal treatment for men and women concerning access to employment conditional upon the level of the posts to be filled (paragraph 64).

The Court (Fifth Chamber) hereby rules:

1) *Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Article 141(4) EC preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.*

2) *Article 2(1) and (4) of Directive 76/207 and Article 141(4) EC also preclude national legislation of that kind where it applies only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures.*

3) *Article 2(1) and (4) of Directive 76/207 does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a fellow applicant of the opposite sex, provided*

that the candidates possess equivalent or substantially equivalent merits, where the applications are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.

4) *The question whether national rules providing for positive discrimination in the making of appointments in higher education are lawful cannot depend on the level of the post to be filled.*

Case C-166/99
MARTHE DEFREYN/SABENA SA
Date of judgment:
13 July 2000
Reference:
ECR [2000] I-6155
Content:
Protocol No 2 on Article 119 of the Treaty — Directive 76/207/EEC (Article 5) — Additional pre-retirement pension — Benefits linked to an occupational social security scheme in accordance with the Protocol — Scope of the judgment of 17 February 1993, *Commission/ Belgium*

1. Facts and procedure

In Belgium, the Collective Labour Agreement No 17 of 19 December 1974 establishes a system of additional redundancy payments for workers aged at least 60 years, provided that they are in receipt of unemployment benefits (unemployed persons cease to be entitled to unemployment benefit from the first day of the calendar month following that in which they reach 65 years of age, in the case of men, and 60 years of age in the case of women). Collective Agreement No 17 provides for the possibility of concluding collective labour agreements at branch level, extending the scheme to workers aged 55 and over. On 23 May 1984, such a collective agreement was concluded within Joint Sub-Committee No 315.1 (Sabena). That agreement extended the supplementary unemployment benefits scheme to workers aged 55 and over who had taken voluntary redundancy. Payments continue until the month of the worker's 65th birthday in the case of a man, or 60th birthday in the case of a woman. Following the judgment in *Commission v Belgium* (Case C-173/91 [1993] ECR I-673), in which the Court censured the exclusion of female workers over the age of 60 from eligibility for the additional redundancy payments provided for by Collective Agreement No 17, that Agreement was adapted. Since that adaptation, all workers are entitled to the additional payment payable by the employer until the last day of the calendar month in which they reach 65 years of age, irrespective of the fact that they have passed the maximum age for grant of unemployment benefit.

Ms Defreyn, an employee of Sabena SA (hereafter 'Sabena') requested the application of the Collective Labour Agreement of 23 May 1984 on 14 November 1984. On 29 November 1984, she was granted a pre-retirement payment with two years' notice (commencing on 1 December 1984 and expiring on 31 December 1986). Sabena consequently was promising to pay the supplement provided for by the collective agreement from 1 January 1987 until the end of the month in which she reached 60 years of age (30 November 1991). Following *Commission v Belgium*, cited above, Ms Defreyn asked Sabena to pay her the supplement to which she claimed to be entitled until her 65th birthday. The Tribunal du Travail (employment tribunal) rejected this request, taking the view that the payments at issue were covered by the Protocol No 2 on Article 119 of the Treaty establishing the European Community (hereafter the 'Protocol'), which limited the temporal scope of Article 119.

2. Questions referred to the Court

1) Can the additional pre-retirement payment provided for by Collective Agreement No 17, rendered compulsory by the Royal Decree of 16 January 1975 and provided for in the Collective Labour Agreement of 23 May 1984 concluded within Joint Sub-Committee No 315.1, be treated as a benefit payable under an occupational social security scheme to which the Protocol on Article 119 of the Treaty establishing the European Community applies?

2) Are the provisions of Collective Labour Agreement No 17 and the Collective Labour Agreement of 23 May 1984 concluded within Joint Sub-Committee No 315.1 compatible with Article 5 of Directive 76/207/EC in that they exclude female workers over the age of 60 from the benefit of pre-retirement payments which constitute additional redundancy payments,

granted in addition to unemployment benefit, whereas such payments are guaranteed for male workers until the age of 65?

3) If the two questions above are answered in the affirmative, does the application of the Protocol on Article 119 of the Treaty preclude the action brought by Ms Defreyn from succeeding, inasmuch as it is founded on breach of Article 5 of Directive 76/207?

3. Court ruling

On the first question, the Court first of all determined whether the payment at issue in the main proceedings constitutes a benefit under an occupational social security scheme within the meaning of the Protocol.

In that respect, the Court firstly recalled that it ruled in *Commission v Belgium*, cited above, that the unemployment benefit supplement was not regarded as a social security benefit but, on the contrary, was independent of the general social security scheme and therefore constituted pay under Article 119 of the Treaty. However, it clarified that considering the payment at issue in the main proceedings as 'pay' within the meaning of Article 119 of the Treaty does not necessarily foreclose the answer to the question whether such pay constitutes a benefit under an occupational social security scheme for the purposes of the Protocol. In that respect, the Court noted that before the entry into force of the Treaty on the European Union and, therefore, of the Protocol, the question could not arise, so it did not have to rule on the point (paragraphs 26-28).

Next, the Court observed that an occupational scheme such as the one at issue in the main proceedings, which provides protection against the risk of unemployment by providing workers employed by an undertaking, in this case Sabena, with benefits intended to supplement the unemployment benefit provided under a statutory social security scheme, must be classified as an occupational social security scheme within the meaning of Articles 2 and 4 of Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, as amended by Council Directive 96/97/EC of 20 December 1996 (paragraph 29).

It follows, according to the Court, that the additional payment at issue in the main proceedings constitutes a benefit under an occupational social security scheme within the meaning of the Protocol. The Protocol may therefore apply if the conditions it lays down are fulfilled (paragraph 30).

The Court noted that these conditions were fulfilled in the main proceedings (paragraph 32).

On the second and third questions, which it examined together, the Court recalled that a benefit which, as in this case, constitutes 'pay' within the meaning of Article 119 of the Treaty cannot also be covered by Directive 76/207 (*Gillespie and Others*, Case C-342/93 [1996] I-475, (paragraph 24) (paragraph 35).

The Court (Fifth Chamber) hereby rules:

1) *Protocol No 2 on Article 119 of the Treaty establishing the European Community, annexed to the EC Treaty, applies to a payment such as the additional pre-retirement payment provided for by Collective Agreement No 17, rendered compulsory by the Royal Decree of 16 January 1975 and provided for in the Collective Labour Agreement of 23 May 1984 concluded within Joint Sub-Committee No 315.1.*

2) *An additional payment which, as in the present case, constitutes 'pay' within the meaning of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) is not covered by Article 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.*

Case C-322/98
BÄRBEL KACHELMANN/BANKHAUS HERMANN LAMPE KG
Date of judgment:
26 September 2000
Reference:
ECR [2000] I-7505
Content:
Directive 76/207/EEC (Article 5) — Conditions governing dismissal — Part-time workers — Comparison with full-time workers when an employer makes decisions based on social grounds — Indirect sex discrimination

1. Facts and procedure

Article 1(1) to (3) of the Kündigungsschutzgesetz (German law on protection in cases of dismissal, BGBl. 1969 I, p. 1317), in the version applicable in the main proceedings (hereafter the 'KSchG'), provides:

'1. The dismissal of an employee whose contract has continued for more than six consecutive months with the same company shall be legally ineffective where it lacks social justification.

2. A dismissal lacks social justification where it is not based on reasons connected with the person or conduct of the employee or with serious constraints affecting the company which make it impossible to retain the employee's post in that company ...

3. If an employee is dismissed due to serious constraints affecting the company within the meaning of Paragraph 2, the dismissal shall nevertheless lack social justification if, in selecting the worker, the employer did not take social factors into account, or did not do so sufficiently. Where the worker so requests, the employer shall tell the worker the reasons that led to the social choice concerning him. The first sentence shall not apply where operational, economical or other justified requirements make it necessary for the company to retain one or more particular workers and thus preclude selection on the basis of social criteria. It is for the employee to prove that there has been a socially unjustified dismissal within the meaning of the first sentence.'

Hired by Bankhaus Hermann Lampe KG (hereafter 'Bankhaus') on 1 April 1991, Ms Kachelmann was employed on a part-time basis of 30 hours per week (76.92 %). Owing to a reduction in the volume of its international activities by Bankhaus, Ms Kachelmann was made redundant with effect from 30 September 1996. Ms Kachelmann contested her dismissal, claiming that during the process leading to this, Bankhaus did not make a selection on the basis of social criteria from among all workers performing the same duties. It did not compare Ms Kachelmann, who was working 30 hours a week, with full-time workers working 38 hours a week, even though the claimant in the main proceedings had stated, before she was given notice of dismissal, that she would be willing to work on a full-time basis. According to the order for referral, Bankhaus continues to employ on a full-time basis a female member of staff whose duties are comparable to those of the claimant.

2. Questions referred to the Court

Is Article 5(1) of Directive 76/207/EEC to be interpreted as meaning that, upon application of Article 1(3) of the Kündigungsschutzgesetz — in this case the version in force until 30 September 1996 — part-time female employees are to be regarded as comparable to male and female full-time employees when selecting employees for dismissal according to social criteria if substantially more women than men are employed on a part-time basis in a particular sector?

3. Court ruling

By way of introduction, the Court recalled its case-law on indirect gender-based discrimina-

tion relating to female workers (see in particular judgment of 6 April 2000 *Jørgensen* Case C-226/98, ECR I-2447) (paragraph 29). Having noted that part-time workers in Germany are far more likely to be women than men, the Court considered it necessary to assess whether application of a national rule such as that at issue in the main proceedings results in full-time workers being treated differently from part-time workers (paragraphs 23–25).

In this respect, the Court noted first of all that that lack of comparability between full-time and part-time workers in the selection process based on social criteria under Article 1(3) of the KSchG does not entail any direct disadvantage for the latter category Effectively, both full-time and part-time workers receive the same advantageous or disadvantageous treatment according to whether in each particular case it is a full-time post or a part-time post which is being abolished. However, as the Court observed, the number of workers employed full-time in Germany, and probably throughout the Community, is significantly higher in all sectors than the number of part-time workers. In the Court's view, it follows that where jobs are being cut, part-time workers are in general put at a greater disadvantage because they have less chance of finding another comparable job. Consequently, the Court concluded, lack of comparability between full-time and part-time workers in the selection process based on social criteria pursuant to Article 1(3) of the KSchG may give rise to a difference in treatment to the detriment of part-time workers and entail an indirect disadvantage for them (paragraphs 26–28).

Aiming to determine whether such a difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex, the Court pointed out that it is clear from the observations submitted to it that job comparability is determined according to the actual content of the respective employment contracts, by assessing whether the worker whose job is being abolished for reasons peculiar to the undertaking would be capable, having regard to his professional qualifications and the activities he has hitherto been carrying out within the undertaking, of carrying out the different but equivalent work done by other workers. It noted that application of those criteria may well create an indirect disadvantage for part-time workers because their jobs cannot be compared with those of full-time workers. However, it highlighted that if job comparability between full-time and part-time workers were to be introduced in the selection process on the basis of social criteria under Article 1(3) of the KSchG, that would have the effect of placing part-time workers at an advantage, while putting full-time workers at a disadvantage. In the event of their jobs being abolished, part-time workers would have to be offered a full-time job, even if their employment contract did not entitle them to one. The Court considers that the question whether part-time workers should enjoy such an advantage is a matter for the national legislature, which alone must find a fair balance in employment law between the various interests concerned. In this case, that assessment has been based on considerations unrelated to the sex of the workers (paragraphs 29–34).

The Court (Fifth Chamber) hereby rules:

Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions must be interpreted as not precluding an interpretation of a national rule, such as that contained in Article 1(3) of the Kündigungsschutzgesetz in the version in force until 30 September 1996, which generally considers that part-time workers are not to be compared with full-time workers when an employer has to proceed to selection on the basis of social criteria when abolishing a part-time job on economic grounds.

Case C-79/99
JULIA SCHNORBUS/LAND HESSEN
Date of judgment:
7 December 2000
Reference:
ECR [2000] I-10997
Content:
Directive 76/207/EEC — Regulation of access to preparatory legal training in Land of Hesse — Priority to candidates having completed military or civilian service, which can only be done only by men — Indirect discrimination — Justification — Objective reason — Proportionality

1. Facts and procedure

Under Article 12a (1) and (2) of the Grundgesetz (Basic law of the Federal Republic of Germany (hereafter 'the Grundgesetz'):

'1. Men who have attained the age of 18 years may be required to serve in the Armed Forces, in the Federal Border Police, or in a Civil Defence organisation.

2. A person who refuses, on grounds of conscience, to do military service in time of war may be required to render a substitute service [...]'

Article 24 of the Juristenausbildungsgesetz (Law on Legal Training), in the version of 19 January 1994 (GVBl. I, p. 74, hereafter the 'JAG') provides:

'1. Legal trainees are recruited for preparatory legal training starting from the first working day in January, March, May, July, September and November, respectively, of each year.

2. Should the number of applications for admission to preparatory legal training on a particular commencement date received before expiry of the deadline exceed the number of available training places, appointment may be deferred by up to 12 months. This shall not apply if deferment would result in particular hardship. Lots shall be drawn to select the applicants whose admission will be deferred'.

Finally, pursuant to Paragraph 14a of the Juristenausbildungsordnung (Legal Training Regulations), in the version of 8 August 1994 (GVBl. I, p. 334, hereafter the 'JAO') provides:

'1. A case of particular hardship for the purposes of Paragraph 24(2) of the JAG shall exist where deferment would result in detriment to the applicant (male or female) which, judged by exacting standards, goes significantly beyond the detriment usually associated with postponement.

2. The following, in particular, may be regarded as cases of particular hardship:

[...]

4) The completion of compulsory service pursuant to Article 12(a)(1) or (2) of the Grundgesetz, or a period of at least two years spent as an overseas aid volunteer within the meaning of the Entwicklungshelfer-Gesetz (Law on Overseas Aid Volunteers) of 18 June 1969 (BGBl. I, p. 549), as amended by the Law of 18 December 1989 (BGBl. I, p. 2261), or the completion of a voluntary community service year within the meaning of the Gesetz zur Förderung eines freiwilligen sozialen Jahres (Law on the Promotion of a Voluntary Community Service Year) of 17 August 1964 (BGBl. I, p. 640), as amended by the Law of 18 December 1989 (BGBl. I, p. 2261)'.

Ms Schnorbus' application for admission to the preparatory legal training was rejected; since too many applications had been received, the ministry had to make a selection in accordance with Paragraph 24(2) of the JAG.

2. Questions referred to the Court

1) Pursuant to the rules contained in Articles 24(2) of the JAG and 14(a) of the JAO, where a decision concerning the admission of applicants to preparatory legal training is required because the number of applicants exceeds the number of training places, an applicant who has completed service which is obligatory only for men (military or substitute service pursuant to Article 12a of the Grundgesetz) is immediately admitted to the preparatory training unconditionally, whereas the admission of other applicants (female and male) may be deferred by up to 12 months. Does such a rule fall within the scope of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40)?

2) If the first question is answered in the affirmative, then

   Does such a rule which, insofar as it results in the preferential admission to preparatory legal training of male applicants who have done their obligatory service, amount to direct discrimination on grounds of sex within the meaning of Article 2(1) of Directive 76/207/EEC?

3) If the second question is answered in the negative:

   Do the German rules give rise to indirect discrimination?

4) Is the fact that the rule automatically results in the preferential admission of men to training without a decision on the matter being subject to an assessment of the individual circumstances of each case or of other relevant factors meriting consideration in the interests of the remaining applicants sufficient to preclude justification of the rule under Article 2(4) of Directive 76/207/EEC if only because it goes beyond a measure seeking to promote equal opportunity?

5) If the fourth question is answered in the negative:

   Is such a rule not justifiable under Article 2(4) of Directive 76/207/EEC because only measures which serve to promote equal opportunity in favour of women are allowed?

6) If the fifth question is answered in the negative:

   Is the mere fact that only men are required to do military or civilian service under Articles 12a(1) and (2) of the Grundgesetz itself to be regarded as an actual existing inequality within the meaning of Article 2(4) of Directive 76/207/EEC which in itself prejudices men's opportunities in the areas referred to in Article 1(1) of the directive, or are the disadvantages faced by women in the workplace because of their sex, and the risks arising from such disadvantages, also to be taken into account with regard to this?

7) Can the rule in Paragraphs 24(2) of the JAG and 14(a) of the JAO be justified with regard to Article 2(4) of Directive 76/207/EEC solely on the ground that it counterbalances disadvantages not faced by women as they are not required to do service?

8) Can Article 6 of Directive 76/207/EEC confer a right of access to training where refusal of access is based on discrimination and there are no other available sanctions in the form of a right to compensation?

3. Judgment of the Court

On the first question, the Court notes that the disputed provisions govern the circumstances in which admission to preparatory legal training

may or may not be delayed because there are not enough places. The Court observes that since practical training constitutes a period of training and a necessary prerequisite of access to employment in the judicial service or the higher civil service, such delay may affect the development of the career of the persons concerned. Such provisions therefore fall, according to the Court, within the scope of Directive 76/207, which applies to employment in the public service (see Case 248/83 *Commission v Germany* [1985] ECR 1459 paragraph 16, and Case C-1/95 *Gerster* [1997] ECR I-5253, paragraphs 18 and 28.

The Court answers the second question in the negative: it notes that Article 14a of the JAO provides for a number of circumstances which may be taken into account for priority access to preparatory legal training. They include the completion of compulsory military or civilian service. In such a case, the benefit of the priority envisaged by the abovementioned provisions cannot be regarded as being directly based on the sex of the persons concerned (paragraph 32).

On the third question, the Court notes that by giving priority to applicants who have completed compulsory military or civilian service, the provisions at issue themselves are evidence of indirect discrimination since, under the relevant national legislation, women are not required to do military or civilian service and therefore cannot benefit from the priority accorded by the abovementioned provisions of the JAO to applications in circumstances regarded as cases of hardship (paragraph 38).

With respect to the fourth, fifth, sixth and seventh questions, which the Court examines together, the Court rules that the disputed provision, which is based on the account taken of the delay experienced in the progress of their education by applicants who have been required to do military or civilian service, is objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay. The Court finds that in such circumstances, the provision at issue cannot be regarded as contrary to the principle of equal treatment for men and women. Furthermore, according to the Court, the advantage conferred upon the persons concerned, whose enjoyment of priority may operate to the detriment of other applicants only for a maximum of 12 months, does not seem disproportionate, since the delay they have suffered on account of the activities referred to is at least equal to that period (paragraphs 44–46).

In view of the answers given to the previous questions, the Court finds it unnecessary to answer the eighth question (paragraph 48).

The Court (Sixth Chamber) hereby rules:

1) *National provisions governing the date of admission to the preparatory legal training which is a necessary prerequisite of access to employment in the civil service fall within the scope of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.*

2) *National provisions such as those at issue in the main proceedings do not constitute discrimination directly based on sex.*

3) *National provisions such as those at issue in the main proceedings constitute indirect discrimination based on sex.*

4) *Directive 76/207 does not preclude national provisions such as those at issue in the main proceedings, in so far as such provisions are justified by objective reasons and prompted solely by a desire to counterbalance to some extent the delay resulting from the completion of compulsory military or civilian service.*

Joined Cases C-122/99P and C-125/99P
D. AND THE KINGDOM OF SWEDEN/COUNCIL OF THE EUROPEAN UNION
Date of judgment:
31 May 2001
Reference:
ECR [2001] p. I-4319
Content:
Appeal — Official household allowance for married official — Registered partnership — Unequal treatment on the basis of sexual orientation — Comparable situations — Legislation in Member States

1. Facts and procedure

By two applications lodged at the Registry of the Court of Justice on 13 and 14 April 1999 respectively, D and the Kingdom of Sweden brought an appeal against the judgment of the Court of First Instance of 28 January 1999, in Case (T-264/97 *D v Council* [1999], ECR-SC I-A-1 and II-1 (hereafter 'the contested judgment'), by which the Court of First Instance dismissed the application by D, supported by the Kingdom of Sweden, for annulment of the refusal by the Council of the European Union to award the applicant the household allowance.

Article 1(2) of Annex VII to the Staff Regulations of Officials of the European Communities (hereafter 'the Staff Regulations') provides as follows:

'The household allowance shall be granted to:

a) a married official;

b) an official who is widowed, divorced, legally separated or unmarried and has one or more dependent children within the meaning of Article 2(2) and (3);

c) by special reasoned decision of the appointing authority based on supporting documents, an official who, while not fulfilling the conditions laid down in (a) and (b), nevertheless actually assumes family responsibilities.'

D, an official of the European Communities of Swedish nationality working at the Council, registered a partnership with another Swedish national of the same sex in Sweden on 23 June 1995. He applied to the Council for his status as a registered partner to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations. The Council rejected the application on the ground that the provisions of the Staff Regulations could not be construed as allowing a 'registered partnership' to be treated as being equivalent to marriage. The complaint brought by D on 1 March 1997 against that decision was rejected on the same ground, by a note of 30 June 1997 from the Secretary-General of the Council (hereafter 'the contested decision').

In the contested judgment, with regard to the first plea, alleging infringement of the principles of equal treatment and non-discrimination, the Court of First Instance held that Council Regulation (EC, ECSC, Euratom) No 781/98 of 7 April 1998 amending the Staff Regulations of Officials of the EC countries and the Conditions of Employment of Other Servants of the European Communities in respect of equal treatment (OJ 1998 L 113, p. 4), which introduced Article 1a into the Staff Regulations giving officials entitlement to equal treatment irrespective of their sexual orientation, without prejudice to the provisions of the Staff Regulations requiring a particular marital status, did not come into force until after the adoption of the contested decision and so it was not appropriate to take that regulation into consideration. It next recalled that according to its case-law, for the purposes of the Staff Regulations the concept of marriage must be understood as meaning a relationship based on civil marriage within the traditional meaning of the term (Case T-65/92 *Arauxo-Dumay v Commission* [1993] ECR II-597, paragraph 28) and reference to the laws of the Member States is not necessary where the relevant provisions of the Staff Regulations are capa-

ble of being given an independent interpretation (Case T-43/90 *Díaz García v Parliament* [1992] ECR I-2619, paragraph 36). Lastly, on the basis of the case-law of the European Court of Human Rights and that of the Court of Justice (Case C-249/96 *Grant* [1998] ECR I-621, paragraphs 34 and 35) the Court of First Instance considered that the Council was under no obligation to regard as equivalent to marriage, for the purposes of the Staff Regulations, the situation of a person who had a stable relationship with a partner of the same sex, even if that relationship had been officially registered by a national authority. It added that the Commission had been requested to submit proposals concerning the recognition of situations involving registered partnerships and that it would be for the Council, as legislator and not as employer, to make any necessary amendments to the Staff Regulations following those proposals.

As regards the fourth plea, alleging infringement of the principle of equal pay for men and women contained in Article 119 of the EC Treaty, (Article 141 EC) the Court of First Instance merely stated that the relevant provisions of the Staff Regulations apply equally to men and women and thus do not lead to any discrimination prohibited by Article 119 of the Treaty.

2. *Judgment of the Court*

The Court rejects all of the pleas made.

With regard to the plea relating to infringement of the principle of equal treatment, discrimination on grounds of sex the Court finds that D, who contends that the contested decision, which deprives him of an allowance to which his married colleagues are entitled solely on the ground that the partner with whom he is living is of the same sex as himself, constitutes, contrary to what the Court of First Instance held, discrimination based on sex, in breach of Article 119 of the Treaty, and infringement of the principle of equal treatment (paragraph 45).

In this respect, the Court, observes, first of all that it is irrelevant for the purposes of granting the household allowance whether the official is a man or a woman. The relevant provision of the Staff Regulations, which restricts the allowance to married officials, cannot therefore be regarded as being discriminatory on grounds of the sex of the person concerned, or, therefore, as being in breach of Article 119 of the Treaty (paragraph 46).

Secondly, as regards infringement of the principle of equal treatment of officials because of their sexual orientation, the Court rules that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner. It specifies that the principle of equal treatment can apply only to persons in comparable situations, and so it is necessary to consider whether the situation of an official who has registered a partnership between persons of the same sex, such as the partnership entered into by D under Swedish law, is comparable to that of a married official. According to the judge, when making this assessment the Community judicature cannot disregard the views prevailing within the Community as a whole. Yet, the Court observes that the existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general equation between marriage and other forms of legal union. The Court concludes that in those circumstances, the situation of an official who has registered a partnership in Sweden cannot be held to be comparable, for the purposes of applying the Staff Regulations, to that of a married official (paragraphs 47–51).

The Court declares and orders:

1) *The appeals are dismissed.*

2) *D and the Kingdom and Sweden are ordered to jointly and severally pay the costs.*

3) *The Kingdom of Denmark and the Kingdom of the Netherlands are ordered to bear their own costs.*

Case C-381/99
SUSANNA BRUNNHOFER/BANK DER ÖSTERREICHISCHEN POSTSPARKASSE AG
Date of judgment:
26 June 2001
Reference:
ECR [2001] p. I-4961
Content:
Article 119 of the Treaty (Article 141 EC) — Directive 75/117/EEC — Definition of 'the same work' and 'work of equal value' — Classification, under a collective agreement, in the same job category — Burden of proof — Objective justification for unequal pay — Quality of the work of a specific employee

1. Facts and procedure

Ms Brunnhofer, who was employed by the Bank Der Österreichisen Postparkasse AG (hereafter the 'Bank') from 1 July 1993 to 31 July 1997, considers that she has suffered discrimination on the basis of sex, contrary to the principle of equal pay, on the ground that she received a monthly salary lower than that paid to a male colleague recruited by the Bank on 1 August 1994. The national court found that, although their basic salary was identical, the difference in salary between the two employees arose from the fact that, under his employment contract, Ms Brunnhofer's male colleague received an individual supplement the monthly amount of which was approximately ATS 2 000 higher than the supplement which she received under her contract with the Bank. It is common ground that, when they took up their duties, Ms Brunnhofer and her male colleague were both classified in salary group V, which covers employees with training in banking who carry out skilled banking work on their own, as provided for by the collective agreement applicable to banking employees and bankers in Austria (hereafter 'the collective agreement').

The Bank denies that Ms Brunnhofer suffered any discrimination contrary to the principal of equal pay. First, it contends that the total salary of the two employees concerned was not in fact different, since, unlike her male colleague, Ms Brunnhofer was not required regularly to work the full overtime hours, which the Bank had allotted to her. Second, it contends that there were objective reasons for the difference in the individual supplement awarded to each of them. In fact, according to the Bank, even though the two jobs in question were initially regarded as being of equal value, Ms Brunnhofer's male colleague in fact carried out more important functions in so far as he was responsible for important customers and was authorised to enter into binding commitments on behalf of the Bank. On the other hand, no such authority was given to Ms Brunnhofer, who had less client contact, which explains why she received a lower salary supplement than that given to her male colleague. Further, the quality of the work of the two employees in question was also different. In fact, after a promising start, Ms Brunnhofer's work was said to have deteriorated, in particular from the beginning of 1994, that is to say at a time when her male colleague had not yet been recruited.

2. Questions referred to the Court

1) a) In assessing whether work is 'equal work' or constitutes 'the same job' within the meaning of Article 119 of the EC Treaty (now Article 141 EC) or is 'the same work' or 'work to which equal value is attributed' within the meaning of Directive 75/117/EEC, is it sufficient, where individual contracts of employment stipulate supplements to pay fixed by collective agreement, to ascertain whether the two workers being compared are classified in the same job category under the collective agreement?

b) If the reply to question 1) a) is in the negative:

In the situation described in Question 1(a), is the same classification under the collec-

tive agreement evidence of the same work or work of equal value within the meaning of Article 119 (Article 141) of the Treaty and of Directive 75/117/EEC, with the result that it is for the employer to prove that the work is different?

c) Can the employer rely on circumstances not taken into account in the collective agreements in order to justify a difference in pay?

d) If the reply to question 1(a) or 1(b) is in the affirmative:

Does this also apply if the classification in the job category under the collective agreement is based on a job description couched in very general terms?

2) a) Are Article 119(141) of the Treaty and Directive 75/117/EEC based on a definition of 'worker' which is uniform at least in so far as the worker's obligations under the contract of employment depend not only on generally defined standards but also on the individual capacity of the worker himself?

b) Are Article 119 (now Article 141) of the Treaty and Article 1 of Directive 75/117/EEC to be interpreted as meaning that the fixing of different pay may be objectively justified by circumstances which can be established only ex post facto, such as in particular a specific employee's work performance?'

3. Judgment of the Court

The Court examines the preliminary questions together in relation to the following aspects.

On the existence of unequal pay between male and female workers, the Court finds that the monthly salary supplement in question in the present case undeniably constitutes consideration stipulated in the individual employment contract and paid by the employer to the two employees concerned in respect of their employment with the Bank. That supplement must, therefore, be classified as pay for the purposes of Article 119 of the Treaty and Article 1 of Directive 75/117. It further recalls that case-law states that as regards the method to be used to ascertain whether the principle of equal pay is being complied with, when the pay of workers is being compared, genuine transparency permitting an effective review is assured only if that principle is applied to each aspect of remuneration granted to men and women, excluding any general overall assessment of all the consideration paid respectively to male and female workers (see judgment of 17 May 1990, Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 34 and 35). According to the Court, in these conditions, the national court identified quite rightly an inequality between the amount of individual salary supplement paid monthly to the plaintiff and that paid to her male comparator, although it is undisputed that the two employees concerned receive the same basic pay and regardless of the Bank's contention that their overall salary is identical (paragraphs 34–37).

In relation to the existence of a same job or work of equal value, the Court recalls its case-law pertaining to these definitions (Judgments of 27 March 1980, Case C-129/79 *Macarthys* [1980], ECR 1275, paragraph 11, and Case C-236/98 *Jämo* [2000], ECR 2101, paragraphs 13 and 23, of 31 May 1995, Case C-400/93 *Royal Copenhagen* [1995] I-1275, paragraphs 32 and 33, and of 11 May 1999, Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* [1999], ECR I-2865, paragraph 17) and rules that it follows that the classification of the employees concerned in the same job category under the collective agreement applicable to their employment is not in itself sufficient for concluding that they perform the same work or work of equal value. Such a classification does not exclude the existence of other evidence to support that conclusion. Indeed, such interpretation is according to the Court, not undermined by the fact that the collective agreement defines the job

covered by the relevant job category in very general terms. As a matter of evidence, the general indications provided in the collective agreement must in any event be corroborated by precise and concrete factors based on the activities actually performed by the employees concerned. The Court considers that in this situation, it is necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question in the case, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work. It adds that it is for the national court to determine, in the light of the actual nature of the activities carried out by those concerned, whether an equal value can be attributed to them (see judgment of 30 March 2000, Case C-263/98 *Jämo* [2000] ECR I-2189, paragraph 48), and specifies that in this case it is more especially for the national court to determine whether the plaintiff and the male colleague used as comparator perform comparable work, even though, the male colleague is responsible for dealing with important customers and has authority to trade, whereas Ms Brunnhofer, who supervises loans, has less contact with clients and cannot enter into commitments that directly bind her employer (paragraphs 42–50).

In relation to the burden of proving the existence of an inequality in pay between men and women workers and any circumstances capable of objectively justifying such a difference in treatment, the Court observes that the special circumstances under which the burden of proof may shift when this is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay (see judgment of 27 October 1993, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 14) are not present in this case, which concerns the inequality of a precise component of the overall remuneration granted by the employer to two particular employees of different sex taken in isolation. It holds that in accordance with the normal rules of evidence, it is accordingly for the plaintiff to prove to the Court by any form of allowable evidence that the pay she receives from the Bank is less than that of her chosen male colleague used as comparator, and that she really does the same work or work of equal value, comparable to that performed by him, so that prima facie she is the victim of discrimination which can be explained only by the difference in sex. The Court specifies that the employer is therefore not bound to show that the activities of the two employees concerned are different (paragraph 52–59).

In relation to the objective justifications for unequal pay, having recalled that a difference in treatment can be justified by objective factors unrelated to any discrimination based on sex, provided that the grounds put forward by the employer to explain the inequality must correspond to a real need of the undertaking, be appropriate to achieving the objectives pursued and necessary to that end (see judgment of 13 May 1986, Case C-170/84 *Bilka* [1986] ECR 1607, paragraph 36), the Court notes, first, that the employer may validly explain the difference in pay, in particular by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, in so far as they constitute objectively justified reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality. It specifies that it is for the national court to make such an assessment of the facts in each case before it, in the light of all the evidence in the case (paragraphs 66–69).

Second, the Court finds that the third paragraph of Article 119 of the Treaty makes a clear distinction between work paid at piece rates and work paid at time rates. In the first case, the Court rules that it is essential for the employer to be able to take employees' productivity into account and therefore their individual work capacity. In the second case, on the other hand, the Court notes that the criterion used in the third paragraph of Article 119 is 'the same job', a term which is equivalent to 'the same work' used in the first paragraph of that provision and Article 1 of the Directive. Yet

the Court stresses, as it has been pointed out before, that such a term is defined on the basis of objective criteria, which do not include the essentially subjective and variable factor of each employee's productivity taken in isolation. According to the Court, any circumstances linked to the person of the employee which cannot be determined objectively at the time of that person's appointment but come to light only during the actual performance of the employee's activities, such as personal work capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing identical or comparable work (paragraphs 70–76).

In relation to the latter the Court further specifies that it is not possible to treat in the same way all the factors directly concerning the person of the employee and therefore, in particular, to equate the professional training necessary to perform the activity in question to its concrete results. Although professional training is a valid criterion not only for ascertaining whether or not employees are doing the same work, but also as an objective justification, if need be, for a difference in pay granted to employees doing comparable work (see, to that effect, Angestelltenbetriebsrat der Wiener Gebietskrankenkasse, cited above, paragraph 19), that is because it is a factor which is objectively known at the time when the employee is appointed, whereas work performance can be assessed only subsequently and cannot therefore constitute a proper ground for unequal treatment right from the start of the employment of the employees concerned. The Court considers that in these circumstances, the employer cannot, at the time when the employees concerned are appointed, pay to a specific employee remuneration lower than that paid to a colleague of the other sex and later justify that difference on the ground that the latter's work is superior, or on the ground that the quality of the former's work steadily deteriorated after that employee's recruitment, where it is established that the employees concerned are actually performing the same work or at any rate work of equal value. If that latter condition is met, a justification for unequal treatment based on future assessment of the respective work of each employee concerned still cannot exclude the existence of considerations based on the different sex of the employees concerned. The difference in pay between a woman and a man occupying the same job can be justified only by objective factors unrelated to any discrimination linked to the difference in sex (paragraphs 78–79).

The Court (Sixth Chamber) hereby rules:

The principle of equal pay for men and women laid down in Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and elaborated by Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women workers must be interpreted as follows:

- *a monthly salary supplement to which the employees concerned are entitled under their individual employment contracts, paid by the employer in respect of their employment, constitutes pay within the scope of Article 119 of the Treaty and Directive 75/117; equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees but also in the light of each element of pay taken in isolation;*

- *the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male worker used as comparator are classified in the same job category under the collective agreement governing their employment is not in itself sufficient for concluding that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive, since this fact is only one indication amongst others that this criterion is met;*

- *as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the colleague chosen as comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case in point but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay;*

- *a difference in pay is capable of being justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality;*

- *in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of a colleague.*

Case C-438/99
MARIA LUISA JIMENEZ MELGAR/
AYUNTAMIENTO DE LOS BARRIOS
Date of judgment:
4 October 2001
Reference:
ECR [2001] p. I-6915
Content:
Directive 92/85/EEC — Pregnancy — Dismissal — Non-renewal of fixed-term employment contract — Direct effect and scope of Article 10 of the Directive

1. Facts and procedure

In June 1998, Mrs Jiménez Melgar was hired, in Spain, by the Ayuntamiento de Los Barrios (Municipality of Los Barrios, hereafter the 'Municipality') as an employee, on the basis of a succession of fixed-term part-time employment contracts. The fourth contract was signed on 3 May 1999. Like the previous contracts, this contract did not specify any expiry date. However, on 12 May 1999, Mrs Jiménez Melgar received a letter from the Municipality, which was worded as follows:

'In accordance with the terms of your contract, the contract will terminate on 2 June 1999. Nevertheless, during the statutory period of notice for termination, you will be informed of any possibility of extension or renewal thereof, and you should go to your personnel department, before 2 June 1999, in order, if appropriate, to sign the appropriate extension or renewal or else to arrange the payment due to you for termination of your employment contract [...]'.

In the meantime, the Municipality had been informed about Mrs Jiménez Melgar's state of pregnancy.

On 7 June 1999, a meeting took place with Mrs Jiménez Melgar in order to continue her employment relationship by the signature of a fifth part-time employment contract. That contract was to take effect on 3 June. However, Mrs Jiménez Melgar refused to sign it and on the day after that meeting she addressed a complaint to the Municipality in which she contended that her previous contract with the Municipality had not expired since she had been dismissed in a discriminatory way, in breach of her fundamental rights. Consequently, in her view, it was not a question of signing a new contract but simply of reinstating her in her employment.

The national court points out that, at the time of the events in question in the main proceedings, Directive 92/85 had still not been transposed into Spanish law.

2. Questions referred to the Court

1) Is Article 10 of Directive 92/85/EEC sufficiently clear, precise and unconditional to be directly effective?

2) In providing that 'Member States shall take the necessary measures to prohibit the dismissal of workers [...] (who are pregnant, have given birth or are breastfeeding) during the period from the beginning of their pregnancy to the end of the maternity leave ... save in exceptional cases not connected with their condition', does Article 10 of the Directive require the Member States to lay down, on a specific and exceptional basis, the available grounds for dismissing a worker who is pregnant, has given birth or is breastfeeding, so that they must introduce into national legislation, together with the general rules on the termination of employment contracts, a further special, exceptional and more limited set of rules expressly for those cases in which the worker is pregnant, has given birth or is breastfeeding?

3) What effects does Article 10 of the Directive have on the non-renewal by an employer of a fixed-term contract of a woman who is pregnant, under the same circumstances as prevailed in relation to earlier contracts? Does

Article 10 affect the protection enjoyed by a worker who is pregnant in the context of temporary employment relationships? If so, in what way, according to what criteria, and to what extent?

4) Where Article 10 of the Directive states that the dismissal of a worker who is pregnant, has given birth or is breastfeeding is to take place 'where applicable, provided that the competent authority has given its consent', does the Directive require that a worker who is pregnant, has given birth or is breastfeeding may be dismissed only by means of a special procedure in which the appropriate competent authority gives its consent prior to the dismissal which the employer seeks?

3. Judgment of the Court

With respect to the first question, the Court notes that the provisions of Article 10 of Directive 92/85 impose on Member States, namely in their capacity of employer, precise obligations which afford them no margin of discretion in their performance (paragraph 33).

On the second question, the Court holds that it is clear from the wording of Article 10 paragraph 1 of the directive that it does not impose on the Member States any obligation to draw up a specific list of the reasons for dismissal which, by exception, would be allowed in the case of pregnant workers, workers who have recently given birth and workers who are breastfeeding. This being the case, according to the Court, the aforesaid Directive, which lays down minimum provisions, does not in any way prevent the Member States from providing for higher protection for those workers, by laying down specific grounds on which such workers may be dismissed (paragraph 37).

On the third question, the Court notes that the Directive makes no distinction, as regards the scope of the prohibition of dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding, based on the duration of the employment relationship in question. If the Community legislature had intended to exclude fixed-term contracts, which represent a significant proportion of employment relationships, from the scope of that directive it would have made express provision to that effect (judgment of 4 October 2001 in Case C-109/00 *Tele Danmark* [2001] ECR I-6993, paragraph 33). However, the Court finds that it is clear that the non-renewal of a fixed-term employment contract, when it reaches the end of its stipulated term, cannot be regarded as a dismissal; as such, non-renewal is not contrary to Article 10 of Directive 92/85. However, it underlines that in certain circumstances, non-renewal of a fixed-term contract could be viewed as a refusal of employment. Yet, the Court observes that it is settled case-law that a refusal to employ a female worker, who is otherwise judged capable of performing the work concerned, based on her state of pregnancy constitutes direct discrimination on grounds of sex, contrary to Articles 2(1) and 3(1) of Directive 76/207 (judgments of 8 November 1990, Case C-177/88 *Dekker* [1990] ECR 3941, paragraph 12, and of 3 February 2000, Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 20). The Court states that it is for the national court to determine whether the non-renewal of an employment contract following a succession of fixed-term contracts was in fact motivated by the worker's state of pregnancy (paragraphs 43–46).

On the fourth question, the Court observes that Article 10(1) of Directive 92/85 is limited to taking account of the possible existence, in the legal systems of some Member States, of prior consent procedures, to which the dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding would be subject. It rules that, if such a procedure does not exist in a Member State, that provision does not require it to introduce one (paragraph 51).

The Court (Fifth Chamber) hereby rules:

1) *Article 10 of Council Directive 92/85/EEC of 19 October 1992, on the introduction of measures*

to encourage improvements in the workplace health and safety of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), has direct effect and is to be interpreted to the effect that, in the absence of transposition measures taken by a Member State within the period prescribed by that directive, it confers on individuals rights on which they may rely before a national court against the authorities of that State.

2) *In allowing derogations from the prohibition of dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding in cases 'not connected with their condition which are permitted under national legislation and/or practice', Article 10(1) of Directive 92/85 does not require the Member States to specify the particular grounds on which such workers may be dismissed.*

3) *If the prohibition of dismissal laid down in Article 10 of Directive 92/85 applies to both employment contracts for an indefinite period and fixed-term contracts, non-renewal of such a contract, when it comes to an end as stipulated, cannot be regarded as a dismissal prohibited by that provision. However, where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex, contrary to Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.*

4) *In providing that the dismissal of a pregnant worker, of a worker who has recently given birth or of a worker who is breastfeeding may take place, in exceptional cases 'and, where applicable, provided that the competent authority has given its consent', Article 10(1) of Directive 92/85 is not to be interpreted as imposing on Member States any obligation to have a national authority, having found that there is an exceptional case justifying the dismissal of such a worker, give its consent prior to the employer's decision to dismiss the worker.*

Case C-109/00
TELE DANMARK A/S/HANDELS-OG KONTORFUNKTIONÆRENES FORBUND I DANMARK (HK), ACTING ON BEHALF OF MS MARIANNE BRANDT-NIELSEN
Date of judgment:
4 October 2001
Reference:
ECR [2001] I-6993
Content:
Directives 76/207/EEC (Article 5) and 92/85/EEC (Article 10) — Pregnancy — Redundancy — Fixed-term employment contract — Size of the undertaking concerned

1. Facts and procedure

In June 1995, Ms Brandt-Nielsen was recruited by Tele Danmark A/S (hereafter 'Tele Danmark') for a period of six months from 1 July 1995, to work in its customer service department for mobile telephones. In August 1995, Ms Brandt-Nielsen informed Tele Danmark that she was pregnant and expected to give birth in early November. Shortly afterwards, on 23 August 1995, she was dismissed with effect from 30 September, on the ground that she had not informed Tele Danmark that she was pregnant when she was recruited.

Under the applicable collective agreement, Ms Brandt-Nielsen would have been entitled to paid maternity leave starting eight weeks before the expected date of giving birth. In the present case, that period should have started on 11 September 1995.

2. Questions referred to the Court

1) Does Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and/or Article 10 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, or other provisions in those directives or elsewhere in the Community law preclude a worker from being dismissed on the ground of pregnancy in the case where

   - the woman in question was recruited as a temporary worker for a limited period;
   - the woman knew that she was pregnant when she entered into the contract of employment, but did not inform the employer of that fact; and
   - her pregnancy meant that the worker was unable to work for a significant portion of her period of employment?

2) Does the fact that the employment occurs in a very large undertaking and that that undertaking frequently uses temporary workers have any bearing on the answer to the first question?

3. Judgment of the Court

In relation to the first question, the Court recalls that as it has held on several occasions, the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, contrary to Article 5(1) of Directive 76/207 (judgments of 8 November 1990, Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 13, of 5 May 1994 Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 15, and of 14 July 1994, Case C-32/93 *Weber* [1993] ECR I-3567, paragraph 19). It underlines that it is also in view of the risk that the possibility of dismissal may pose for the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, including the particularly serious risk that they may be encouraged to have abor-

tions, that the Community legislature, in Article 10 of Directive 92/85, laid down special protection for those workers by prohibiting dismissal during the period from the start of pregnancy to the end of maternity leave (paragraphs 25–26).

Further, the Court recalls that in paragraph 26 of *Webb*, the Court also ruled that while the availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during the period corresponding to maternity leave is essential to the proper functioning of the undertaking in which she is employed. The Court considers that such an interpretation cannot be altered by the fact that the contract of employment was concluded for a fixed term (paragraphs 29–30).

The Court notes that since the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex, whatever the nature and extent of the economic loss incurred by the employer as a result of her absence because of pregnancy, whether the contract of employment was concluded for a fixed or an indefinite period has no bearing on the discriminatory character of the dismissal: in either case, the employee's inability to perform her employment contract is due to her pregnancy. The Court further specifies that the duration of an employment relationship is a particularly uncertain element of the relationship in that, even if the worker is recruited under a fixed-term contract, such a relationship may be for a longer or shorter period, and is moreover liable to be renewed or extended. Finally, according to the Court, one must note that Directives 76/207 and 92/85 do not make any distinction, as regards the scope of the principle of equal treatment for men and women, according to the duration of the employment relationship in question. Had the Community legislature wished to exclude fixed-term contracts, which represent a substantial proportion of employment relationships, from the scope of those directives, it would have done so expressly (paragraphs 31–33).

On the second question, which in the opinion of the parties to the main proceedings, the Commission and the EFTA Surveillance Authority should be answered in the negative, the Court observes that Directives 76/207 and 92/85 do not make any distinction, as regards the scope of the prohibitions they lay down and the rights they guarantee, based on the size of the undertaking concerned. As regards the circumstance that the employer makes considerable use of fixed-term contracts, the Court reiterates that the duration of the employment relationship has no bearing on the extent of the protection guaranteed to pregnant workers by Community law (paragraphs 36–38).

The Court (Fifth Chamber) hereby rules:

1) *Articles 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Article 10 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the workplace health and safety of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) are to be interpreted as precluding a worker from being dismissed on the ground of pregnancy*

   - *where she was recruited for a fixed period,*
   - *when she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded,*
   - *and that because of her pregnancy she was unable to work during a substantial part of the term of that contract.*

2) The fact that the worker has been recruited by a very large undertaking which employs temporary workers frequently is of no relevance to the interpretation of Article 5(1) of Directive 76/207 and Article 10 of Directive 92/85.

Case C-379/99
PENSIONSKASSE FÜR DIE ANGESTELLTEN DER BARMER ERSATZKASSE VVAG/HANS MENAUER
Date of judgment
9 October 2001
Reference:
ECR [2001] I-7275
Content:
Article 119 of the Treaty (Article 141 EC) — Occupational supplemental pension scheme — Survivor's pension — Enforceability of Article 119 against a pension fund entrusted with carrying out the employer's obligation as regards payment of the allowance — Impact of complete legal protection of the worker against the employer under national law

1. Facts and procedure

Mr Menauer's wife was employed by the Barmer Ersatzkasse (Barmer Private Sickness Insurance Fund) until her death. Under a clause in Mrs Menauer's contract of employment the contract was governed by the Ersatzkassentarifvertrag (Private Sickness Insurance Funds' Collective Agreement, hereafter 'the EKTV'). Under the provisions of the EKTV, the Barmer Ersatzkasse is liable to pay its male and female employees occupational pension benefits. The pension payments comprise a retirement pension, which the Barmer Ersatzkasse itself is liable to pay, and a supplementary pension, paid by the Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG (Barmer Ersatzkasse Employees' Pension Fund, hereafter 'the Fund'). Under the terms of the EKTV, the Barmer Ersatzkasse is responsible for payment of contributions to the pension fund on behalf of its employees. In addition, Paragraph 11(2)(a) of the rules of the Fund, entitled 'Types of benefits', provides:

'A widower's pension is paid to the widow of a deceased member. A widower's pension is paid to a surviving husband on the death of a wife who was a member of the scheme where the deceased was the main breadwinner in the family.'

Mr Menauer claimed that the additional requirement to which Article 11, above, makes payment of a widower's pension subject is contrary to the principle of equal treatment.

The national court indicates in particular that under German labour law, the employer remains liable to provide the pension to which the employee is entitled, even in a case such as the present where the Fund's rules contravene the prohibition on discrimination. It must therefore make good the shortfall itself by providing the benefits concerned, and cannot avoid that obligation. Furthermore the employee is protected against the employer's insolvency.

2. Question referred to the Court

Must Article 119 of the EC Treaty be interpreted as meaning that pension funds must be considered to be employers and obliged to treat men and women equally as regards payment of occupational old-age pensions, even though disadvantaged employees have an entitlement, which is secured against insolvency and excludes discrimination, against the body directly responsible for provision of a pension, that is to say the employer as a party to the employment contract?

3. Judgment of the Court

The Court recalls, first that a retirement pension paid under an occupational scheme set up under a collective agreement falls within the scope of Article 119 of the Treaty (see, in particular, judgments of 13 May 1986, Case 170/84 *Bilka* [1986] ECR 1607, paragraphs 20 and 22, and of 17 May 1990, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 28, and of 14 December 1993, Case C-110/91 *Moroni* [1991] ECR I-6591, paragraph 15), and in particular that this is so for a survivor's pension created by such scheme (see judgments of 6 October 1993, Case C-109/91 *Ten Oever* [1991] ECR I-4879, paragraphs 12 and 13, of 28 September 1994, Case C-200/91 *Coloroll Pension Trustees* [1991] ECR I-4389, paragraph 18, and of 17 April 1997, Case C-147/95 *Evrenopoulos*

[1997] ECR I-2057, paragraph 22) (paragraphs 17–18).

On the question whether a surviving spouse can rely on Article 119 with regard to an outside body, such as a pension fund under German law ('Pensionskasse'), to which the employer has entrusted payment of the benefits concerned and which is legally independent, the Court recalls that the applicability of Article 119 of the Treaty to an occupational pension scheme is not thwarted by the fact that the scheme has been set up in the form of a trust and is administered by trustees who are technically independent of the employer, since Article 119 also applies to benefits received indirectly from the employer (see *Barber*, paragraphs 28 and 29, and *Coloroll Pension Trustees*, paragraph 20). It concludes that since the persons who are entrusted with administering an occupational pension scheme are required to pay benefits which constitute pay within the meaning of Article 119 of the Treaty, they are bound to comply with the principle of equal treatment laid down in that provision, whatever the legal form of those persons or the manner in which they are responsible for administering that pension scheme. According to the Court this finding applies equally to pension funds governed by German law, such as that in the main proceedings, and neither the legal independence that they enjoy nor indeed their status as insuring bodies are of any importance in that respect (paragraphs 20–27).

The Court further examines whether the obligation to comply with Article 119 of the Treaty also extends to a body such as a German pension fund if employees who are discriminated against by that body on the basis of sex, or dependants of those employees, may turn to the employer, who, under national regulations, remains directly liable for the benefits paid by that body, and they enjoy to that end a protected right in the event of the insolvency of the employer that excludes all discrimination. In this respect, the Court recalls that the effectiveness of Article 119 of the Treaty would be considerably diminished and the legal protection required to ensure real equality would be seriously impaired if an employee or an employee's dependants could rely on that provision only as against the employer, and not as against those who are expressly charged with performing the employer's obligations (see to that effect *Coloroll Pension Trustees*, paragraph 23, and judgment of 28 September 1994, Case C-128/93 *Fisscher* [1994] ECR I-4583, paragraph 31). The Court rules that this finding remains valid, even in a situation where, according to national law employees discriminated against on the basis of sex, or their dependants, enjoy complete legal protection as against their employer. For Article 119 of the Treaty to be effective, any person who has to pay benefits falling within the scope of that provision must comply with it. To force employees or their dependants to turn to the employer alone, to the exclusion of the body responsible for paying benefits, would amount to limiting the number of persons against whom the employees concerned or their dependants can enforce their rights (paragraphs 28–30).

The Court (Sixth Chamber) hereby rules:

Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) must be interpreted to the effect that bodies such as German pension funds ('Pensionskassen') entrusted with providing benefits under an occupational pension scheme are required to ensure equal treatment between men and women, even if the employees discriminated against on the basis of sex have, as against those directly liable, namely their employers in their capacity as parties to their employment contracts, a protected right in the event of insolvency that excludes all discrimination.

Case C-366/99
JOSEPH GRIESMAR/MINISTER OF ECONOMIC AFFAIRS, FINANCE AND INDUSTRY AND MINISTER OF PUBLIC SERVICE, STATE REFORM AND DECENTRALISATION
Date of judgment
29 November 2001
Reference:
ECR [2001] I-9383
Content:
Article 119 of the Treaty (Article 141 EC) — Civil servants' retirement scheme — Definition of 'pay' — Service credit for children reserved for female civil servants — Comparable situation — Article 6(3) of the Agreement on Social Policy — Time limits for the effects of the judgment

1. Facts and procedure

The French civil service retirement pension scheme is set out in the Code des pensions civiles et militaires de retraite (hereafter 'the Code'). Pursuant to Article L. 12(b) of the Code:

'Under conditions determined by rules of public administration, the following service credits shall be added to the periods of service actually completed:

[...]

b) An additional service credit granted to female civil servants for each legitimate child, each natural child of established paternity, and each adopted child, and, subject to the condition that they have been brought up for at least nine years before reaching their twenty-first birthday, for each of the other children listed in paragraph II of Article L. 18.'

Mr Griesmar, a French magistrate and father of three children, was granted a retirement pension by decree of 1 July 1991, in accordance with the Code. For the calculation of that pension, account was taken of the years of service actually completed by Mr Griesmar. However, no account was taken of the additional service credit provided for under Article L. 12(b) of the Code.

2. Questions referred to the Court

1) Do the pensions provided by the French retirement pension scheme for civil servants constitute pay within the meaning of Article 119 of the Treaty of Rome (Article 141 of the Treaty establishing the European Community)? If the answer is positive, in the light of the requirements of paragraph 3 of Article 6 of the Agreement annexed to Protocol No 14 on Social Policy, is the principle of equal pay breached by the provisions of Article L. 12(b) of the Civil and Military Retirement Pensions Code?

2) If Article 119 of the Treaty of Rome is not applicable, do the provisions of Directive 79/7/EEC of 19 December 1978 prevent France from maintaining provisions such as Article L. 12(b) of the Civil and Military Retirement Pensions Code?

3. Judgment of the Court

On the first part of the first question, the Court recalls its judgment of 28 September 1994, *Beune* (Case C-7/93 [1994] ECR I-4471) (paragraphs 27–30).

Applying this case-law to the scheme in the main proceedings in the present case, the Court first points out that civil servants who benefit under that scheme must be regarded as constituting a particular category of workers. They are distinguished from employees grouped within an undertaking or group of undertakings in a particular sector of the economy, or in a trade or inter-trade sector, only by reason of the specific features governing their employment relationship with the State, or with other public employers or bodies (see, to this effect, *Beune* cited above, paragraph 42) (paragraph 31).

Second, it observes that it follows from Article L.1 of the Code that the pension there referred to is granted as pay for the services performed by civil servants until they cease regular work, and its amount takes account of the level, duration and nature of the services rendered. It also notes that pursuant to Articles L. 13 to L. 15 of the Code, as well as from the information provided by the French Government that this amount results from the multiplication of a rate by a basic amount, that the rate is established by annual instalments, which are determined by the number of years of service. Each annual instalment is equivalent to 2 %, subject to the proviso that the rate obtained after taking into account the years of service cannot exceed 75 %, that the basic amount is the salary corresponding to the last salary index applicable to the civil servant during his or her final six months at work, that this index depends on the level of the post, that is to say, the grade, and on the time spent in the post, that is to say, seniority, expressed in terms of steps, and finally that various service credits may serve to supplement the number of annual instalments. It concludes that the pension provided under the French retirement scheme for civil servants is determined directly by length of service and that its amount is calculated on the basis of the salary which the person concerned received during his or her final six months at work (paragraphs 32–34).

Consequently the Court finds that this pension satisfies the criterion of employment which the Court, in the judgment in *Beune*, already cited, held to be decisive for the purpose of characterising, with respect to Article 119 of the Treaty, pensions provided under a retirement scheme for civil servants (paragraph 35).

The French Government having pointed out that, unlike the Dutch scheme at issue in *Beune* (see above), which was a supplementary pension scheme operating by capitalisation and based on joint management, the French retirement scheme for civil servants is a basic scheme under which the amount of the pensions provided is not guaranteed by a retirement pension fund but results directly from the annual law on finances, and thus without the need for management or capitalisation of any fund, the Court finds that it follows from paragraphs 37 and 38 of the *Beune* judgment (see above) that neither the criterion derived from the supplementary nature of a pension in relation to a basic pension provided by a statutory social security scheme nor the criterion relating to the arrangements for funding and managing a pension scheme is conclusive for the purpose of determining whether the scheme in question falls within the scope of Article 119 of the Treaty (paragraphs 36–37).

On the second part of the first question, the Court starts by asking whether a difference in treatment on the basis of sex exists. In this regard it is necessary to determine whether, in relation to the grant of the additional service credit at issue in the main proceedings, the situations of a male civil servant and a female civil servant who are respectively the father and mother of children are comparable. In this respect, it recalls that for the purpose of applying the principle of equal pay, the situation of a male worker is not comparable to that of a female worker where the advantage granted to the female worker alone is designed to offset the occupational disadvantages, inherent in maternity leave, which arise for female workers as a result of being away from work (see judgment of 16 September 1999, Case C-218/98 *Abdoulaye e.a.* [1999] ECR I-5723, paragraphs 18, 20 and 22). According to the Court, it is therefore necessary to establish whether the credit is designed to offset the occupational disadvantages which arise for female workers as a result of being absent from work during the period following childbirth, in which case the situation of a male worker is not comparable to that of a female worker, or whether it is designed essentially to offset the occupational disadvantages which arise for female workers as a result of having brought up children, in which case it will be necessary to examine the question whether the situations of a male civil servant and a female civil servant are comparable (paragraphs 40–46).

With regard to this, the Court finds, firstly, that even if the credit at issue in the main proceedings is granted, in particular, to female civil servants in respect of their legitimate and natural children, thus their biological children, the grant of that credit is not linked to maternity leave or to the disadvantages which a female civil servant incurs in her career as a result of being absent from work during the period following the birth of a child. The Court observes, on the one hand, that there is nothing in Article L. 12(b) of the Code which establishes a link between the credit provided for and any career disadvantages resulting from maternity leave. On the other hand, the credit under consideration is also granted in respect of adopted children without being linked to a prior grant of adoption leave to the mother. According to the Court, this analysis is not invalidated by the fact that, in the case of the legitimate, natural or adopted children of the pension holder, Article L. 12(b) of the Code does not make the grant of the credit subject to the condition that the pension holder has brought up those children, whereas that is required in regard to the other children mentioned in Article L. 18, paragraph II, of the Code. Indeed, the Court notes that it appears that the national legislature used a single criterion for granting the credit at issue in the main proceedings, namely that relating to the upbringing of the children and that, in the case of legitimate, natural or adopted children, it simply took it for granted that they were brought up at the home of their mother (paragraphs 52-55).

Second, the Court observes that the situations of a male civil servant and a female civil servant may be comparable as regard the bringing-up of children. In particular, the Court considers that the fact that female civil servants are more affected by the occupational disadvantages entailed in bringing up children, because this is a task generally carried out by women, does not prevent their situation from being comparable to that of a male civil servant who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages. The Court underlines that Article L. 12(b) of the Code does not permit a male civil servant who is in such a situation to receive the credit at issue in the main proceedings, even if he is in a position to prove that he did in fact assume the task of bringing up his children The court finds therefore that, irrespective of the question whether such proof should also be demanded of female civil servants who have children, the Court therefore finds that Article L. 12(b) of the Code introduces a difference in treatment on grounds of sex in regard to male civil servants who have in fact assumed the task of bringing up their children (paragraphs 56–58).

Examining thereafter whether Article L. 12(b) of the Code may be justified under Article 6(3) of the Agreement on Social Policy, pursuant to which 'This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers,' the Court observes that the credit at issue in the main proceedings is not a measure contemplated in that provision of the Agreement on Social Policy. Article 6(3) authorises national measures intended to eliminate or reduce actual instances of inequality which result from the reality of social life and affect women in their professional life. It follows, according to the Court, that the national measures covered by that provision must, in any event, contribute to helping women conduct their professional life on an equal footing with men. Yet, the Court notes that the measure at issue in the main proceedings does not appear to be of a nature such as to offset the disadvantages to which the careers of female civil servants are exposed by helping those women in their professional life. The Court finds that on the contrary, that measure is limited to granting female civil servants who are mothers an additional service credit at the date of their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career (paragraphs 63–65).

Considering the reply to the first question, the Court rules that it is not necessary to reply to the second question (paragraphs 67–68).

The French Government requested the Court to limit in time the effects of its judgment, arguing in particular that any misinterpretation by the French authorities of Article 119 of the Treaty and Article 6(3) of the Agreement on Social Policy stems from a legal uncertainty discernible in the Court's case-law concerning positive action in favour of women, and in this respect by referring to the judgments of 17 October 1995, Case C-450/93 *Kalanke* [1995] ECR I-3051,), and of 11 November 1997, Case C-409/95 *Marschall* [1997] ECR I-6363); of 28 March 2000, Case C-158/97 *Badeck e.a.* [2000] ECR I-1875), and *Abdoulaye e.a.* above. The Court rejects this request. It finds that the credit at issue in the main proceedings is, in terms of the detailed rules governing its award and of its objective, entirely different from the measures which were the subject of the judgments cited by the French Government, with the result that that government cannot rely on those judgments in order to demonstrate the existence of objective and significant uncertainty as to the validity of that credit from the point of view of Community law. Moreover, the Court considers, it is not established that the number of retired male civil servants who are able to prove that they assumed the task of bringing up their children is such as to give rise to serious economic repercussions (paragraphs 70–77).

The Court hereby rules:

Pensions provided under a scheme such as the French retirement scheme for civil servants fall within the scope of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

Notwithstanding what is provided in Article 6(3) of the Agreement on Social Policy, a provision such as Article L. 12(b) of the French Civil and Military Retirement Pensions Code infringes the principle of equal pay inasmuch as it excludes male civil servants who are able to prove that they assumed the task of bringing up their children from entitlement to the credit which it introduces for the calculation of retirement pensions.

Case C-206/00
HENRI MOUFLIN/RECTEUR DE L'ACADEMIE DE REIMS
Date of judgment
13 December 2001
Reference:
ECR [2001] I-10201
Content:
Article 119 of the Treaty (Article 141 EC) — Civil servants' retirement scheme — Definition of 'pay' — Immediate enjoyment of the pension for female civil servants only — Comparable situation

1. Facts and procedure

The French scheme governing the retirement of civil servants is set out in the Code des pensions civiles et militaires de retraite (hereafter 'the Code'). Pursuant to Article L. 24-I-3 of the Code:

'The entitlement to the civil pension has immediate effect:

[...]

3. For female public servants:

[...]

b) where it is proven in accordance with the procedure laid down by Article L. 31:

that they suffer from a disability or incurable illness which makes it impossible for them to perform their former duties;

or that their husband suffers from a disability or incurable illness which makes it impossible for him to undertake any form of employment'.

Mr Mouflin is a school-teacher and civil servant in the Marne *département*. He applied, on the basis of Article L. 24-I-3. of the Code, to be allowed to claim his retirement pension rights with immediate effect so as to be able to care for his wife who was suffering from an incurable illness. His application was rejected on 6 November 1998 by letter from the Minister of National Education, stating that 'the right to retire to care for an invalid spouse is reserved exclusively to female civil servants.'

2. Question referred to the Court

1) Do the pensions provided by the French retirement pension scheme for civil servants constitute pay within the meaning of Article 119 of the Treaty of Rome (now Article 141 of the Treaty establishing the European Community)? If so, is the principle of equal pay breached by the provisions of Article L. 24-I-3. of the Civil and Military Retirement Pensions Code?

2) If Article 119 of the Treaty of Rome is not applicable, do the provisions of Directive 79/7/EEC of 19 December 1978 prevent France from maintaining in force provisions such as Article L. 24-I-3. of the Civil and Military Retirement Pensions Code?

3. Judgment of the Court

On the first part of the first question, the Court refers to its judgment of 29 November 2001, *Griesmar* (Case C-366/99 [2001] ECR 1-9383), in which the Court ruled that the pensions provided under a scheme such as the French retirement scheme for civil servants fall within the scope of Article 119 of the Treaty (paragraphs 21–22).

On the second part of the first question, the Court holds that as for the entitlement to a retirement pension with immediate effect provided for by Article L.24-I-3. of the Code, male and female civil servants are in comparable situations. According to the Court, there is nothing to distinguish the situation of a male civil servant whose wife suffers from a disability or incurable illness making it im-

possible for her to undertake any form of employment from that of a female civil servant whose husband suffers from such a disability or disease. The Court notes that Article L.24-I-3. of the Code does not entitle a male civil servant whose wife is disabled to receive a retirement pension with immediate effect. The Court therefore concludes that this provision discriminates against male civil servants in such a situation on grounds of sex (paragraphs 29–30).

Considering the reply to the first question, the Court rules that it is not necessary to reply to the second question (paragraphs 32–33).

The Court (Second Chamber) hereby rules:

Pensions provided under a scheme such as the French retirement scheme for civil servants fall within the scope of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

The principle of equal pay for men and women enshrined in Article 119 of the Treaty is infringed by a provision of national law such as Article L.24-I-3.(b) of the Civil and Military Retirement Pensions Code which, in providing that only female civil servants whose husbands suffer from a disability or incurable illness making it impossible for them to undertake any form of employment are entitled to a retirement pension with immediate effect, deprives male civil servants in the same situation of that right.

Case C-476/99
H. LOMMERS/MINISTER VAN LANDBOUW, NATUURBEHEER EN VISSERIJ
Date of judgment:
19 March 2002
Reference:
ECR [2002] I-2891
Content:
Directive 76/207/EEC (Article 2(4)) — Working conditions — Subsidised nursery places made available by a Ministry to its staff — Reservation of places for children of female civil servants only — Equal opportunities — Proportional representation.

1. Facts and procedure

In the Netherlands, on 15 November 1993, the Ministry of Agriculture adopted Circular No P93 — 7841 (hereafter the 'Circular') according to which the Ministry would make a certain number of nursery places available to its female staff. Some of these places would be found in a nursery owned by the Ministry of Agriculture and some would be obtained by the aforementioned ministry in public childcare centres. Civil servants who obtained a nursery place for their child must pay a parental contribution at an amount set according to their income and is on a sliding scale for children of the same family. The Circular states in particular:

'Childcare services are, in principle, exclusively reserved for female employees of the ministry, except in emergency cases at the manager's discretion'.

Mr Lommers is a civil servant at the Ministry of Agriculture. His wife works for another employer. On 5 December 1995, Mr Lommers asked the Minister of Agriculture to reserve a nursery place for his child that was soon to be born. This request was rejected on the grounds that the children of male employees cannot benefit from nursery services, except in emergency cases.

2. Questions referred to the Court

Does Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions preclude rules of an employer under which subsidised nursery places are made available only to female employees save where, in the case of a male employee, an emergency situation, to be determined by the employer, arises?

3. Court ruling

In the first place, the Court found that employer childcare provision, on site or elsewhere, must be considered as a 'working condition' as defined in Council Directive 76/207. The court ruled that this categorisation could not be rejected in favour of a categorisation by pay, due to the fact that the cost of the aforementioned nursery places is partially borne by the employer. In this regard, the court reiterated its previous judgment in which it was decided that because the fact that implementation of some working conditions may have pecuniary consequences is not sufficient reason to deal with them under EC Treaty Article 119, which is a provision based on the close connection existing between the nature of the work done and the amount of pay (rulings of 15 June 1978, Defrenne III, 149/77, [1978] ECR 1365, (21), and of 30 March 2000, Jamo, C-236/98, [2000] ECR I-2189, (59)). In addition, the Court believes that such a measure as that at issue in the main proceedings is, above all else, of a practical nature. The primary object and effect of such a measure, in particular in a context where there are insufficient nursery places available, is to facilitate the exercise of the professional activity of the workers involved (paragraphs 26–29).

Secondly, the court noted that there was clearly, in this case, a difference in treatment based on gender, as defined by Articles 2(1) and Article 5(1) of the directive. The situations of a male and a female worker, as father and mother respectively, of young children, are effectively comparable as re-

gards the need to use nursery services because they are in employment (paragraph 30).

In the third place, the Court established whether a measure such as this is nonetheless admitted by Article 2(4) of the Directive. The Court recalled that it had ruled that this provision did not preclude a national public-sector regulation which granted at least half of all training places to women. However, this only concerns certain professions where women are under-represented and where the State is not the only training provider. Having pointed out that such a rule forms part of a restricted concept of equality of opportunity, insofar as these are not places in employment that are reserved for women, but places on training courses with a view to obtaining qualifications with the prospect of subsequent access to qualified professions in the civil service. It is therefore limited to improving the chances of female candidates in the public sector ... The Court therefore held that this measure comes under those which propose to eliminate obstacles to accessing the labour market for women, and are intended to increase their opportunities to compete on the labour market and pursue a career on an equal footing with men (ruling of 28 March 2000, *Badeck et al*., C-158/97, [2000] ECR I-1875, (paragraphs 52–55) (paragraphs 31–33).

The Court considers that similar considerations would suggest that a measure such as that at issue in the main proceedings — which in any case meets the guidelines in points 1, 3, 4 and 8 of Recommendation 84/635 of the Council of 13 December 1984 (OJ L 331, p. 34) — does not infringe Article 2(1) and (4) of the Directive. Firstly, the Court noted that at the time when the Circular was adopted and at the material time in the main proceedings, the employment situation within the Ministry of Agriculture was characterised by a significant under-representation of women, both in terms of the number of women working there and their occupation of higher grades. Secondly, the court highlighted that it is more likely to be women who give up work because of an acknowledged lack of adequate childcare. The court concluded that, in these conditions, such a measure as that at issue in the main proceedings, which forms part of the restricted concept of equality of opportunity, insofar as it is not places of employment that are reserved for women, but enjoyment of certain workplace conditions designed to facilitate pursuit and progression in their professional career comes under those measures which are designed to eliminate reasons the causes of women's reduced opportunities for access to employment and careers and are intended to improve their ability to compete on the labour market and to pursue a career on an equal footing with men. The Court added that in this regard, it is up to the referring court to determine whether the factual circumstances recalled here are indeed established (paragraphs 34–38).

Nonetheless, the Court specified that it would be appropriate, when determining the scope of an exemption from an individual right, such as equal treatment between men and women laid down by the Directive, to respect the principle of proportionality which requires that exemptions do not exceed the limits of what is appropriate and necessary in order to achieve that result (paragraph 39).

In this regard, the Court judged that account must be taken of the fact that there is insufficient supply as outlined above, the number of nursery places available under the measure at issue is limited and that there are waiting lists for female civil servants at the Ministry of Agriculture so that the latter are not themselves assured of being able to obtain such a place (paragraph 43).

The court noted, additionally, that a measure such as that at issue in this case does not in the least deprive either the male workers concerned, or indeed the female workers who could not obtain a nursery place subsidised by the Ministry of Agriculture, of access to nursery places for their children, as these are still available on the relevant services market.

The Court reiterated also that this measure does not completely exclude male civil servants from its sphere of application, but rather authorises the

employer to allow them to apply in urgent cases at their discretion. The Court indicated, in this regard, that a measure excluding male civil servants who are sole carers for their children from access to a childcare scheme subsidised by the employer would go beyond the dispensation described in Article 2(4) of the Directive by interfering excessively with the individual right to equal treatment which the aforementioned Directive guarantees (paragraphs 45–47).

In these circumstances, the Court ruled that it cannot be maintained that the fact that the Circular does not guarantee access to nursery places on the basis of equality among civil service employees of both sexes is contrary to the principal of proportionality (paragraph 48).

As for the fact that the wife of the applicant in this case may potentially encounter difficulties in pursuing her professional career, given the need to care for the couple's young children, the Court ruled that this point did not seem relevant to the evaluation of the validity of the measure in question, in the light of Article 2, paragraphs 1 and 4 of the Directive. Effectively, as far as working conditions determined by an employer are concerned, the principle of equal treatment could only, by definition, be applied to that employer's own workers, as in paragraph 49.

The Court hereby rules:

Article 2(1) and (4) of Council Directive 76/207/EEC dated 9 February 1976, concerning the principle of equal treatment between men and women in relation to access to work, training, promotion and working conditions does not preclude a regulation which is introduced by a ministry in order to tackle significant under-representation of women in its organisation and which, in a context characterised by a well-established shortage of suitable, affordable childcare centres, reserves the limited number of subsidised childcare places for female employees only, whilst male employees may only have access to this system in urgent cases at the employer's discretion. However, this is only so if the exception thus provided for in favour of male civil servants is interpreted particularly as meaning that those who have sole responsibility for their children are allowed to have access to nursery places scheme on the same conditions as female officials.

Case C-351/00
PIKKO NIEMI
Date of judgment:
12 September 2002
Reference:
ECR [2002]. I-7007
Content:
Article 119 of the Treaty (EC Article 141) — Public service retirement system — Retirement payment — Retirement age

1. Facts and procedure

Ms Niemi served in the Finnish defence forces as an enlisted public servant. As such, she fell within the scope of the pension scheme provided by the 'valtion eläkelaki' 280/1966, modified by Law 638/1994 (*hereafter* 'Law 280/1996'), for which the age limit is fixed by 'Asetus puolustusvoimista' 667/1992 (Regulation on the defence forces), as modified by Regulation 1032/1994. The aforementioned scheme is managed by the Valtiokonttori, which rules on pension applications at first instance. In order to determine the age at which she would have the right to draw a retirement pension based on years of service, Ms Niemi asked the aforementioned Valtiokonttori for a preliminary binding decision. By the decision dated 26 April 1995, the latter party determined that Ms Niemi did not have the right to draw a retirement pension before reaching 60 years of age.

Mrs Niemi believes that she has the right to benefit from a retirement pension from 55 years of age. She asserts that a man, having pursued exactly the same career as her own, and having fulfilled exactly the same duties, can draw a retirement pension from the age of 50–55, whilst for women serving in the defence forces, the age is 60 years of age without exception. Therefore, she maintains that the transitional provisions of the current pension scheme concerning defence force employees are discriminatory on grounds of sex.

2. Question referred to the Court

Does the pension scheme provided by the valtion eläkelai fall under the scope of Article 141 EC or that of Council Directive 79/7/EEC?

3. Court ruling

The Court applied criteria extracted from its judgments dated 28 September 1994, *Beune* (C-7/93, [1994] ECR I-4471) and 29 November 2001, *Griesmar* (C-366/99, [2001] ECR I-9383) to the disputed pension scheme in order to qualify, in the light of Treaty Article 119, the benefits available under a pension scheme for public servants.

First, in relation to the criterion according to which a pension must only concern a particular category of workers, the Court observed that, although the retirement scheme established by Law 280/1966 was introduced for all state employees, access to the pension benefits that it provides is linked to age limits which are specifically fixed for certain categories of public servants, such as those enlisted in the defence forces, which are different from the age limits of the general retirement scheme established by the aforementioned law. The Court ruled, therefore, that if the group comprising all public servants was considered to constitute a particular category of workers, the same applies *a fortiori* for the group of Finnish people serving in the defence force, who are seen as distinct from other public servants. (48–49)

Second, in reference to the criterion according to which the pension payment must be directly linked to the period of service fulfilled, the Court noted that an individual does not have the right to a pension as defined by Law 280/1966 unless that individual is linked to the state either as a civil servant or as a state employee. The age limit at which a civil servant must leave work, thus giving rise to the right to pension entitlements, is in the present case directly related to the period of service completed. Finally, the level of the pension paid under that law is determined by how long the person concerned has worked (50).

Third, concerning the amount of the benefits involved, the Court noted that pension benefits provided according to Law 280/1966 are calculated on the basis of the average pay received during a period limited to a few years immediately preceding the employee's retirement. According to the Court, such a basis of calculation essentially satisfies the criterion it applied previously in the abovementioned *Beune* and *Griesmar* judgments, according to which the amount of the pension is calculated on the basis of the public servant's last salary (51).

The court concluded that a pension paid in accordance with a scheme such as that established by Law 280/1966 satisfied the three criteria characterising the employment relationship that, in the abovementioned *Beune* and *Griesmar* judgments, the court had considered decisive for characterising benefits provided under a civil servant's pension scheme with respect to Treaty Article 119 (52).

The court added that Treaty Article 119 prohibits all pay-related discrimination between male and female employees, whatever the means that gives rise to this inequality, and that, therefore, establishing different age conditions according to sex for access to employment-related pensions for workers in the same or comparable situations is contrary to the aforementioned Treaty (paragraph 53).

The Court (Fifth Chamber) hereby rules:

A pension such as that paid in accordance with Valtion eläkelaki 280/1966 (Finnish law on State personnel and pensions) such as that modified by Law 638/1994, comes under the scope of Article 119 of the EU Treaty (Articles 117–120 of the EU Treaty have been replaced by Articles 136 EC to 143 EC).

Case C-320/00
A.G LAWRENCE AND OTHERS/REGENT OFFICE CARE LTD, COMMERCIAL CATERING GROUP AND MITIE SECURE SERVICES LTD
Date of judgment:
17 September 2002
Reference:
ECR [2000] I-7325
Content:
EC Article 141 — Direct effect — Applicability — Different employers — Differences in pay not attributable to a single source

1. Facts and procedure

Until approximately 1990, North Yorkshire County Council (hereafter the 'Council') itself assumed responsibility for the cleaning and catering services in educational establishments under its control. Responsibility for providing these services was then transferred to the respondent firms, under a compulsory tendering process imposed by the Local Government Act 1988. At that point, these firms employed a certain number of the women who had been employed by the council, and offered them lower pay than they had been receiving prior to this transition. The firms also recruited new employees who had never previously worked for the Council, and paid them less than the Council had paid its female employees before the transition took place.

The plaintiffs are workers who are or had been employed by the defending firms to provide cleaning and catering services in schools run by the Council. The majority of the plaintiffs had originally been employed by the former to provide the same services in the same schools. In December 1995, the employees instituted proceedings against the defending firms on the basis of the Equal Pay Act of 1970 before the Industrial Tribunal (England and Wales) (United Kingdom). The women asserted that in the specific circumstances detailed here, EC Article 141 gave them the right to claim the same level of pay as male workers employed by the Council, regardless of whether they were initially or currently employed by the Council.

2. Questions referred to the Court

1) Is Article 141 EC directly applicable in the circumstances of this case (cited in this judgment) so that the female plaintiffs are able to invoke it in national proceedings so as to allow them to compare their pay with that of men employed by the North Yorkshire County Council who are performing work of equal value to that performed by the plaintiffs?

2) Can an applicant who seeks to rely on the direct effect of Article 141 (EC) do so only if the respondent employer is able to explain why the employer of the chosen comparator pays his employees as he does?

3. Court ruling

The Court started by reiterating that it recognised the direct effect of the principle of equal pay between male and female workers defined in the EC Treaty (see in particular, judgment dated 8 April 1976, *Defrenne II*, 43/75, Rec. p. 455, paragraphs 39 and 40) (paragraph 13).

The court next examined whether Article 141(1) EC was applicable in the circumstances such as those in the main proceedings. It observed that three features distinguish the present case. Firstly, the individuals whose pay is being compared work for different employers; on the one hand, the Council, and on the other, the respondent firms. Next, the plaintiffs perform the same work for these firms as some of them did for the Council before the transfer of undertakings. Finally, this work has been recognised as being of equal value to that carried out by Council workers selected for comparison and continues to be so recognised (paragraphs 14–15).

In this regard, the Court held that there is nothing in the wording of Article 141(1) EC that indicates

that the applicability of this clause is limited to situations in which men and women carry out the same work for the same employer. The Court reiterated that it had ruled that the principle established by this article could be invoked before national courts, particularly in the case of discrimination directly arising from legislative provisions or collective labour agreements, as well as in cases in which the work is carried out in the same establishment, or department, be it public or private (see, particularly, *Defrenne II* judgments, aforementioned, paragraph 40; 27 March 1980, *Macarthys*, 129/79, ECR. p. 1275, paragraph 10, and 31 March 1981, *Jenkins*, 96/80, ECR p. 911, paragraph 17) (paragraph 17).

However, the Court highlighted that, when, as in the situation in question, the differences observed in pay conditions for workers performing work of the same or equal value cannot be attributed to a single source, there is no one body which is responsible for the inequality, and could therefore restore equal treatment. Such a situation does not therefore, in the Court's opinion, come under Article 141(1) EC: the work and the pay of these workers cannot therefore be compared on the basis of this provision (paragraph 18).

The court believes that, in view of the answer to the first question, there is no need to answer the second.

The Court hereby rules:

A situation such as that in the main proceedings, in which the differences observed in the pay conditions of workers of different sexes performing the same work or work of equal value cannot be attributable to the same source, does not come under the remit of Article 141(1), EC.

Case C-320/01
WIEBKE BUSCH/KLINIKUM NEUSTADT GMBH & CO. BETRIEBS-KG
Date of judgment:
27 February 2003
Reference:
ECR [2003] I-2041
Content:
Directive 76/207/EEC (Article 2(1) — Parental study leave — Pregnancy — Request from pregnant employee to return to work — Refusal of employer

1. Facts and procedure

Ms Busch has worked as a nurse for the defendant, Klinikum Neustadt GmbH & Co. since April 1998. Betriebs-KG (hereafter, the 'Clinic'). After the birth of her first child, in June 2000, she took parental study leave, which was to last three years. In October 2000, she found herself pregnant again. Ms Busch asked the Clinic in a letter dated 30 January 2001 to curtail her parental study leave and resume her full role as a nurse (so as to qualify for maternity benefits, which are higher than the allowance received for study leave), which was granted by her employer since there was a vacancy in a care service in March 2001. Her employer did not ask her if she was pregnant. Ms Busch resumed her work on 9 April 2001. The next day, she informed her employer that she was seven months pregnant. Under Article 3, paragraph 2 of the Mutterschutgesetz (law on the protection of maternity, BGBI. 1997 I, p. 22 hereafter referred to as 'MuSchG'), Ms Busch's maternity leave was to start on 23 May 2001, six weeks before her estimated date of birth. The Clinic released the plaintiff from her work with effect from 11 April 2001, and by letter dated 19 April 2001 rescinded its consent to her returning to work on grounds of wilful misrepresentation. In support of its position, the Clinic asserted that, with due regard to the prohibitions on working described in Article 4, paragraph 2 of the MuScG, Ms Busch would not have been able to carry out her duties effectively.

2. Questions referred to the Court

1) Does it constitute illegal discrimination on grounds of sex, within the meaning of Article 2(1) of Council Directive 76/207/EEC, if a woman, who, after she has started her parental leave (Erzieungsurlaub) wishes to shorten that leave with the consent of her employer, is under an obligation to inform the employer if she knows she is pregnant again before the agreement on her return to work is concluded, where she cannot fully carry out the work in question because, from the very first day, a prohibition of employment applies in respect to tasks that are essential to her job?

2) In the event that Question 1 is answered in the affirmative, in the case described, does it constitute unlawful discrimination on the grounds of sex, within the meaning of Directive 76/207, if the employer then has the right to rescind his consent to the shortening of parental leave because he was mistaken about the fact that the woman was pregnant?

3. Court ruling

On the first question, the Court recalled that Article 5, paragraph 1 of Directive 76/207 prohibits discrimination based on sex in relation to conditions of employment, which include conditions applicable to a worker returning to work, after taking parental leave. However, the Court stressed that an employer taking into account a woman's pregnancy in order to refuse her reinstatement in her role before the end of her parental leave would constitute direct discrimination based on sex. The Court concluded that as the employer could not take the employee's pregnancy into consideration when applying her conditions of work, the woman concerned is not bound to inform her employer if she is pregnant (paragraphs 38–40).

Equally, the court recalled that it follows from case-law that discrimination based on sex would

not be justified by the fact that a legal prohibition imposed due to pregnancy would temporarily prevent the employee from fully taking up their designated position (see judgments dated 5 May 1994, *Habpositiermann-Beltermann*, C-421/92, Rec. p. I-1657, paragraphs 24 and 26, and dated 3 February 2000, *Mahlburg*, C-207/98, Rec. p. I-549, paragraph 27). Certainly, the Court noted, Article 2(3) of Directive 76/207 reserves to Member States the right to maintain or to introduce provisions designed to protect women in regard to 'pregnancy and maternity', thus recognising the legitimacy, on the one hand, of protecting women's health during pregnancy and nursing and, on the other, of protecting the special relationship between the woman and her child during the period immediately following birth. The Court added that Articles 4(1) and 5 of Directive 92/85 aim to guarantee special protection to pregnant employees, and new mothers, regarding all activities likely to present a specific risk to their safety or health, or likely to have negative consequences for the pregnancy and the nursing period. However, the Court ruled that to accept that a pregnant employee may be refused the right the return to work before the end of parental leave due to temporary prohibitions on performing certain work duties for which she was hired would be contrary to the objective of protection pursued by Article 2(3) of Directive 76/207 and Articles 4(1) and 5 of Directive 92/85 and would deprive these of any practical effect (paragraphs 41–43).

As for the financial consequences which could ensue for the employer by the obligation to reinstate a pregnant woman in a role when she legally cannot fulfil all the tasks assigned to the position, the Court reiterated that financial loss suffered by the employer could not justify discrimination based on sex. The court reiterated also in this regard, that Article 5 of Directive 92/85 allows the employer, if there is risk to the safety or health of the woman, or negative consequences for the pregnancy, to rearrange working times or conditions temporarily, or if this is not possible, to change her role, or, as a last resort, to grant the worker leave (paragraphs 44–45).

The Court believes furthermore that the fact that Ms Busch's intentions, when requesting her reinstatement had been to claim maternity allowance, which is higher than study allowance, as well as the supplementary allowance paid by the employer — cannot legally justify discrimination on grounds of sex regarding employment conditions (paragraph 46).

Finally, the Court ruled that taking into consideration the answer given to the first question, the second question can also be answered in the affirmative (paragraph 49).

The Court (Fifth Chamber) hereby rules:

1) *Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions is to be interpreted as precluding a requirement that an employee who, with the consent of her employer, wishes to return to work before the end of her parental study leave must inform her employer that she is pregnant in the event that, because of certain legislative prohibitions, she will be unable to carry out some of her duties.*

2) *Article 2(1) of Directive 76/207 is to be interpreted as precluding an employer from contesting under national law the consent it gave to the reinstatement of an employee before the end of her parental leave on the grounds that it was in error as to her being pregnant.*

Case C-186/01
ALEXANDER DORY V. THE FEDERAL REPUBLIC OF GERMANY
Date of judgment
11 March 2003
Reference:
ECR [2003] I-2479
Content:
Directive 76/207/EEC (Article 2) — Compulsory military service in Germany limited to men only — Inapplicability of Community law to national choice of military organisation

1. Facts and procedure

In accordance with Article 12a, paragraph 1 of the Grundgesetz für die Bundesrepublik Deutschland (fundamental law of the Federal Republic of Germany):

'Men who have attained the age of 18 years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defence organisation'.

The Wehrflichtgesetz (federal law on military service), in the version applicable from 1 January 1996 (BGBI. 1995 I, p. 1756, hereafter the 'law on military service'), sets out in paragraph 1 of the first article:

'From 18 years of age, all men who are German in the sense of the fundamental law are obliged to carry out military service in Germany'.

Mr Dory was born on 15 June 1982. After having received, in September 1999 a questionnaire preceeding the medical visit designed to determine his eligibility for military service, he asked the Kreiswehrersatzamt Schwäbisch Gmünd that he be exempted from registering for the army and from compulsory military service. In support of his request, he asserted that the law on military service was contrary to Community law, recalling judgment dated 11 January 2000, *Kreil* (C-285/98, Rec. p. I-69, where the Court had judged that women could not be excluded from employment in the German army.

2. Question referred to the Court

Taking particularly the interpretation of Article 2 of Directive 76/207/EEC [...], is the fact that in Germany military service is only compulsory for men contrary to Community law?

3. Court ruling

The Court recalled its case-law relative to conditions in which Community law has been applied to the armed forces, particularly judgments dated 26 October 26 1999, *Sirdar* (C-273/97, Rec. p. I-7403), and *Kreil*, aforementioned, in which the court had judged that Directive 76/207 was applicable to employment access in the armed forces, and that it was their task to establish whether measures taken by national authorities, making use of the powers of discretion they are recognised as having, were in fact following the aim of guaranteeing public safety and whether these measures were appropriate and necessary to attain this objective (respectively paragraphs 28 and 25). The Court judged however, that this did not mean that military organisations that defend their territory and national interests in the Member States are not governed by Community Law. The Court indicated that it is the Member States, who must decide on their own measures to assure their domestic and foreign security,and who have to take decisions on the organisation of their armed forces (see aforementioned rulings *Sirdar*, paragraph 15, and *Kreil*, paragraph 15) (paragraph 29–36).

Moreover, the Court observed, the German government had asserted that compulsory military service had significant importance in Germany, both politically and in terms of the organisation of the armed forces. It had indicated that the institution of such a service contributed to the democratic transpareny of the military organ, to national cohesion, to the link between the armed forces

and the population as well as the mobilisation of trained soldiers necessary to their armies in combat situations. According to the Court, this choice, which is inscribed in the Grungesetz, consists of imposing an obligation to serve the interests of security, were this to the detriment, in numerous hypotheses, to access to the labour market for young people. It takes precedence over the aims of policies intended to get young people into work. The Court concluded that the decision of the Federal Republic of Germany to assure in part its defence by a compulsory military service is the expression of such a choice of military organisation for which Community law is not therefore applicable (paragraphs 37–39).

The Court noted that limiting compulsory military service to men does normally entail a delay in the career progression of those concerned, even though military service allows some conscripts to acquire further training, or to access a career in the armed forces themselves. The Court believed nonetheless that the delay in career progression for conscripts is an inevitable consequence of the decision made by the Member State on the matter of military organisation and does not mean that the choice made by the Member State comes into the scope of Community law. In effect, the existence of unfavourable consequences for access to work being restricted to men cannot, in this instance, without encroaching on the competences of individual Member States, constrain the Member State in question either to extend the obligation to undertake military service to women, and thus impose the same disadvantages to accessing the labour market, or to eliminate military service altogether (paragraphs 40–41).

The Court hereby rules:

Community law cannot oppose compulsory military service for men.

Case C-187/00
HELGA KUTZ-BAUER V. FREIE UND HANSESTADT HAMBURG
Date of judgment
20 March 2003
Reference:
ECR [2003] I-2741
Content:
Directive 76/207/EEC (Article 2(1) and Article 5(1) — Part-time work scheme for older employees — Link to legal retirement age — Indirect discrimination — Objective justification — Promotion of hiring — Budgetary considerations — Direct and primary effect

1. Facts and procedure

Mrs Kutz-Bauer, born 21 August 1939, is employed by the city of Hamburg. She requested her employer to enter into an agreement under which she would be eligible for the scheme of part-time work for older employees in accordance with the 'block' working formula during the period 1 September 1999 to 31 August 2004, when she would have reached the age of 65, the age of retirement as written in the Altersteilzeitgesestz (law on part-time working for older employees). According to that formula, she would have worked full time for two and a half years and not worked for the remainder of that five-year period. The City of Hamburg rejected this request on the basis of Article 9, paragraph 2 of the Tarifvertrag zur Regelung der Altersteilzeit (collective agreement regarding part-time working for older employees), dated 5 May 1998 (hereafter referred to as 'TV ATZ'), which specifies that:

'Without prejudice to other conditions regarding termination of contract provided by collective agreements […] the work relation comes to an end

a) at the end of the calendar month before that after which the employee can claim an old-age pension or, if the employee is exempt from the retirement scheme, the individual can claim a comparable benefit provided by a pension and insurance institution or insurance firm; this rule does not apply to pensions which can be claimed before the insured person's retirement age, or

b) at the beginning of the calendar month from which the employee receives an old-age pension, compensatory benefits for children, a similar state benefit, or, if the employee is not obliged to obtain insurance in the legal social security framework, a comparable benefit provided by a pensions and insurance institution'.

In the opinion of the City of Hamburg, in accordance with this clause, a part-time working arrangement for older employees agreed between the two parties would bring an immediate end to their working relationship.

Mrs Kutz-Bauer asserted that the refusal to allow her the right to work part-time as an older employee constituted indirect discrimination based on sex contrary to Directive 76/207.

2. Questions referred to the Court

1. Does a provision of a collective agreement for the public service which allows male and female employees to take advantage of a scheme of part-time work for older employees infringe Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, if under that provision the scheme of part-time work applies only until the time when the person concerned first becomes eligible for a full pension under the statutory old-age insurance scheme, and if the class of persons entitled to draw a full pension at the age of 60 consists almost exclusively of women, while the class entitled to draw a full pension only from the age of 65 consists almost exclusively of men?

2. Are national courts empowered, where provisions of collective agreements and legislative provisions are in breach of Directive 76/207/EEC or Directive 79/7/EEC, to apply the corresponding provisions in favour of the disadvantaged class, disregarding the restrictions which are contrary to Community law, until non-discriminatory rules are made by the parties to the collective agreement and/or the legislature?

3. Court ruling

On the first question, the Court checked, by way of introduction, whether the part-time working scheme for older employees in question here came under Directive 76/207. In this regard, the Court affirmed that the scheme aimed to reduce normal working hours, either as a uniform reduction of working time for all the period considered, or as part of an expected retirement. In both of these cases, the Court observed, the aforementioned scheme affected the undertaking of the employees' professional activity, by altering their working times. According to the Court, it was therefore appropriate to affirm that the scheme referred to in this case established regulations relative to working conditions in according to Article 5(1) of Directive 76/207. The Court added that, contrary to what the German Government maintains, this conclusion could not be challenged due to the fact that the collective agreement aimed to allow employees of a certain age a smooth passage between working life and retirement, and thus to create new hiring opportunities for newly trained applicants and the long-term unemployed. The fact that the aforementioned agreement followed these two objectives was not sufficient, in effect, to cause the scheme to be included in the scope of Directive 79/7 (paragraphs 43–46).

The Court then noted that it appears from the file that, whilst both female and male employees could benefit equally from the part-time working scheme from 55 years of age with the agreement of their employer, the vast majority of workers who are able to benefit from the aforementioned scheme for a period of five years, from 60 years of age, are male. Given these circumstances, the Court affirmed that clauses such as those related in this case resulted in discrimination against female employees in comparison to male employees, and that these clauses must be considered in principle, as contrary to Articles 2(1) and 5(1) of Directive 76/207. The Court specified that this would always be the case unless the difference in treatment between the two categories of workers was justified by objective reasons, far removed from any discrimination based on sex (see, to that end, judgments of 13 July 1989, *Rinner-Kühn*, 171/88, Rec. p. 2743, paragraph 12; 6 February 1996, *Lewark*, C-457/93, Rec. p. I-243, paragraph 31; 17 June 1988, *Hill and Stapleton*, C-243/95, Rec. p. I-3739, paragraph 34, and 6 April 2000, *Jørgensen*, C-226/98, Rec. p. I-2447, paragraph 29) (paragraphs 49–50).

In this regard, the German Government, asserted that one of the objectvies followed by such a scheme as that in question is to combat unemployment, by encouraging at most, early retirement for workers not yet entitled to it, thereby freeing up positions. The Court reiterated the indications given in its ruling dated 9 February 1999, *Seymour-Smith* and *Perez* (C-167/97, Rec. p. I-623). The Court highlighted in particular, that the margin of independence accorded to Member States in matters of social policy could not have the effect of rendering void the fundamental principle of Community law, such as that of equal treatment for employees of both sexes, and that mere declarations of the suitability of the scheme to promote new hiring opportunities would not be sufficient to demonstrate that the objective of the litigious clauses did not consititute discrimination based on sex or provide evidence making it reasonable to judge that the measures chosen are, or could be appropriate for this objective to be carried out (paragraphs 54–58).

The German Government, having in addition, raised an argument relating to the additional burden which would result if female employees were to benefit from the scheme in question even when these women had acquired the right to a

full-rate retirement pension, the Court recalled the indications given in its ruling dated 24 February 1992, *Roks e .al.* (C-343/92, Rec. p. I-571) (paragraphs 59–60).

On the second question, the Court recalled its case law relating to the direct effect of Article 5(1) of Directive 76/207 (see judgment dated 26 February 986, *Marshall*, known as *'Marshall I'*, 152/84, Rec. p. 723, paragraphs 52 and 56) and to the primacy of Community law, including where a clause contrary to Community law results from a collective agreement (see ruling dated 7 February 1991, *Nimz*, C-184/89, Rec. p. I-297, paragraph 20) (paragraphs 70–74).

The Court (Sixth Chamber) hereby rules:

1. *Articles 2(1) and 5(1) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, must be interpreted as meaning that they preclude a provision of a collective agreement applicable to the public service which allows male and female employees to take advantage of a scheme of part-time work for older employees where under that provision the right to participate in the scheme of part-time work applies only until the date on which the person concerned first becomes eligible for a retirement pension at the full rate under the statutory old-age insurance scheme and where the class of persons eligible for such a pension after the age of 60 consists almost exclusively of women whereas the class of persons entitled to receive such a pension only from the age of 65 consists almost exclusively of men, unless that provision is justified by objective criteria unrelated to any discrimination on grounds of sex.*

2. *In the case of a breach of Directive 76/207 by legislative provisions or by provisions of collective agreements introducing discrimination contrary to that directive, the national courts are required to set aside that discrimination, using all the means at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the setting aside of the provisions by the legislature, by collective negotiation or otherwise.*

Case C-25/02
KATHARINA RINKE V. ÄRZTEKAMMER HAMBURG
Date of judgment:
9 September 2003
Reference:
ECR [2003] I-8349
Content:
Directive 76/207/EEC — Directives 86/457/EEC and 93/16/EEC — Obligation to carry out certain full-time training periods in the context of part-time training programme in general medicine — Indirect discrimination — Fundamental rights — Objective justification — Appropriate and necessary means

1. Facts and procedure

Article 5 of Council Directive 86/457/EEC of 15 September 1986, relating to specific training in general medical practice, is worded in the following terms:

'1. Without prejudice to the principle of full-time training laid down in Article 2(1)(b), Member States may authorise specific part-time training in general medical practice in addition to full-time training where the following particular conditions are met:

- the total duration of training may not be shortened because it is being followed on a part-time basis,

- the weekly duration of part-time training may not be less than 60 % of weekly full-time training

- part-time training must include a certain number of full-time training periods, both for the training conducted at a hospital or clinic and for the training given in an approved medical practice or in an approved centre where doctors provide primary care. These full-time training periods shall be of sufficient number and duration as to provide adequate preparation for the effective exercise of general medical practice.

2. Part-time training must be of a level of quality equivalent to that of full-time training. It shall lead to a diploma, certificate or other evidence of formal qualification, as referred to in Article 1'.

Directive 86/457 has been incorporated into Council Directive 93/16/EEC of April 5 1993, with the aim of facilitating free circulation of doctors and mutual recognition of their diplomas, certificates and other qualifications. Article 34 of Directive 93/16 has the same content as Article 5 in Directive 86/457.

Mrs Rinke is a medical doctor. In the context of her specific training in general medical practice, she worked part time in a medical surgery, notably from 1 April 1994 to 31 March 1995, working more than 60 % of a normal working hours as a trainee assistant. On 4 May 1995, Mrs Rinke applied to the respondent in the main proceedings for a certificate of 'specific training in general medicine' as well as the right to use the title 'General Medical Practitioner'. The request was rejected for the reason that, in accordance with Article 13, paragraph 2, first sentence, of the Hamburgische Ärztegesetz (Hamburg law relating to the medical profession), the prescribed training must be carried out at a medical surgery for at least six months working full time. Mrs Rinke asserted the regulation of the Hamburgiste Ärztegesetz is contrary to the principle of non-discrimination laid out in Community law by Directive 76/207.

2. Questions asked of the Court

1) Does the requirement laid down in Directives 86/457/EEC and 93/16/EEC, that certain parts of the specific training in general medical practice must be undertaken full-time — completion of which confers the right to use

the title 'general medical practitioner' — constitute indirect discrimination on grounds of sex within the meaning of Directive 76/207/EEC?

2) If the first question is answered in the affirmative, then

   a) How is the incompatibility of Directive 76/207/EEC on the one hand with Directives 86/457/EEC and 93/16/EEC on the other to be resolved?

   b) Does the prohibition of indirect discrimination on grounds of sex constitute a basic unwritten right under Community law that overrides any conflicting rule in secondary Community legislation?

3. Court ruling

The Court started by examining the second question. In this regard, the Court noted that Directive 76/207 is addressed to Member States and not to Community institutions and that these clauses cannot consequently be treated as imposing any obligations as such on the Council in the exercise of its legislative powers. However, as all the parties who presented observations in the present case have stated, the elimination of discrimination on grounds of sex forms part of the fundamental rights the observance of which, as general principles of Community law, the Court has a duty to ensure (rulings dated 15 June 1978, *Defrenne III*, 149/77, ECR. p. 1365, paragraphs 26 and 27, and dated 30 April 1996, P./S., C-13/94, ECR. p. I-2143, paragraph 19). It recalls that it is also common ground that the respect of fundamental rights is a condition of the legality of Community acts (notice 2/94 of March 28 2996, ECR. p. I-1759, paragraph 34 and ruling dated 17 February 1998, *Grant*, C-249/96, ECR. p. I-621, paragraph 45). The Court concluded that a provision of a directive adopted by the Council in disregard of the principle of equal treatment for men and women would be vitiated by illegality (paragraphs 23–27).

On the first question, the Court examined whether the requirement that medical training must comprise a certain number of full-time training periods disadvantages a higher percentage of women than of men. The Court observed on this point that, from the statistical data provided by the counsel for the prosecution, the percentage of women working part-time is much higher than the percentage of the active male population working part-time. This fact, which can be explained by an unequal division of family tasks among women and men, demonstrates, according to the Court, that a higher percentage of women than men who wish to pursue medical training, would have difficulty undertaking periods of full-time work during their training. Such a requirement, the Court judged, therefore disadvantaged women more than men (paragraphs 34–35).

The Court judged however, that such a requirement is justified by objective factors, far removed from discrimination on the grounds of sex.

The Court pointed out in this regard that, according to the third recital in the preamble to Directive 86/457 and the 16th recital in the preamble to Directive 93/16, specific training for a general medical practitioner must prepare him better to fulfil his particular function, which depends to a great extent on his personal knowledge of his patients' environment and consists in giving advice on the prevention of illness, protecting the patient's general health and providing appropriate treatment. The Court noted that, the harmonisation at Community level of that training not only facilitates the free movement of doctors but also contributes to a high level of public health protection in the Community. The Court indicated that, in the pursuit of those objectives, the Community legislature must be allowed a wide margin of discretion, which cannot, however, render meaningless the implementation of a fundamental principle of Community law such as the elimination of indirect discrimination on grounds of sex (paragraphs 36–39).

The Court believed primarily that the measure referred to in Article 5(1) of Directive 86/457 and Article 34(1) of Directive 93/16 can be considered as appropriate in reaching its intended purpose. In effect, the Court judged, that it was reasonable for the legislature to take the view that that requirement enables doctors to acquire the experience necessary, by following patients' pathological conditions as they may evolve over time, and to obtain sufficient experience in the various situations likely to arise more particularly in general medical practice. The Court next observed that the Community legislature has left to the national legislatures the task of fixing the number and duration of full-time training periods. It has simply stated that those periods must be of such a number and duration as adequately to prepare for the effective exercise of general medical practice. In view of the margin of discretion which the Community legislature has in the matter in question, such a measure may be regarded as not exceeding what is necessary to achieve the objectives set out previously (paragraphs 40–41).

The Court hereby rules:

1) *Compliance with the prohibition of indirect discrimination on grounds of sex is a condition governing the legality of all measures adopted by the Community institutions.*

2) *Examination of Question 1 has failed to disclose any factor capable of affecting the validity of the provision contained in Article 5(1) of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice and Article 34(1) of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other formal qualifications, according to which part-time training in general medical practice must include a certain number of periods of full-time training.*

Case C-77/02
ERIKA STEINICKE V. BUNDESANSTALT FÜR ARBEIT
Date of judgment:
11 September 2003
Reference:
ECR [2003] I-9027
Content:
Directive 76/207/EEC (Article 2(1) and Article 5(1) — Scheme of part-time work for older employees — Precondition of full-time work — Indirect discrimination — Objective justification — Promotion of hiring — Budgetary considerations

1. Facts and procedure

In Germany, following the term of Article 72, paragraph 1, first phrase, of the Budesbeamtengesetz (law on federal employees) of 14 July 1953 (BGBI. I, p. 551), in version dated 31 March 1999 valid until 30 June 2000 (BGBI. I, p. 675, hereafter the 'provision at issue':

'Public servants in receipt of a salary may be authorised, at their request, to work part time for half of normal hours, where this request covers the period prior to their retirement, and where:

1. they have reached the age of 55,

2. they have worked full-time for at least three of the five years preceding part-time work,

3. part-time work begins before 1 August 2004 and

4. there are no overriding work-related reasons why they should not'.

Mrs Steinicke, born in 1944, has worked for the Bundesanstalt für Arbeit (Federal Employment Office) since 1962. On 30 June 1999, she applied to the Bundesanstalt für Arbeit to take advantage of the part-time working scheme for older employees, in accordance with the provision at issue, for the period between 1 October 1999 to 30 September 2007. She additionally declared her plans to retire on 1 October 2007. This request was rejected on the grounds that Mrs Steinicke did not fulfil the requirements of the provision at issue, notably the obligation to have worked full time for three years out of the last five preceding the request for part-time working.

2. Question referred to the Court

Do Article 141 EC, Directives 75/117/EEC, 76/207/EEC and/or Directive 97/81/EC preclude the rule in point 2 of the first sentence of Paragraph 72(b)(1) of the Bundesbeamtengesetz (German Law on federal public servants), in the version of 31 March 1999 which was in force until 30 June 2000, that part-time work for older employees may be authorised only for public servants who have worked full-time for a total of at least three of the five years preceding that part-time work, where significantly more women than men work part-time and are consequently excluded by that provision from the older employees' part time work scheme?

3. Court ruling

The Court followed reasoning very similar to that upheld in its judgment of 20 March 2003, *Kutz-Bauer* (C-187/00, Rec. p. I-2741).

The Court (Sixth Chamber) hereby rules:

Articles 2(1) and Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions must be interpreted as precluding a provision, such as point 2 of the first sentence of Paragraph 72(b)(1) of the Bundesbeamtengesetz (German Law on federal public servants), in the version of 31 March 1999 in force until 30 June 2000, by virtue of which part-time work for older employees may be authorised for public servants only if they have worked full-time for a total of at least three of the five years preceding

such part-time work, when significantly more women than men work part-time and are consequently excluded by that provision from the scheme of part-time work for older employees, unless such provision is justified by objective factors unrelated to any discrimination on grounds of sex.

Joined Cases C-4/02 and C-5/02
HILDE SCHÖNHEIT V. STADT FRANKFURT AND SILVIA BECKER V. LAND HESSEN
Date of judgment:
23 October 2003
Reference:
ECR [2003] I-12575
Content:
Article 141 EC — Employee retirement scheme — Concept of pay — Calculation of pension for civil servants who have been working part-time — Indirect discrimination — Objective justification — Budgetary considerations — Compensation of a smaller benefit — Protocol on Article 141 EC — Limitation in time of the ability to invoke the direct effect of Article 141 EC.

1. Facts and procedure

In Germany, the clauses combined from Article 14, in the version applicable from 1 August 1984 to 31 December 1991 (hereafter the 'previous version of Article 14') and from Article 85 of the Gesetz über die Versorgung der Beamten und Richter in Bund und Ländern (law governing pensions for public servants and for federal and regional judges) of 24 August 1976 (BGBl. I, p. 3829, hereafter the 'BeamtVG'), makes provision, in substance, for a reduction in the sum of the pension for public servants who have carried out their roles on a part-time basis for at least part of their career (hereafter the 'pension reduction'.)

Mrs Schönheit and Mrs Becker were both employed as civil servants, one for the City of Frankfurt am Main, the other by the Land of Hesse. Both carried out their roles on a part-time basis for at least part of their careers. The level of pension they received was calculated on the basis of the aforementioned clauses.

2. Questions referred to the Court

In Case C-4/02:

1) Is the grant of an old-age pension under the BeamtVG subject to Article 119 of the EC Treaty, now superseded by Article 141(1) and (2) EC, in conjunction with Directive 86/378/EEC or the provisions of Directive 79/7/EEC?

2) Do benefits under the BeamtVG constitute a scheme under Article 6(1)(h) of Directive 86/378/EEC with the consequence that, irrespective of their being publicly financed, it is legitimate to take into account actuarial factors or analogous matters in order to differentiate levels of benefit?

3) Are the factors required to justify indirect, but identifiable discrimination on the ground of sex provided for by Article 2(2) of Directive 97/80/EC for the application of Article 119 of the EC Treaty and Article 141(1) and (2) EC, as well as Directive 86/378/EEC, applicable irrespective of whether a question arises in judicial proceedings as to relaxation of the burden of proof or whether that question is of no significance given the inquisitorial nature of that procedure?

4) Must the need to use an apparently neutral criterion in a legal provision be judged solely on the basis of the intention of the legislature and the grounds for enactment which are apparent from the legislative process, in particular where the existence of such intentions and grounds is documented in the procedure and prove to be decisive when they were adopted?

5) In so far as, in parallel with or in addition to those intentions and grounds (see Question 4), regard may also be had to other legitimate aims of the legislature justifying a discriminatory measure within the meaning of Article 2(2) of Directive 97/80/EC, or the case-law of the Court of Justice relating to indirect discrimination based on sex, can a national court in that connection establish of its own motion the existence of legitimate aims and, where appropriate, use them to

justify a distinguishing criterion, in particular where its reasoning in that regard is founded on the economics of the system? Is the answer to this question different when such reasoning cannot be based on any of the elements of the grounds for adopting the rule which were documented during the legislative procedure?

6) Can the discrimination initially apparent in the calculation of the pensions of older female part-time civil servants as a proportion of final salary be justified on the ground that it is necessary to achieve a legitimate aim where that discrimination is intended, as it were, to offset a minimum pension acquired during the first 10 years of service with no account being taken of the reduced working time, although civil servants' pension benefits are met solely from general budgetary resources without any contribution by female officials? As justification for such necessity, if appropriate on an ancillary basis, can reference be made to the fact that pension benefits are in the nature of maintenance support and to their characteristic as a traditional principle of the professional civil service under Article 33(5) of the Grundgesetz (Basic Law)?

7) If such discrimination is deemed necessary under Question 6, is a reduction in the rate of pension for older female and male officials with entitlement to benefits far above the minimum pension in respect of at least 10 reckonable years of service, applicable by virtue of their previous part-time service, still reasonable (proportionate) if the amount of such reduction is calculated by reference not only to the extent of the reduced working time on a linear basis but also, to the detriment of those concerned, to the duration of full-time employment in relation to that of part-time employment — even though for older female and male civil servants the possibly disproportionately favourable grant of a minimum pension irrespective of the reduction of their working time is no longer possible? Would it not in this context be (more) appropriate to abandon the disproportionate reduction in the rate of pension for older and longer-serving female and male officials, and instead for there merely to be a proportionate reduction in the minimum pension?

8) Where the numbers of budgetary and established posts remain unchanged, can additional personnel costs incurred in the recruitment of additional persons by an expansion of part-time employment, in contrast to the hitherto predominant full-time employment, justify the necessity of passing these costs on to part-time employees by way of a disproportionate reduction in their rate of pension, as intended by the second and third clauses of the first sentence of Paragraph 14(1) of the BeamtVG in the version thereof applicable until 31 December 1991?

9) Is it reasonable for such costs to be taken into account as a matter of necessity (Question 8) if the additional costs are passed on solely to civil servants who have in the past worked part-time, and who are mainly women at the very time that there has been an expansion in part-time opportunities just as their legislative amendment principally with the objective of reducing general unemployment by the absorption of surplus male and female applicants into the civil service?

In Case C-5/02:

The first nine questions are identical to those posed in case C-4/02. To these the following two questions are added:

10) Does the Protocol concerning Article 119 of the EC Treaty as part of the Treaty on European Union of 1992 (OJ 1992 C 191, p. 68) generally preclude examination under Article 141(1) and (2) EC (formerly Article 119 of

the EC Treaty) of the detailed rules for the inclusion of periods of employment prior to 17 May 1990? Does the prohibition on such examination also apply where after 17 May 1990 the provisions relevant to the inclusion of periods of employment completed before the relevant date of 17 May 1990 were amended after that date but those amendments effect only a partial adjustment to meet the requirements of Article 119 of the EC Treaty and, for certain categories, effect no such favourable adjustment?

11) In determining impact of the relevant date of 17 May 1990 on the enactment of laws is the date of publication in the official gazette decisive, or is the matter determined by the conclusion of deliberations in the legislative bodies — even where the assent of the Federal Government is required by law?

3. Court ruling

On the first and second questions (C-4/02 and C-5/02), that the Court examined together, the Court started by recalling the criteria pertinent to the aims of judging whether a retirement penion comes into the scope of EC Article 141 (see judgments of 28 September 1994, *Beune*, C-7/93m ECR, p. I-4471, paragraph 43, and of 17 April 1997, *Evrenopoulos*, C-147/95, ECR. p. I-2057, paragraph 19; of 29 November 2001, *Griesmar*, (C-366/99, ECR. p. I-9383, (28), and of 12 September 2002, *Niemi*, C-351/00, ECR p. I-7007, paragraph 45). The Court believed that these criteria are fulfilled in the case in question (paragraphs 55–63).

The Court next checked whether the clauses at issue of the BeamtVG could constitute indirect discrimination on the grounds of sex. The Court judged, in this regard, that it was established that the application of clauses on the pension reduction in combination with the regressive scale is likely to have the result that, for the same number of hours worked, part-time employment would give rise to a lower pension that if an individual had worked full-time. Moreover, the Court noted, from the referral order it appears that a considerably higher percentage of female civil servants work part-time than their male counterparts, and are therefore affected by the BeamtVG provisions at issue (paragraphs 66–72).

On the third to ninth questions (C-4/02 and C-5/02) aiming to determine whether the legislation which is the subject of this case can be justified by objective reasons, unrelated to any discrimination on the grounds of sex, the Court recalled firstly on the subject of limiting public spending, which according to the national court, had been invoked by the public authorities when the pension reduction was introduced into the national legislation, its case law on the invocation of budgetary considerations in order to justify discrimination based on sex (judgments dated 24 February 1994, *Roks et al.*, C-343/92, ECR p. I-571, paragraphs 35 and 36; and of 6 April 2000, *Jørgensen*, C-226/98, ECR. p. I-2447, paragraph 39, and of 20 March 2003, *Kutz-Bauer*, C-187/00, ECR p. I-2741, paragraphs 59 and 60) (paragraphs 84–85).

The Court noted, however, that a difference in treatment between men and women can be justified, if the need arises, for other reasons than those invoked in the adoption of the measure which introduced this difference in treatment. On this point, the German Government, having maintained that the pension reduction would be objectively justified by the fact that the pension in this case compensates for a less significant provision of service, the Court indicated that Community law is not opposed to calculating retirement pensions on a *pro rata* basis, in the case of part-time work. In effect, besides the number of years of service, taking into account the effective duration of employment undertaken by the civil servant in the course of their career, compared to that of a civil servant who worked full-time throughout their working life, constituted an objective criterion unrelated to discrimination on the grounds of sex, and therefore allows a proportionate reduction in pension rights. On the other hand, the Court believed, a measure which resulted in the reduction of the sum of retirement pen-

sion paid to an employee by an amount which is more than could be reasonable by taking into consideration periods of part-time work, could not be considered as objectively justified by the fact that the pension was in this case in return for a smaller amount of work. Moreover, the Court observed, such is the case in the reduction in pension envisaged by the previous version of Article 14 of the BeamtVG (paragraphs 86–94).

The Court added that such a result could not be justified by the argument, invoked by the German Government, according to which this pension reduction could be justified by the aim to ensure equal treatment between part-time and full-time civil servants in a regressive pension scheme. In effect, the reduction in pension does not guarantee that this aim would be reached: in the case of equality of hours worked throughout a part-time civil servant's career, and those of a full-time civil servant, the application of the pension reduction scheme is likely to entail the former being allocated a lower rate of pension than the latter, in application of the previous version of Article 14 of the BeamtVG (paragraphs 95–96).

The Court noted that, by its 10th and 11th questions (C-5/02), which it was appropriate to examine together, the national court was asking in substance, whether protocol No 2 and protocol on EC Article 141 must be interpreted in a general manner which excludes, respectively, the application of Treaty Article 119, and application of EC Article 141(1) and (2), to benefits provided by an occupational social security scheme in respect of periods of employment preceding 17 May 1990, or whether it would be appropriate, in this regard, to take into consideration the fact that national clauses applicable to these periods of work had been modified by a national legislation adopted before this date, but published afterwards, which leaves in certain cases, unequal treatment, contrary to those treaty clauses (paragraph 98).

The Court judged on this subject, that it resulted neither from the *Barber* ruling, nor from protocol No 2 or of the protocol on EC Article 141 on reasons for acknowledging other exceptions than that which they expressly provide, to the rule according to which the direct effect of Treaty Article 119 or that of EC Article 141(1) and (2) cannot be invoked in order to require equal treatment for occupational pensions, except for benefits paid for employment periods preceding 17 May 1990 (paragraph 103).

The Court (Fifth Chamber) hereby rules:

1) *A retirement pension paid under a scheme such as the one established by the Gesetz über die Versorgung der Beamten und Richter in Bund und Ländern of 24 August 1976, in the version published on 16 March 1999, falls within the scope of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Article 141(1) and (2) EC. Those provisions preclude legislation, such as that deriving from Paragraph 85 of the abovementioned law in conjunction with the old version of Paragraph 14 thereof, which may entail a reduction in the pension of civil servants who have worked part-time for at least a part of their working life, where that category of civil servants includes a considerably higher number of women than men, unless the legislation is justified by objective factors unrelated to any discrimination on grounds of sex.*

2) *It is for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision which, though applying independently of the sex of the worker, actually affects a considerably higher percentage of women than men is justified by objective factors unrelated to any discrimination on grounds of sex.*

   Restricting public expenditure is not an objective which may be relied on to justify different treatment on grounds of sex.

   A difference in treatment between men and women can be justified, if the need arises, for other reasons than those invoked in the adop-

tion of the measure which introduced this difference in treatment.

National legislation, such as that deriving from Paragraph 85 of the Gesetz über die Versorgung der Beamten und Richter in Bund und Ländern in conjunction with the previous version of Paragraph 14 thereof, which has the effect of reducing a worker's retirement pension by a proportion greater than that resulting when his periods of part-time work are taken into account cannot be regarded as objectively justified by the fact that the pension is in that case consideration for less work or on the ground that its aim is to prevent civil servants employed on a part-time basis from being placed at an advantage in comparison with those employed on a full-time basis.

3) *Protocol No 2 concerning Article 119 of the Treaty establishing the European Community and the Protocol concerning Article 141 EC annexed to the EC Treaty are to be interpreted as precluding the application of Article 119 of the Treaty and Article 141(1) and (2) EC respectively to benefits provided under an occupational social security scheme payable in respect of periods of employment prior to 17 May 1990, subject to the exception for workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.*

Case C-117/01
K.B. V. NATIONAL HEALTH SERVICE PENSIONS AGENCY AND SECRETARY OF STATE FOR HEALTH
Date of judgment:
7 January 2004
Reference:
ECR [2004] I-541
Content:
Treaty Article 141 — Directive 75/117/EEC — Reversion pension for surviving spouse — Pay — Transsexual partner — Inability to marry — Unequal treatment

1. Facts and procedure

In the United Kingdom, the Matrimonial Causes Act of 1973 does not recognise marriage between two partners who are not respectively male and female. The Birth and Death Registration Act of 1953 forbids any alteration of the birth certificate, except in cases of clerical or factual error. The NHS Pension Scheme Regulations of 1995 provides that, if a female member of the scheme dies in the circumstances defined and leaves behind a widower, this widower would have the right to a reversion pension. The term 'widower' is not defined. Nonetheless, under English law, this term refers to a person married to the employee.

K.B. is a woman. She is a member of the NHS Pension Scheme. K.B. has shared an emotional and domestic relationship for a number of years with R., a person born a woman and registered as such in the Register of Births, who, following medical gender reassignment, has become a man but has not, however, been able to amend his birth certificate to reflect this change officially. As a result, and contrary to their wishes, K.B. and R. have not been able to marry. As they were not married, the NHS Pensions Agency informed K.B. that, if she were to pre-decease R., R., would not be able to receive a survivor's pension since this beneft is reserved for the surviving spouse, and that no clause in British law recognised a partner as a spouse in the absence of a lawful marriage.

K.B. argued that this amounted to discrimination based on sex, contrary to the provisions of Article 141 EC and Directive 75/117/EEC. For K.B., these provisions require that in such a context 'widower' should be interpreted in such a way as to encompass the surviving member of a couple, who would have achieved the status of widower had his sex not resulted from medical gender reassignment.

2. Question referred to the Court

Does the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme, which limits the material dependant's benefit to her widower, constitute sex discrimination in contravention of Article 141 EC and Directive 75/117?

3. Court ruling

Firstly the Court recalled that benefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and come within the scope of Article 141 EC (see, in particular, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 28, and Case C-351/00 *Niemi* [2002] ECR I-7007, paragraph 40). I-1889, paragraph 28 and Case C-351/00 *Niemi* [2002] ECR I-7007, paragraph 40). The Court also recalled that it had recognised that a survivor's pension provided for by such a scheme falls within the scope of Article 141 EC and that it has stated in that regard that the fact that such a pension, by definition, is not paid to the employee but to the employee's survivor does not invalidate that interpretation because, such a benefit being an advantage deriving from the survivor's spouse's membership of the scheme, so that the pension is vested in the survivor by reason of the employment relationship between the employer and the said spouse and is paid to the survivor by reason of the employment relationship between the employer and the said spouse (Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraphs 12 and 13) and *Menauer* (Case C-379/99 [2001] ECR I-7275, paragraph 18). The Court concluded that a survivor's pension paid under an oc-

cupational pension scheme such as the NHS Pension Scheme therefore constitutes 'pay' within the meaning of Article 141 EC and Directive 75/117 (paragraphs 25–27).

The Court noted that the decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is discrimination on grounds of sex, prohibited by Community law (see, as regards the powers of the Community legislature, *D.* v *Council*, C-122/99 P and C-125/99 [2001] ECR I-4319, paragraphs 37 and 38). The Court believed that, in this instance, such a requirement cannot be regarded *per se* as discriminatory on grounds of sex and, accordingly, as contrary to Article 141 EC or Directive 75/117/EEC, since for the purposes of awarding the survivor's pension it is irrelevant whether the claimant is a man or a woman (paragraphs 28–29).

However, in a situation such as that before the national court, there is inequality of treatment which does not relate to the award of a widower's pension but to a necessary precondition for the grant of such a pension: namely, the capacity to marry. In effect, the Court observed, in the United Kingdom, a couple such as that formed by K.B. and R. are unable to fulfil the condition of being legally married, the condition required by the NHS Pension Scheme in granting a survivor's pension. The objective cause of this inability to marry is due to the fact, first, that the Matrimonial Causes Act 1973 deems a marriage void if the parties are not respectively male and female; second, that a person's sex is deemed to be that appearing on his or her birth certificate; and, lastly, that the Births and Deaths Registration Act does not allow for any alteration of the register of births, except in the case of clerical or factual error. In this regard, the Court believed it necessary to recall that The European Court of Human Rights had held that the fact that it is impossible for a transsexual to marry a person of the sex to which he or she belonged prior to gender reassignment operation, which arises because, for the purposes of the registers of civil status, they belong to the same sex (United Kingdom legislation not admitting of legal recognition of transsexuals' new identity), was a breach of their right to marry under Article 12 of the ECHR (see European Court of Human Rights judgments of 11 July 2002 in *Goodwin* v *United Kingdom* and *I.* v *United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, paragraphs 97 to 104 and paragraphs 77 to 84 respectively. The Court concluded that legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC (paragraphs 30–34).

The Court added that Member States are accorded the discretion to determine conditions governing legal recognition of sex reassignment of an individual in R.'s situation, just as the Europan Court of Human Rights acknowledged (aforementioned judgment *Goodwin).* It is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension (paragraph 35).

The Court hereby rules:

Article 141 EC, in principle, precludes legislation, which, in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other. It is for the national court to determine whether in a case such as the subject of the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.

Case C-256/01
DEBRA ALLONBY V. ACCRINGTON & ROSSENDALE COLLEGE, EDUCATION LECTURING SERVICES, TRADING AS PROTOCOL PROFESSIONAL AND SECRETARY OF STATE FOR EDUCATION AND EMPLOYMENT
Date of judgment:
13 January 2004
Reference:
ECR [2004] I-873
Content:
EC Article 141 — Female teacher fulfilling work considered of the same value as the work done in the same college by an employed male teacher, but under an agreement with a third party — Differences in payment between different employers — Exclusion of non-employed teachers from occupational pensions scheme — Concept of pay — Concept of employee — Indirect discrimination — Primacy of Community law

1. Facts and procedure

In the United Kingdom, the Secretary of State for Education and Employment, hereafter, the 'Secretary of State' runs an occupational pension scheme for teachers, the 'Teachers' Superannuation Scheme 1988', hereafter the 'TSS'. Only jobs under a part-time or full-time contract are covered by this scheme. Addtionally, only certain types of establishment fall under the scope of the scheme.

Ms Allonby was originally employed by the Accrington & Rossendale College, hereafter the 'College'. as a part-time lecturer in office technology. The 'College' decided that, in order to reduce its overheads it would renew Ms Allonby's contract of employment with effect from 29 August 1996. Instead she was offered a new position, through Education Learning Services, trading as Protocol Professional (hereafter 'ELS'). This firm operated as an agency, with a database of available lecturers. Colleges could call on ELS to provide supply teachers. Ms Allonby, and others like her, had to register with ELS if they wanted to continue to work as part-time lecturers, thereby became self-employed. Their pay became a proportion of the fee agreed between ELS and the College. Their income fell. ELS is not an employer contributing to the TSS.

Ms Allonby brought proceedings alleging, first, that ELS was obliged by law to pay her the same as a male lecture employed full-time by the college for work which must be considered as equal, and secondly that the State, represented by the Secretary of State, was acting unlawfully in denying her access, as a self-employed worker, to the TSS.

2. Questions referred to the Court

1) Does Article 141 EC have direct effect allowing a woman to claim equal pay with a man in the circumstances of this case?

2) Does Article 141 EC have direct effect entitling Ms Allonby to claim access to the pension scheme either (a) by comparing her situation with that of Mr Johnson or (b) by showing statistically that a considerably smaller proportion of female than of male teachers who are otherwise eligible to join the TSS can comply with the requirement of being employed under a contract of employment in order to join, and by establishing that the requirement is not objectively justified?

3. Court ruling

The Court noted that the first question must be construed as seeking to ascertain whether, in circumstances such as those of the main proceedings, Article 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is entitled to

rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for the same work or work of equal value by a man employed by the woman's previous employer. According to the Court, this question cannot be answered in the affirmative. The Court recalled in this regard the judgment of 17 September *Lawrence et al.* [2002] (C-320/00, ECR. p. I-7325), where it ruled that where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment and that such a situation does not come within the scope of Article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision (*Lawrence*, (42–46)).

On the seond question, the Court stated by way of introduction in the light of its case law, that a pension scheme such as the TSS in these proceedings, which depends essentially on the job occupied by the plaintiff, is linked to the latter's pay and comes under EC Article 141 (see in particular, in this respect, judgments of 13 May *Bilka* [1986], 170/84 ECR. P. 1607, (22); 17 May *Barber* [1990], C-262/88, ECR. I-1889, (28), of 28 September, *Beune*, [1994] C-7/93, ECR p. I-4471, (34) and ruling dated 10 February, *Deutsche Telekom*, [2000] C-234/96 and C-235/96, ECR. I-799, (32)). The Court recalled moreover, that Article 141 EC covers not only entitlement to benefits paid by an occupational pension scheme but also the right to be a member of such a scheme (see, in particular, in this respect, Case C-128/93 *Fisscher* [1994] I-4583, paragraph 12) (52–53)).

The court noted that part (a) of the second question sought to ascertain whether Article 141(1) EC must be interpreted as meaning that a woman in circumstances such as those of the main proceedings is entitled to rely, vis-à-vis the intermediary undertaking and/or vis-à-vis her previous employer, on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers, set up under State legislation, of which only teachers with a contract of employment may become members, using as a basis for comparison the pay, including such a right of membership, received for equal work or work of equal value by a man employed by the woman's previous employer. The Court believed that, as far as the relationship between Ms Allonby and ELS was concerned, the same reasoning as that applied to the first question must be followed. As regards her relationship with the College, the Court notes that, following the amicable settlement reached between Ms Allonby and the College while the case was before the Court, the question whether Ms Allonby suffered indirect discrimination on grounds of sex as a result of her dismissal and the question whether, if appropriate, she may still claim elements of remuneration from the College on the basis of Article 141(1) EC no longer arise (paragraphs 54–56).

The Court noted that the first part of part (b) of the second question concerns, first, the State, represented by the Secretary of State, and, second, ELS, as an intermediary undertaking (paragraph 58).

On the first part of part b) of the second question, in so far as the State is concerned, the national court seeks in essence to ascertain whether the requirement of being employed under a contract of employment as a precondition for membership of a pension scheme for teachers, set up by State legislation, must not be applied where it is shown that, among the teachers who fulfil the other conditions for membership, an appreciably lower percentage of women than of men are able to satisfy that condition and it is established that that condition is not objectively justified. The Court considered that, in order to answer this question, it is necessary, firstly, to interpret the concept of 'worker' within the meaning of Article 141(1) EC, secondly, to determine precisely the category of persons who may be included in the comparison and, thirdly, to examine the consequences of possible incompatibility of the condition at issue with that provision (paragraphs 60–61).

On the concept of 'worker' within the meaning of Article 141(1) EC, the Court recalled that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied (Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 31). The Court observed that the term 'worker' within the meaning of Article 141(1) EC is not expressly defined in the EC Treaty. The Court judged, that it was therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having especial regard to its context and to the objectives of the Treaty. The Court further specified that, according to Article 2 EC, the Community's task is to promote, among other things, equality between men and women. Article 141(1) EC constitutes a specific expression of the principle of equality for men and women, which forms part of the fundamental principles protected by the Community legal order (see, to that effect, Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 57). Accordingly, the term 'worker' used in Article 141(1) EC cannot be defined by reference to the legislation of the Member States but has a Community meaning. Moreover, it cannot be interpreted restrictively. For the purposes of that provision, the Court considered a person must be considered as a worker who, for a certain period of time, performs services for and under the direction of another person in return for which he receives payment (see, in relation to free movement of workers, in particular Case 66/85 *Lawrie-Blum* [1986] ECR 2121, (17), and *Martínez Sala*, aforementioned, (32)) the Court observed that, it is clear from that definition that the authors of the Treaty did not intend that the term 'worker', within the meaning of Article 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 15). The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised. The Court specified that the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article. The Court stressed that in the case of teachers who are, vis-à-vis an intermediary undertaking, under an obligation to undertake an assignment at a college, it is relevant in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context (see to that effect, in relation to free movement of workers, *Raulin*, cited above, paragraphs 9 and 10) (paragraphs 63–72).

On the category of persons who may be included in the comparison, the Court judged that In order to show that the requirement of being employed under a contract of employment as a precondition for membership of the TSS — a condition deriving from State rules — constitutes a breach of the principle of equal pay for men and women in the form of indirect discrimination against women, a female worker may rely on statistics showing that, among the teachers who are workers within the meaning of Article 141(1) EC and fulfil all the conditions for membership of the pension scheme except that of being employed under a contract of employment as defined by national law, there is a much higher percentage of women than of men. If that is the case, the Court considered, the difference of treatment concerning membership of the pension scheme at issue must be objectively justified. In that regard, no justification can be inferred from the formal classification of a self-employed person under national law (paragraphs 75–76).

On the legal consequences of the incompatibility of the requirement to be employed under a work contract as a precondition for membership of a pension scheme with Article 141(1) EC, the Court considered that where it is found that such in-

compatibility exists, the condition concerned must not be applied, in view of the primacy of Community law (paragraph 77).

On the second part of part (b) of the second question, as far as ELS is concerned, the Court pointed out that the national court was seeking to ascertain in essence whether the applicability of Article 141(1) EC vis-à-vis an undertaking is subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and has received higher pay for equal work or for work of equal value and that a woman cannot therefore invoke statistics in order to claim, on the basis of that provision, eligibility for membership of a pension scheme set up under State legislation. In that regard, the Court stated that a woman may rely on statistics to show that a clause in State legislation is contrary to Article 141(1) EC because it discriminates against female workers. Where that provision is not applicable, the consequences are binding not only on the public authorities or social agencies but also on the employer concerned (paragraphs 80–81).

The Court hereby rules:

1) *In circumstances such as those of the main proceedings, Article 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer.*

2) *Article 141(1) EC must be interpreted as meaning that a woman in circumstances such as those of the main proceedings is not entitled to rely on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers set up by State legislation of which only teachers with a contract of employment may become members, using as a basis for comparison the remuneration, including such a right of membership, received for equal work or work of the same value by a man employed by the woman's previous employer.*

3) *In the absence of any objective justification, the requirement, imposed by State legislation, of being employed under a contract of employment as a precondition for membership of a pension scheme for teachers is not applicable where it is shown that, among the teachers who are workers within the meaning of Article 141(1) EC and fulfil all the other conditions for membership, a much lower percentage of women than of men is able to fulfil that condition. The formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional.*

4) *Article 141(1) EC must be interpreted as meaning that where State legislation is at issue, the applicability of that provision vis-à-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and who has received higher pay for equal work or work of equal value.*

Case C-380/01
GUSTAV SCHNIEDER V. BUNDESMINISTER FÜR JUSTIZ
Date of judgment:
5 February 2004
Reference:
ECR [2004] I-1389
Content:
Directive 76/207/EEC (Article 6) — Professional promotion of a magistrate — Effective jurisdictional control — State responsibility for general actions before civil jurisdictions — Inadmissibility of preliminary question

1. Facts and procedure

In Austria a general claim for compensation may be brought against the State on the basis of Paragraph 1(1) of the Amtshaftungsgesetz ('Government Liability Act', hereafter 'the AHG'). Such a claim for compensation against the State must be brought before the civil courts.

Article 15 of the Bundes-Gleichbehandlungsgesetz (Federal law on equal treatment, BGBl. I, 1993/100, hereafter the 'BGBG') provides that when a male or female civil servant is refused an appointment as a result of the State's violating the principle of equal treatment as required by Paragraph 3(5) of the BGBG, the State shall be liable to compensate for the harm suffered. The civil servants concerned must exercise their rights by bringing a claim against the State before their own department. The decision given may be challenged before the Verwaltungsgerichtshof, which is an administrative court, under the procedure provided for by Paragraph 130 of the BundesVerfassungsgesetz (Federal constitutional law).

Mr Schneider is a judge of the Arbeits- und Sozialgericht Wien (Austria). In 1997 and 1998 he twice applied for a specialised post corresponding to his qualifications with the Oberlandesgericht Wien. Both times preference was given to a younger female candidate with less seniority on the grounds that the quota set for women's career advancement had not been filled. Following those decisions, Mr Schneider brought a claim for compensation against the State on the basis of the AHG before the Landesgericht für Zivilrechtsachen Wien in order to obtain compensation for the harm he claims to have suffered. After his claim was rejected, appealed to the Oberlandesgericht Wien, who rejected his appeal. Mr Schneider then appealed to the Oberster Gerichtshof, who also rejected his appeal. Mr Schneider submitted a claim to the Bundesminister für Justiz for compensation for harm allegedly suffered by him. That claim, submitted on the basis of the BGBG, was dismissed by that minister. Mr Schneider challenged that refusal before the Verwaltungsgerichtshof. In the order for referral, the Verwaltungsgerichtshof stresses that the action brought before it is, by its very nature, an appeal. As an appeal court, it can carry out only a limited review of the facts. In that context, and in light of the Court's case-law, it considers that it is at the very least doubtful whether the judicial protection provided in this case by the Verwaltungsgerichtshof alone satisfies the legal requirements of Community law as laid down in Article 6 of Directive 75/207.

2. Question referred to the Court

Is Article 6 of Council Directive 76/207/EEC to be interpreted as meaning that the requirement set out in the above article, that any injured party must be able to pursue a claim (in the present case, a claim for compensation) by judicial process is not adequately satisfied by the Austrian Verwaltungsgerichtshof alone, in view of that court's legally limited powers (a court which hears appeals on points of law only with no fact-finding powers)?

3. Court ruling

The Court judged that the reference for preliminary ruling was inadmissible. Its reasoning is the following:

The Court highlighted that Article 6 of Directive 76/207, according to which all those who allege to have suffered unequal treatment because the principle of equal treatment has not been applied to them, must be able to make a legal claim, does not specify to which court each of the Member States must allocate this task. In effect, if an individual believes that they have suffered unequal treatment because the principle of equal treatment has not been applied, they can make a legal claim to the relevant jurisdiction, the requirements of the aforementioned Article 6 are satisfied (paragraph 24).

The Court observed that Directive 76/207 was transposed into Austrian law by the BGBG, the application of which may be challenged before an administrative authority and then before an administrative court (paragraph 25).

However, the Court noted, in Austria there is also the possibility of bringing a general claim before the civil courts for compensation against the State based on Paragraph 1(1) of the AHG with a view to obtaining compensation for harm suffered as a result of a decision found to be unlawful having regard to the principle of equal treatment for men and women in the promotion of civil servants and magistrates. Thus, the Court stated, through the general State liability provisions, the application of which is controlled by three levels of the Courts in theory and in practice, the Austrian legal order offers individuals a means by which they may pursue a claim concerning failure to apply the principle of equal treatment to them. It could not be denied, specifed the Court, that such a judicial process undeniably satisfies the requirement of adequate and effective judicial protection as contemplated in Article 6 of Directive 76/207. The Court noted in the main proceedings, moreover, that Mr Schneider brought proceedings before the Landesgericht Wien and the Oberlandesgericht Wien, as well as before the Oberster Gerichtshof, in order to obtain compensation for the harm he allegedly suffered as a result of the violation of the principle of equal treatment for men and women occasioned by the decision dismissing his claim. The Court considered accordingly, in a judicial system such as that at issue in the main proceedings, the requirements of Article 6 of Directive 76/207 are fully satisfied by the judicial processes for State liability available before the civil courts under the general provisions such as those of the AHG, on which Mr Schneider has relied (paragraphs 26–30).

That being so, the question whether the proceedings before the administrative court satisfy the requirements of Article 6 of Directive 76/207 is not relevant for resolving the main dispute, so that the question referred for a preliminary ruling is hypothetical (paragraph 31).

The Court (Fifth Chamber) hereby rules:

The reference for a preliminary ruling submitted by the Verwaltungsgerichtshof by order of 13 September 2001 is inadmissible.

Case C-303/02
PETER HAACKERT V. PENSIONS-VERSICHERUNGSANSTALT DER ANGESTELLTEN
Date of judgment:
4 March 2004
Reference:
ECR [2004] I-2195
Content:
Directive 79/7/EEC (Article 7(1)(a)) — Old-age pension anticipated through unemployment — Different ages according to sex

1. Facts and procedure

By decision of 5 December 2000, the Pensionsversicherungsanstalt der Angestellten (Austrian organisation for employee pension schemes) dismissed an application for an early old-age pension on account of unemployment submitted by Mr Haackert, born on 14 February 1944, on the ground that, in order to receive that benefit, male insured persons must, in accordance with Paragraph 253a of the Allgemeines Sozialversicherungsgesetz (general law on social security, hereafter the 'ASVG'), be aged 738 months (61 years and 6 months). As the aforementioned clause provides that female pension scheme affiliates receive their benefit when aged 678 months (or 56 years and 6 months), Mr Haackert believes that the establishment of different ages for men and women is contrary to the principle of Community law on equal treatment.

2. Question referred to the Court

Is the derogation contained in Article 7(1)(a) of Directive 79/7/EEC to be interpreted as being applicable to a benefit such as the early old-age pension by reason of unemployment in respect of which different pensionable ages for men and for women are set in national law?

3. Court ruling

The Court examined firstly whether a benefit such as that at issue in the main proceedings can be regarded as an old-age pension within the meaning of Article 7(1)(a) of Directive 79/7. The Court judged that this was not the case, noting that although granting an early old-age pension on account of unemployment is indeed subject to an age condition, the fact remains that, according to the national legislation in question, that benefit is granted only to persons who, during the last 15 months preceding the reference date, received a financial benefit from insurance against unemployment for at least 52 weeks (paragraphs 24–25).

The Court therefore needed to determine, then, whether the fixing of a different age condition according to sex for granting the benefit at issue in the main proceedings may be regarded, within the meaning of Article 7(1)(a) of the directive, as a consequence which follows from the retirement age fixed by national legislation for enjoying an old-age pension. On that point, the Court judged that, according to the case-law, the temporary maintenance of different retirement ages according to sex may necessitate the subsequent adoption, after expiry of the period prescribed for transposition of the directive, of measures which are indissociable from that derogation and also amendments to such measures. In effect, to prohibit a Member State which has set different retirement ages for men and women from adopting or amending, after expiry of the period prescribed for transposition, measures linked to that age difference would be tantamount to depriving the derogation for which Article 7(1)(a) of the directive provides of its practical effect. The Court specified that where, pursuant to Article 7(1)(a) of the directive, a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', that provision is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to that age difference. That would be the case, the Court recalled, if those forms of discrimination were objectively necessary to avoid endangering the financial equilibri-

um of the social security system or in order to ensure coherence between the system of retirement pensions and that of other benefits (see *Buchner et al*, [2000], C-104/98, ECR I-3625, paragraphs 23-26, and case-law cited) (paragraphs 27–30).

Concerning, first, the condition regarding preservation of the financial equilibrium of the social security system, the Court pointed out that on the one hand, the order for reference shows that the percentage of early old-age pensions on account of unemployment paid in December 2001 in relation to the total of old-age pensions and early old-age pensions represented barely 1.2 %. On the other hand, the Austrian Government has not raised any argument before the Court concerning the preservation of the financial equilibrium of the social security system. In those circumstances, the Court indicated, it must be concluded that the removal of such discrimination could not have any serious effect on the financial equilibrium of the social-security system (paragraphs 31–32).

Moving on to the question of the preservation of coherence between early old-age pension on account of unemployment and the old-age pension, the Court, making a distinction between the system at issue in the main proceedings and that in the previously cited judgment of *Blucher et al,* noted that it is true that the retirement age fixed for the benefit at issue in the main proceedings and the normal retirement age are objectively linked, not only because the old-age pension is substituted for the early old-age pension on account of unemployment where the persons concerned attain the normal retirement age, but also because the age at which that benefit may be claimed is the same for men as for women, namely three and a half years before the normal retirement age (see, to that effect, Case C-139/95 *Balestra* [1997] ECR I-549, paragraph 40). In effect, observed the Court, under the national legislation at issue, the normal age for retirement is 65 years for men and 60 years for women, and moreover it is possible to draw early pension on account of unemployment at the age of 61 years and 6 months for men and 56 years and 6 months for women. In addition, the Court further noted, the referral order and the observations of the Austrian Government showed that the system of early old-age pension on account of unemployment, as laid down in Paragraph 253a of the ASVG, is designed to establish an early entitlement to old-age pension where, for reasons connected with age, illness or reduced working capacity, or for other reasons, it is no longer possible, save at the cost of inevitable difficulties, for the insured person to find a job during a certain period. That benefit is therefore designed to assure an income to a person who is no longer capable of being reintegrated into the employment market before attaining the age entitling him or her to an old-age pension. In those circumstances, the Court noted, it must be concluded the introduction of the discrimination at issue in the main proceedings could be regarded as objectively necessary in order to ensure coherence between early old-age pension on account of unemployment and the old-age pension (paragraphs 33–37).

The Court (Fifth Chamber) hereby rules:

The derogation provided for in Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as applying to a benefit such as early old-age pension on account of unemployment, for which a different age condition according to sex has been established, since such a condition may be regarded, within the meaning of that provision, as a consequence which may follow from the provision in national legislation of a different age condition according to sex for the granting of old-age pensions.

Case C-342/01
MARIA PAZ MERINO GÓMEZ V. CONTINENTAL INDUSTRIAS DEL CAUCHO S.A
Date of judgment:
18 March 2004
Reference:
ECR [2004] I-2605
Content:
Directives 76/207/EEC (Article 5(1) and 92/85/EEC (Article 11(2)(a)) — Directive 93/104/EC concerning certain aspects of managing working hours — Maternity leave coinciding with annual leave for personnel governed by a collective agreement.

1. Facts and procedure

By collective agreement dated 7 May 2001 between Continental Industrias del Caucho SA (hereafter, 'Continental Industrias' and the workers' representatives, two periods were fixed for all staff holidays; the first from 16 July to 12 August 2001 and the second from 6 August to 2 September 2001. This agreement also provided that, in exceptional circumstances, six workers could take their holidays in September. For this exceptional period, preference was given to those who had not been able to choose their preferred holiday dates the previous year.

Mrs Merino Gómez has been employed by Continental Industrias as a worker since 12 September 1994. She had taken maternity leave from 5 May 2001 to 24 August 2001. Mrs Merino Gómez had been able to choose her holiday dates in 2000 and consequently, in accordance with the rules established in the collective agreement of 7 May 2001, she would not be able to take her annual leave in September 2001, during the exceptional period. Nonetheless, she requested to take her annual leave from 25 August to 21 September 2001, or, as a second choice, from 1 September to 27 September 2001, that is to say, during the period immediately after her maternity leave. Continental Industrias rejected this request.

2. Questions referred to the Court

1) Where collective agreements between an employer and workers' representatives fix the timing of leave for the entire workforce, and where the dates concerned coincide with those of a worker's maternity leave, do Article 7(1) of Directive 93/104, Article 11(2)(a) of Directive 92/85 and Article 5(1) of Directive 76/207 guarantee that worker's entitlement to take annual leave during a period other than the one agreed, which does not coincide with her period of maternity leave?

2) If the first question is answered in the affirmative, what is the substantive scope of the entitlement to annual leave? Does it cover exclusively the four weeks' leave referred to in Article 7(1) of Directive 93/104, or does it extend to the 30 calendar days laid down by national legislation, in Article 38(1) of Royal Decree-Law 1/95, the Workers' Statute?

3. Court ruling

On the first question, the Court recalled that, under Article 7(1) of Directive 93/104 dated 23 November 1993 concerning certain aspects of managing working hours, Member States are to take the necessary measures to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. The Court underlined that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104 (judgment dated 26 June *BECTU* [2001], C-173/99, ECR I-4881, paragraph 43). Having recalled that the purpose of the entitlement to annual leave is different from that of the entitlement to maternity leave, as maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second,

to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see Case 184/83 *Hofmann* [1984] ECR 3047, paragraphs 25 and 27, case C-411/96 *Boyle,* [1998] ECR I-6401, paragraph 25, and Case C-136/95, *Thibault,* [1998] ECR I-2011, paragraph 41), the Court concluded that Article 7(1) of Directive 93/104 must thus be interpreted as meaning that where the dates of a worker's maternity leave coincide with those of the entire workforce's annual leave, the requirements of the directive relating to paid annual leave cannot be regarded as met. Furthermore, the Court noted, Article 11(2)(a) of Directive 92/85 provides that the rights connected with the employment contract of a worker, being different from than the rights referred to in Article 11(2)(b), must be ensured in a case of maternity leave. Therefore, that must be the case so far as the entitlement to paid annual leave is concerned (paragraphs 28–35).

The determination of when paid annual leave is to be taken falls within the scope of Directive 76/207 (see, as regards the beginning of the period of maternity leave, *Boyle,* paragraph 47). The Court recalled that the said directive is intended to bring about equality in substance rather than in form. In effect, the exercise of rights conferred on women as referred to in Article 2(3) of Directive 76/207 by provisions intended to protect women in relation to pregnancy and maternity cannot be made subject to unfavourable treatment regarding their working conditions (see *Thibault*, above, paragraph 26). It follows that Article 5(1) of Directive 76/207 is to be interpreted as meaning that a worker must be able to take her annual leave during a period other than the period of her maternity leave (paragraphs 36–38).

On the second question, the Court observed that by virtue of Article 15 of Directive 93/104, the latter does not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the health and safety of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the health and safety of workers. The Court judged that where a Member State has chosen to provide for a longer annual leave entitlement than the minimum period prescribed by the directive, Article 11(2)(a) of Directive 92/85 applies in respect of the entitlement to longer annual leave for women who have taken maternity leave coinciding with the period of annual leave for all staff. The answer to the second question must therefore, according to the Court, be that Article 11(2)(a) of Directive 92/85 is to be interpreted as also applying to the entitlement of a worker in circumstances such as those of the case before the referring court to a longer period of annual leave, provided for by national law, than the minimum laid down by Directive 93/104 (paragraphs 43–45).

The Court (Sixth Chamber) hereby rules:

1) *Article 7(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, of Article 11(2)(a) of Council Directive 92/85/EEC of 19 October 1992 on the implementation of measures to encourage improvements in the health and safety at work of women who are pregnant, newly-delivered or nursing (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and of Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions are to be interpreted as meaning that a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed, by a collective agreement, for the entire workforce.*

2) *Article 11(2)(a) of Directive 92/85 is to be interpreted as also applying to the entitlement of a worker in circumstances such as those of the case before the referring court to a longer period of annual leave, provided for by national law, than the minimum laid down by Directive 93/104.*

Case C-147/02
MICHELLE K. ALABASTER V. WOOLWICH PLC AND SECRETARY OF STATE FOR SOCIAL SECURITY
Date of judgment:
30 March 2004
Reference:
ECR [2004] I-3101
Content:
Article 119 of the Treaty (Article 141 EC) — Directive 92/85/EEC — Calculation of payments made during maternity leave — Whether to include pay rise — Interpretation of the Gillespie case

1. Facts and procedure

In the United Kingdom, national provisions concerning statutory maternity benefits are contained within the XII part of the Social Security Contributions and Benefits Act of 1992, (hereafter, the 'Act'). Article 166 of the Act provides two benefit rates, named 'higher rate' and 'lower rate.' The higher rate is equivalent to 90 % of the woman's normal weekly earnings for a period of eight weeks immediately preceding the 14th week before the expected week of confinement or the lower rate, whichever is the higher. The lower rate is a flat-rate weekly payment. An employee who is entitled to higher rate statutory maternity pay, receives the higher rate for six weeks and the lower rate for 12 weeks. Section 171(4) of the Act provides that a woman's normal weekly earnings are to be taken to be the average weekly earnings which in the relevant period have been paid to her. This period is defined by Article 21 paragraph 3 of the Statutory Maternity Pay (General) Regulations 1986 as between:

'a) the last normal pay day before the appropriate date; and

b) the last normal pay day to fall at least 8 weeks earlier than the normal pay day mentioned in subparagraph (a), including the normal pay day mentioned in subparagraph (a) but excluding the first date mentioned in subparagraph (b).'

Mrs Michelle K. Alabaster was an employee of Woolwich plc ('the Woolwich') from 7 December 1987 to 23 August 1996. She commenced maternity leave on 8 January 1996. Her expected week of confinement was 11 February 1996. Mrs Alabaster received statutory maternity pay from the week of 7 January 1996. She was paid statutory maternity pay at the higher rate not just for the statutory six-week period but for an additional four weeks under her contract of employment. She then received statutory maternity pay at the lower rate for eight weeks. On 12 December 1995 Mrs Alabaster had received a salary increase with effect from 1 December last. However, this salary increase was not reflected in her statutory maternity pay calculation because it came after the relevant period for calculating normal earnings. Pursuant to Regulation 21(3) of the Regulations, the relevant period for calculating normal earnings in Mrs Alabaster's case began on 1 September 1995 and ended on 31 October 1995. Mrs Alabaster contended that the failure to reflect the salary increase in her statutory maternity pay constituted discrimination against her on grounds of sex.

2. Questions referred to the Court

In a situation where:

- the earnings-related element of a woman's statutory maternity pay ('SMP') is calculated by reference to her normal weekly earnings for an eight week period ending on the 15th week before the expected week of confinement ('the relevant period'), and

- the employer grants a pay rise, which is not back-dated to the relevant period, at any time after the end of the relevant period used for calculating that woman's earnings-related element of SMP and before the end of her maternity leave:

1) Is Article (141 of the EC) Treaty and the judgment in *Gillespie* to be interpreted as meaning that the woman is entitled to have that pay rise taken into consideration in calculating or re-calculating the earnings-related element of her SMP?

2) Is the answer to Question 1 affected by whether the effective date of the pay rise commences: (i) prior to the beginning of the woman's maternity leave, (ii) prior to the ending of the period of the earnings-related period of her SMP, or (iii) on some other date and, if so, on what date?

3) If the first question is answered in the affirmative, then

   a) how should the calculation or re-calculation of the normal weekly earnings in the relevant period take into account the pay rise?

   b) Should the relevant period be changed?

   c) What allowance, if any, should be made for other factors occurring within the period to which the pay rise relates, such as the numbers of hours worked, and the reason for the pay increase?

   d) Does it follow that if there is a reduction in pay after the end of the relevant period but before the end of the woman's period of maternity leave, her SMP should be calculated or re-calculated to take account of the reduction of pay, and if so, how is this to be done?

3. Court ruling

The Court started by noting that by the first question, the national court is concerned with whether Treaty Article 119 and judgment dated 13 February *Gillespie* [1996] (C-342/93, ECR. p. I-475) are to be interpreted as meaning that a woman is entitled to have a pay rise which was awarded to her after the relevant period and was not back-dated to that period taken into consideration in the calculation of the earnings-related element of the statutory maternity pay. By the second question it asks whether the fact that the effective date of the pay rise commences prior to the beginning of the maternity leave, or prior to the end of the earnings-related period of her statutory maternity pay, or on some other date has any effect on the answer to the first question. As those questions are closely related it is necessary to consider them together (paragraph 37).

Firstly then, the Court judged that Directive 92/85 does not, in itself, bring a useful response to the first two questions (paragraphs 38–39). The Court then recalled the ruling in Gillespie, above, notably paragraph 22 where it considered that since the payment made during maternity leave is equivalent to a weekly wage, calculated on the basis of weekly average income received by the employee at a given moment, the principle of non-discrimination requires that the employee, who remains connnected to the employer by a contract or employment relationship during the maternity leave, must benefit, even retroactively, from any increase in salary received during the period covered, as would any other worker. It follows, according to the Court, that in a case such as that in the main proceedings where the income guaranteed by national law to the female worker is calculated partially on the pay received by her before the said maternity leave, Article 119 of the Treaty entitles her to have a pay rise which was awarded to her after the beginning of the period covered by the reference pay and before the end of maternity leave taken into account in determining the elements of her pay used to calculate the consideration paid by her employer. The requirement recalled in paragraph 22 of the judgment in *Gillespie* means that any pay rise awarded after the beginning of the period covered by her reference pay must be included in the elements of pay used to determine the amount of pay owed to the worker, and should not be limited to cases where the pay is back-dated to that period (paragraphs 40–49).

The Court noted that by its third question the referring court asks essentially, in the event that the Court finds that there is a right to have a pay rise taken into account in circumstances such as those in the main proceedings, how the pay rise should be taken account of in calculating the pay due to the worker during her maternity leave and whether account should also be taken of any decrease in the woman's pay during the period following that covered by the reference pay and during her maternity leave (paragraph 51).

The Court recalls that it is not for the Court to rule on the manner in which the pay rise is to be taken into account when determining the reference pay, or on whether the period covered by that pay should be altered or whether, where the information on file is in any event not sufficient, other factors that may affect the determination of that pay should be taken into account (paragraphs 52–53).

As to the question of whether decreases in pay ought to be taken into account, the Court emphasises that in the context of Article 234 EC proceedings it must underscore the hypothetical nature of the problem on which it has been charged to rule. In this case the hypothetical nature of the issue on which the Court is asked to rule is confirmed by the fact that the main proceedings, as set out in the order for reference, relate exclusively to the refusal to take account of a pay rise, there being no question of any pay decrease. In those circumstances, says the Court, the reply to the second part of the third question cannot have any bearing on the main proceedings. This part of the question is therefore inadmissible (paragraphs 54–55).

The Court (full court) hereby rules:

1) *Article 119 of the EC Treaty (Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC) must be interpreted as requiring that, in so far as the pay received by the worker during her maternity leave is determined at least in part on the basis of the pay she earned before her maternity leave began, any pay rise awarded between the beginning of the period covered by the reference pay and the end of the said maternity leave must be included in the elements of pay taken into account in calculating the amount of such pay. This requirement is not limited to cases where the pay rise is back-dated to the period covered by the reference pay.*

2) *Given the absence of any Community legislation in this sphere, it is for the competent national authorities to determine how, in compliance with all the provisions of Community law, and in particular Council Directive 92/85/EEC of 19 October 1992 on the implementation of measures to encourage improvements in the health and safety at work of pregnant, recently-delivered or nursing women (tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC), any pay rise awarded before or during maternity leave must be included in the elements of pay used to calculate the pay due to a worker during maternity leave.*

Case C-172/02
ROBERT BOURGARD V. INSTITUT NATIONAL D'ASSURANCES SOCIALES POUR TRAVAILLEURS INDEPENDANTS (INASTI)
Date of ruling
30 April 2004
Reference:
ECR [2004] I-5823
Content:
Directive 79/7/EEC (Article 4(1)) and (Article 7(1)(a)) — Self-employed workers — Retirement age — Anticipation of retirement pension for male workers — Reductions for anticipation — Method of calculating pension

1. Facts and procedure

In Belgium, Royal Decree No 72 of 10 November 1967 on retirement and survival pensions for self-employed persons, as amended by Royal Decree No 416 of 16 July 1986, hereafter 'Royal Decree No 72') sets the normal retirement age at 65 for men and 60 for women. According to Article 3(1) of that decree, the retirement pension may commence, none the less, for men, at the election and request of the person concerned, within a period of five years preceding the normal pensionable age. In such a case, the pension is reduced by 5 % for each year by which the pension is drawn in advance. Royal Decree No 72 provides that the retirement pension of self-employed workers is calculated on the basis of a professional career expressed as a 45th part or a 40th part, according to whether the worker is a man or a woman.

At the age of 60 Mr Bourgard, a self-employed worker, applied to the 'Institut National d'Assurances Sociales pour Travailleurs Independents' (hereafter the 'Inasti') for his retirement pension. He was applying for his pension early, that is to say, five years before the normal retirement age. Inasti awarded Mr Bourgard a self-employed person's retirement pension per annum. That pension was calculated on the basis of 34/45 of the professional career and was reduced by 25 %, that is, 5 % for each year by which the pension was drawn in advance of the normal retirement age.

Mr Bourgard alleges that he has suffered discrimination on the grounds of sex, as self-employed women who take their retirement pension at the age of 60 do not take a reduction. He contended furthermore, that there had been discrimination, in that the pension at issue was calculated on the basis of a normal career of 45 years in the case of self-employed men, whereas the career of self-employed women was based on a normal period of 40 years.

2. Question referred to the Court

Does Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 permit a Member State which has set the pensionable age of self-employed men at 65 and that of self-employed women at 60, with the result that the old-age pension for men is calculated on the basis of an insurance record expressed as a fraction with a denominator of 45, whilst the denominator is 40 for women, to impose in the case of men, who alone have the right to request early payment of the old-age pension in the five years prior to normal retirement age, a reduction in the amount of the pension of 5 % for each year by which the pension is taken in advance?

3. Court ruling

Since it considered that the answer to the question raised by the referring court can, on the one hand, be clearly deduced from its existing case-law and on the other, that it leaves no room for reasonable doubt, the Court informed the referring court that it intended to give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure and invited the persons referred to in Article 23 of the EC Statute of the Court of Justice to submit any observations which they might wish to make in that regard. The Belgian and German Governments and the Commis-

sion made no objection to the Court's proposal to rule by reasoned order. Mr Bourgard submitted no observations on the matter.

In its Order, the Court recalled that, according to settled case-law, the derogation available under Article 7(1)(a) of Directive 79/7 must be interpreted strictly (see, in particular *Thomas et al.*, C-328/91 [1993] (8)). I-1247, (8)). Consequently, where, under that article, a Member State establishes different retirement ages for men and women for the grant of old-age and retirement pensions, the extent of the permitted derogation is confined to those forms of discrimination which are necessarily and objectively linked to the difference in retirement ages (*Thomas*, (10) and (20), and *Richardson*, C-137/94 (18) ECR I-3407) (paragraph 28).

The Court applied this criterion, in the first place, to the difference in the way the retirement pension is calculated. In that connection, the Court indicated that it has already had occasion to rule on the interdependence between, on the one hand, the specification of the normal retirement age and, on the other, the method of calculating the retirement pension, as regards the arrangements for employed workers, in Case C-154/92 *Van Cant* [1993] ECR I-3811), of 30 April *De Vriendt* [1998] ECR I-4583, (37); of 24 October *Dietz* [1996], c-435/93, Compendium p. I-6173). The Court recalls that, in paragraph 28 of the judgment in *Wolfs*, above, it had noted the fact that the age specified for grant of the retirement pension effectively dictates the period for which the persons concerned can contribute to the pensions system, and that it had concluded, in paragraph 29, that in such a case discrimination in the method of calculating pensions such as that arising from the national legislation at issue is necessarily and objectively linked to the difference maintained in relation to specification of the pensionable age. That finding in relation to the pension arrangements for employed workers is equally applicable, in the Court's opinion to those for self-employed workers (paragraphs 32–37).

The Court next applied the above mentioned criterion of the reduction of 5 % for each year by which the pension is drawn in advance.

In this respect it observes firstly that it is apparent from the order for reference, and from several observations submitted to this Court, that the option to take a retirement pension before the age of 60 was abolished, with effect from 1 January 1987, by Article 1 of Royal Decree No 416. As a result of that amendment, women could no longer take early retirement between the ages of 55 and 60. The removal of that option related to the legislature's desire ultimately to achieve a uniform retirement age of 65 for both men and women who are self-employed. There is therefore, the Court noted, a relationship of interdependence between the fact that men can choose to retire early and the associated early retirement reduction and the fact that a difference in retirement ages according to sex has been retained (paragraphs 38-41).

The Court next judged that it was undeniable that the early drawing of retirement benefits has financial repercussions on the pension system concerned as a result of the reduction in the income received from social security contributions and the increase in the expenditure incurred by way of the additional pensions payable. It notes that an arrangement consisting of an early retirement reduction would seem conducive to offsetting that financial impact, and that the calculations and other information provided by the Belgian Government indicate that the arrangement could not be abolished without compromising the financial equilibrium of the pensions system in issue. As regards more specifically the amount of the early retirement reduction applied in the main proceedings, that is, 5 % for each year by which the pension is drawn in advance, the Court stresses that the fact that the Member States have a wide discretion in the implementation of measures intended to preserve the financial equilibrium of social security systems, and of pensions systems in particular. One cannot, the Court concludes, establish from the

evidence in the case-file that the amount of the reduction was set at an unreasonable level (paragraphs 42–43).

The Court believes that, in those circumstances, an early retirement reduction such as that at issue in the main proceedings is objectively linked to maintenance of national provisions setting the retirement age differently according to sex (paragraph 46).

The Court (Third Chamber) hereby rules:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, read in conjunction with Article 7(1)(a), of the same directive, must be interpreted as meaning that, where the national legislation of a Member State has maintained a difference of retirement ages for men and women, it does not preclude that Member State, in circumstances such as those in the main proceedings in this case, from calculating the amount of the retirement pension differently according to the sex of the worker and from applying to male workers, who alone have the right to apply for an early retirement pension in the five years prior to the normal age of retirement, a reduction of five per cent for each year in which the pension is taken in advance.

Case C-285/02
EDELTRAUD ELSNER-LAKEBERG V. LAND NORDRHEIN-WESTFALEN
Date of judgment:
27 May 2004
Reference:
ECR [2004] I-5861
Content:
Article 141 EC — Directive 75/117/EEC — Remuneration for extra hours worked by teachers — Teachers working part-time — Indirect discrimination on the grounds of sex

1. Facts and procedure

Mrs Elsner-Lakeberg, who has the status of a civil servant, works part-time as a secondary school teacher for the Land Nordrhein-Westfalen. Full-time teachers at the applicant's school work for 24.5 hours per week, which corresponds to 98 hours per month, based on an average of 4 weeks. Mrs Elsner Lakeberg works for 15 hours per week, or 60 hours per month. In December 1999 Mrs Elsner-Lakeberg was required to teach 2.5 additional hours in that month. Her request for remuneration of those hours was refused on the basis that the relevant legislation provided that excess hours worked by a teacher who is a civil servant would be remunerated only if the additional work exceeded three hours in a month.

2. Question referred to the Court

Is it compatible with Article 141 EC in conjunction with Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women that men and women teachers, part-time as well as full-time, who are civil servants in the Land Nordrhein-Westfalen are not granted remuneration for excess hours worked if that additional work does not exceed three teaching hours in the calendar month?

3. Court ruling

The Court recalled that as regards the method to be used for comparing the pay of the workers concerned in order to determine whether the principle of equal pay is being complied with, according to the case-law, genuine transparency permitting an effective review is assured only if that principle is applied to each aspect of remuneration granted to men and women respectively, excluding any general overall assessment of all the consideration paid to workers (see judgment of 17 May 1990, Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 34 and 35, and dated 26 June *Mahlburg*, C-381/99, ECR I-4961, (35)). Accordingly, it is necessary to make separate comparisons in respect of the pay for regular hours and the pay for additional hours (paragraph 15).

In this regard, the Court noted that, in the main proceedings, the pay for additional hours constitutes consideration paid by the Land Nordrhein-Westfalen to the teachers concerned in respect of their employment. The Court stated that, although that pay may appear to be equal inasmuch as the entitlement to remuneration for additional hours is triggered only after three additional hours have been worked by part-time and full-time teachers, three additional hours is in fact a greater burden for part-time teachers than it is for full-time teachers. In effect, a full-time teacher must work an additional three hours over their regular monthly schedule of 98 hours, which is approximately 3 % extra, in order to be paid for their additional hours, whilst a part-time teacher must work three hours more than their monthly 60 hours, which is 5 % extra. The Court concluded that, given that the number of additional teaching hours giving entitlement to pay is not reduced for part-time teachers in a manner proportionate to their working hours, they therefore receive different treatment compared with full-time teachers as regards pay for additional teaching hours (paragraphs 16-17).

The Court added that it was for the national court to determine, first, whether the different treatment established by the legislation in question

affects considerably more women than men and, second, whether there is an objective unrelated to sex which justifies such different treatment and whether that different treatment is necessary to achieve the objective pursued (see, to that effect, Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165, (28)) (paragraph 18).

The Court (First Chamber) hereby rules:

Article 141 EC and Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, must be interpreted as precluding national legislation which provides that teachers, part-time as well as full-time, do not receive any remuneration for additional hours worked when the additional work does not exceed three hours per calendar month, if that different treatment affects considerably more women than men and if such difference in treatment cannot be justified by an objective unrelated to sex or is not necessary to achieve the objective pursued.

Case C-220/02
ÖSTERREICHISCHER GEWERKSCHAFTSBUND, GEWERKSCHAFT DER PRIVATANGESTELLTEN V. WIRTSCHAFTSKAMMER ÖSTERREICH
Date of judgment:
8 June 2004
Reference:
ECR [2004] I-5907
Content:
Article 141 EC — Directive 75/117/EEC — Taking into account periods of military service for calculation of termination payments — Situation not comparable with parental leave whose duration is not taken into account when calculating termination payment — Concept of payment

1. Facts and procedure

In Austria, under Paragraph 23 of the Angestelltengesetz (Law on employees, BGBl. 1921/292, amended by BGBl. I 2002/100, hereafter the 'AngG') which, in accordance with Paragraph 2(1) of the Arbeiter-Abfertigungsgesetz (Law on termination payments for workers), applies also to manual workers, workers are entitled to a termination payment under certain conditions. The amount of the payment depends inter alia on the worker's length of service in his employment.

Following maternity leave, the employee, following Article 15, paragraph 1 of the Mutterschutzgesetz of 1979 (Law on the Protection of Mothers, BGBl. 1979/221, amended by BGBl.I, 2002/100, hereafter the 'MSchG'), has the right, on her request, to unpaid leave until her child reaches the age of two years, provided that she lives in the same household as the child. Under Article 15, section 7(1) of the MSchG, '[u]nless otherwise agreed, the period of [parental] leave shall not be taken into account for the purposes of entitlements of a female employee based on length of service.'

Under Paragraph 8 of the Arbeitsplatz-Sicherungsgesetz (Law on job security, BGBl 1991/683, amended by BGBl. I 1998/30, hereafter 'the APSG'), '[w]here an employee's entitlements are based on length of service, periods of

1. military service within the meaning of Paragraph 27(1), points 1 to 4 and 6 to 8, of the Wehrgesetz (Law on defence) (now Article 19(1), points 1 to 4 and 6 to 8, of the Wehrgesetz 2001),

2. service as a fixed-term soldier within the meaning of Article 27(1), point 5, of the Wehrgesetz (now Article 19(1), point 5, of the Wehrgesetz 2001) of up to 12 months,

3. military training service for women and

4. civilian service

during which the employment relationship was in existence, shall be counted towards length of service.'

The Österreichischer Gewerkschaftsbund Gewerkschaft der Privatangestellten (union representing private sector employees, hereafter the 'Gewekschaftsbund'), the claimant in the main proceedings, made an application to the Oberster Gerichtshof for a declaration that the first parental leave of workers in an employment relationship must be taken into account in calculating the termination payment, as length of service, for up to eight months in the same way as military or civilian service. According to the Gewerkschaftsbund, the fact that under Paragraph 15f(1) of the MSchG periods of parental leave are not taken into account in calculating the termination payment under Paragraph 23 of the AngG, in the same way as periods of military or civilian service, constitutes indirect discrimination prohibited by Article 141 EC. It submits that 98.253 % of workers on parental leave are women, with men making up 1.747 % of the total. Conversely, military service, which is compulsory for men, or alternative civilian service concerns exclusively men.

2. Questions referred to the Court

1) Is the term 'pay' in Article 141 EC and in Article 1 of [Directive 75/117] […] to be interpreted as meaning that it also encompasses statutory provisions of general application, such as Paragraph 8 of [the APSG], where, in the public interest, periods of service in the performance of public duties as defined therein, during which it is generally not possible to perform services of a private-employment nature, which are taken into account for the purposes of claims under employment law calculated according to length of service in a private-employment relationship?

2) Are Article 141 EC and Article 1 of Directive 75/117 […] to be interpreted as meaning that, from the equal pay point of view, in the case of a system of pay that awards termination payments to workers essentially based on past loyalty to their employer in order to tide them over until they start a new job if the employment relationship is broken, unless the employment is brought to an end by the worker without good reason or its termination is the result of fault on his part, whereby individual periods of employment are categorised as independent and the exclusion of periods of unpaid leave is permitted, if that unpaid leave is taken for reasons that are in the worker's interests and at his initiative and if those reasons do not constitute an important reason that would entitle the worker to terminate the employment and retain the termination payment, the group of male and female workers covered by Paragraph 8 of the APSG (Group A) is comparable with the group of female workers who decide, in accordance with Paragraph 15 of the Mutterschutzgesetz to take parental leave ('childcare leave') to care for their child without pay after their normal 16-week period of 'maternity leave' has expired and until, at the maximum, the child reaches its second birthday (Group B)?

3) Are Article 141 EC and Article 1 of Directive 75/117 […] to be interpreted as meaning that the differences between the groups of male and female workers referred to in Question 2, which consist principally of the fact that, in the case of Group A, 'persons on military service',

- there is normally an obligation to enlist but, in any event, even if they should enlist voluntarily,
- enlisting is only permissible in so far as it is in the public interest, and
- it is normally not possible to perform services under a private sector employment relationship — even if it is another employment relationship,

whereas, in the case of Group B, male and female workers on 'unpaid parental leave',

- it is left solely to the individual workers in a particular employment relationship to choose whether to take unpaid parental leave to care for their child, and
- during that unpaid leave and in the time available to them even though they are caring for their children, they can also undertake work of a limited nature in a private employment relationship,

constitute sufficient objective justification for the different ways of taking into account those periods for the purposes of rights based on length of service?

3. Court ruling

The Court noted that, by its first question the national court essentially asked whether the benefit, for persons performing military service or, as an alternative, compulsory civilian service which may be extended voluntarily, consisting in the taking into account, for calculation of a termination payment they might subsequently be entitled to claim, of the duration of that service is to

be regarded as part of their pay within the meaning of Article 141 EC (paragraph 33).

On this point, the Court stated that it was not disputed by the parties to the main proceedings nor by the Austrian Government nor the Commission that the main proceedings relate to the duration of employment relationships with an employer and that that duration must be taken into account to calculate the amount of the termination payment, which falls within the concept of pay (see, to that effect, judgment dated 14 September *Gruber*, [1999], paragraph 22, C-249/97, ECR I-5295, (22)). The Court judged that the fact that duration may be increased by virtue of a statutory provision, by taking into account the duration of military or civilian service which is performed in the public interest and is not connected with the employment in respect of which the payment is granted, has no effect on the character of that payment as 'pay'. So, the Court concluded, since the system of termination payments falls within the scope of Article 141 EC, individual situations concerning different workers with regard to that system may be analysed on the basis of the provisions of that article (paragraphs 36–38).

The Court noted that, by its second and third questions the national court essentially asks whether Article 141 EC and Directive 75/117 preclude the calculation of the termination payment from taking into account as length of service the duration of military or equivalent civilian service performed mostly by men but not that of parental leave taken most often by women (paragraph 40).

With regard to this, the Court recalls that the principle of equal pay enshrined in Article 141 EC and Directive 75/117, like the principle of non-discrimination of which it is a specific expression, assumes that the male and female workers whom it benefits are in comparable situations (see Case C-218/98 *Abdoulaye and Others* [1999] ECR I-5723, paragraph 16, and Case C-366/99 *Griesmar* [2001] ECR I-9383, (39)). In the present case, the Court observed, parental leave is leave taken voluntarily by a worker in order to bring up a child. The voluntary nature of such leave is not lost because of difficulties in finding appropriate facilities for looking after a very young child, however regrettable such a situation may be. Parental leave does not have the same purpose as maternity leave; it is regulated by different legislation, and may moreover be taken at periods other than those following maternity leave. On the other hand, the Court noted, fulfillment of national service constitutes a civic obligation laid down by law and is not governed by the individual interests of the worker. The constraint imposed in the public interest on the contract of employment is of a general nature, whatever the size of the firm and the employee's length of service may be. In the context of national service, the person called up is at the disposal of the armed forces, at a time which he does not choose. In each case, the Court concluded, the suspension of the contract of employment is thus based on particular reasons, more precisely the interests of the worker and family in the case of parental leave and the collective interests of the nation in the case of national service. These reasons being of a different nature, the workers who benefit are not in comparable situations (paragraphs 59–64).

The Court (Grand Chamber) hereby rules:

1) *The benefit, for persons performing military service or, as an alternative, compulsory civilian service which may be extended voluntarily, consisting in the taking into account, for calculation of a termination payment they might subsequently be entitled to claim, of the duration of that service is to be regarded as part of their pay within the meaning of Article 141 EC.*

2) *Article 141 EC and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women do not preclude the calculation of a termination payment from taking into account, as length of service, the duration of periods of military service or the civilian equivalent performed mainly by men but not of parental leave taken most often by women.*

Case C-319/03
SERGE BRIHECHE V. MINISTRE DE L'INTERIEUR, MINISTRE DE L'ÉDUCATION NATIONALE AND MINISTRE DE LA JUSTICE
Date of judgment:
September 30, 2004
Reference:
ECR [2000] I-8807
Content:
Article 141(4) EC — Directive 76/207/EEC Article 2(4) — Conditions of access to public-sector posts — National clauses reserving the benefit of exemption from the age limit to access these posts for widows who have not remarried — Equality of opportunity — Proportionality

1. Facts and procedure

In France, in accordance with the first paragraph of Article 5 of Decree No 90-713 of 1 August 1990 concerning common statutory provisions applicable to administrative assistants within the State administration (JORF of 11 August 1990, p. 9795), the age limit for recruitment of those civil servants by external competitive examination is fixed at 45 years. In the words of the first paragraph of Article 8 of Law No 75-3 of 3 January 1975 enacting various measures to improve and simplify pensions or benefits for surviving spouses, mothers and the elderly (JORF of 4 January 1975, p. 198) 'the age limit for obtaining access to public-sector employment is not applicable to women who are obliged to work following the death of their husband'. This exception was amended by Law No 79-569 of 7 July 1979 abolishing the age limit for obtaining access to public-sector employment for certain categories of women (JORF of 8 July 1979) to make it applicable to mothers with three or more children, widows who have not remarried, divorced women who have not remarried, legally separated women and unmarried women with at least one dependent child, if they are obliged to work. Finally, Article 34 of Law No 2001-397 of 9 May 2000 concerning equality at work for men and women (JORF of 10 May 2001, p. 7320) adds to that list of categories of persons referred to in the preceding paragraph unmarried men with at least one dependent child who are obliged to work.

Mr Briheche, a 48-year-old widower who had not remarried with one dependent child, applied to sit various competitive examinations organised by the French public administration, including a competitive examination organised by the Ministry for the Interior in 2002 for the recruitment of administrative assistants within central government. His application to sit the latter competition was rejected on the grounds that he did not fulfil the age requirement laid down in the first paragraph of Article 5 of Decree No 90-713 for entry to that examination. He brought an administrative appeal against that decision rejecting his application, in which he claimed that, following the entry into force of Law No 2001-397, the age limit of 45 years could no longer be enforced against him. His appeal was dismissed by decision of the Minister for the Interior of 8 March 2002 in which the Minister, first, reiterates the terms of his previous decision, and secondly, states that, except for certain categories of women, only unmarried men with at least one dependent child who are obliged to work may benefit from the abolition of the age limit for obtaining access to public-sector employment.

2. Question referred to the Court

Does Directive 76/207/EEC of 9 February 1976 preclude France from maintaining in force the provisions of Article 8 of Law No 75-3 of 3 January 1975, as amended by Law No 79-569 of 7 July 1979 and Law No 2001-397 of 9 May 2001, concerning widows who have not remarried?

3. Court ruling

After having recalled that, in accordance with settled case-law, the principle of equal treatment laid down by Directive 76/207 is of general application and that directive applies to employment

in the public service (see, in particular, Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 18, and Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 25), the Court judged that a national provision such as that in question in the main proceedings which provides, as regards entry to external competitive examinations organised for the recruitment of civil servants, that the age limit is not applicable to widows who have not remarried who are obliged to work, results in discrimination on grounds of sex, contrary to Article 3(1) of the Directive, against widowers who have not remarried who are in the same situation as those widows. The Court believed that, in those circumstances it must be considered whether such a provision may nevertheless be allowed under Article 2(4) of the Directive, which states that it 'shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1) (points 18–21).

The Court indicated, in this regard, that, a measure which is intended to give priority in promotion to women in sectors of the public service must be regarded as compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates (see, to that effect, Case C-158/97 *Badeck and Others* [2000] ECR I-1875, (23)). Those conditions, the Court specified, are guided by the fact that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued (*Lommers*, cited above, paragraph 39). Article 2(4) of the Directive thus authorises, according to the Court, national measures relating to access to employment which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. The Court highlighted that the aim of that provision is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons concerned (see, to that effect, Case C-450/93 *Kalanke* [1995] ECR I-3051, paragraph 19, and Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraph 48) (paragraphs 23–25).

The Court then judged that such a provision as that in the main proceedings automatically and unconditionally gives priority to the candidatures of certain categories of women, including widows who have not remarried who are obliged to work, reserving to them the benefit of the exemption from the age limit for obtaining access to public-sector employment and excluding widowers who have not remarried who are in the same situation. It follows, according to the Court, that such a provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women, while it is to men in the same situation as those women, cannot be allowed under Article 2(4) of the Directive (paragraphs 27–28).

Next, seeking to establish whether a provision such as that in question in the main proceedings is nevertheless allowed under Article 141(4) EC, which authorises the Member States to maintain or adopt measures providing for specific advantages in order, inter alia, to prevent or compensate for disadvantages in professional careers, with a view to ensuring full equality in practice between men and women in working life, the Court considered that irrespective of whether positive action which is not allowed under Article 2(4) of the Directive could perhaps be allowed under Article 141(4) EC, it is sufficient to state that the latter provision cannot permit the Member

States to adopt conditions for obtaining access to public-sector employment of the kind in question in the main proceedings which prove in any event to be disproportionate to the aim pursued (see, to that effect, *Abrahamsson and Anderson*, cited above, paragraph 55) (paragraphs 29–31).

The Court (Second Chamber) hereby rules:

Article 3(1) and Article 2(4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions must be interpreted as meaning that they preclude a national provision, such as that in question in the main proceedings, which reserves the exemption from the age-limit for obtaining access to public-sector employment for widows who have not remarried who are obliged to work, excluding widowers who have not remarried who are in the same situation.

Case C-313/02
NICOLE WIPPEL/PEEK & CLOPPENBURG GMBH & CO. KG
Date of judgment:
12 October 2004
Reference:
2004 compendium p. I-9483
Content:
Article 141 EC — Directive 97/81/EC — Directive 76/207/EEC — Part-time work — Contract of employment in accordance with the requirements — Duration of work and reorganization of working time — Interpretation of national rights in conformity with the directive before expiration of the transfer period

1. Facts and procedure

On 28 September 1998, an employment contract, in the form of a 'framework contract of employment in accordance with the requirements', was concluded, in Austria, between Ms Wippel and Peek & Cloppenburg GmbH & Co. KG (hereafter called 'P & C'). It was a contract in which the duration of work and reorganization of working time were determined on a case by case basis by mutual agreement between the interested parties. P & C would seek the services of Ms Wippel on the basis of the quantity of work to be executed, and Ms Wippel could refuse at any time an offer of an assignment without having to justify her doing so. It was stipulated in the annex to the employment contract that there was no assured fixed revenue for Ms Wippel; the two parties expressly renounced fixing a determined quantity of work.

Ms Wippel, in the course of several months of employment, namely October 1998 to June 2000, worked in an irregular manner and was remunerated irregularly as well.

In June 2000, Ms Wippel demanded that P & C pay her a sum of EUR 11 929.23, increased by expenses and incidentals. She claimed that P & C had to pay her the difference between the amount due for one maximum duration period of work which was allowed to be demanded and that which was owed for hours worked which she had effectively evidenced. She claimed that the monthly maximum duration of work should in-fact constitute the basis of her remuneration for each month in the course of which she had worked for P & C. Ms Wippel also put forth that the absence in her employment contract of an agreement on the duration of work and on reorganization of working time constituted discrimination based upon gender.

2. Questions referred to the Court

1) a) Should Article 141 EC, the first Article of Directive 75/117 [...], the second clause of the framework agreement on part-time work concluded by the UNICE, the CEEP and the CES [...] and the ninth point of the Community charter of the fundamental social rights of workers of 9 December 1989, be interpreted as meaning (concept of worker) the protection they give should also be continuously enjoyed by people who, like the plaintiff, as it happens, agree, in a full framework contract, on pay, resignation and dismissal conditions etc., but also stipulate that the time spent and the work schedule shall depend on the amount of work arising and shall only be decided upon on a case-to-case basis by mutual agreement?

b) Does a person come under the notion of 'worker' in the sense of the first question, under a), when it is expected, without obligation on either side, that he or she will work about 3 days per week and 2 Saturdays per month?

c) Does a person coming under the notion of 'worker' in the sense of the first question, under a), when he or she does in fact work about 3 days per week and 2 Saturdays per month?

d) Does the Community charter of the fundamental social rights of workers [...] have a legally binding character at least such that the other provisions of Community rights should be interpreted in the light of it?

2) Should Article 141 EC, the first article of Directive 75/117, Article 5 of Directive 76/207 [...] and clause 4 of the framework agreement on part-time work be interpreted as meaning that one is in the presence of an inequality in salary not objectively justified

when the law or the collective convention prescribes a regulation applicable to full-time workers (approximately 60 % of which are men and 40 % women), not only as for the duration of the work, but in equal parts for the hours, a regulation which a full-time equivalent worker can seek to have applied even in the absence of contractual stipulation,

and when there does not exist an equivalent regulation concerning part-time workers (of which approximately 90 % are women and 10 % men) for the case where the contracting parties have not concluded an agreement conventionally — required by law — on this point?

3) Should Article 141 CA, the first article of Directive 75/117 [...], Article 5 of Directive 76/207 and clause 4 of the framework agreement on part-time work be interpreted in the sense that there is unequal treatment not objectively justified present when an employer expressly excludes agreement on the hours and the duration of work effective for part-time workers — of whom there are reasons to believe that a large majority are women (approximately 90 % women and 10 % men) — whilst that concerning full-time workers — for which it is supposed that there is not a majority proportion of women — the time they can work and how it is scheduled is already imposed by law or the collective agreement?

4) Should Article 141 EC, the first article of Directive 75/117, Article 5 of Directive 76/207 and clause 4, but also clause 1 b) (ease the development of part-time work), of the framework agreement on part-time work be interpreted in the sense that it is in this case necessary and legitimate, in order to compensate for unequal treatment not objectively justified,

a) regarding the length of time worked, on the basis of a determined duration and, in the affirmative, on

- the normal duration of work; or
- the most important effective weekly duration worked, unless the employer has demonstrated that there existed a particular need in the workforce arising in that time period; or
- the need in the main workforce in existence at the time the employment contract was concluded; or
- the average weekly duration of work; and

b) with regard to hours worked, in view of remuneration for the extra burden that flexibility lays on the worker and the advantage that it gives the employer, giving to the worker

- a 'proper' mark-up of the hourly wage, determined on a case-by-case basis; or
- a minimum mark-up similar to that due to full-time equivalent workers working more than the normal hours of work (8 hours per day or 40 hours per week); or
- independent of the effective time worked, compensation for the times which were not compensated for like time worked but during which, under the contract, the worker might have worked

(time of potential work), when the period of preliminary notification is less than

- 15 days,

- a reasonable period?

3. Court ruling

As an introductory matter, the Court examines a labour contract such as this which as its main purpose fixes neither the duration of work weekly nor working schedule, which is a function of the amount of work needed to be supplied, determined on a case-by-case basis, of a mutual agreement between the parties. It judges that, in this case, the aforesaid contract affects the exercise of professional activities of workers concerned in rescheduling, in accordance with needs, their time of work, and notices, therefore, that one such contract establishes relative rules for working conditions in the sense, in particular, of Article 5(1) of Directive 76/207. The Court respects, otherwise, that these policies for working conditions would back up equality of application of the notion of employment conditions, in the sense of clause 4, paragraph 1, of the framework agreement annexed at Directive 97/81. The Court adds that the fact that one such type of contract has these pecuniary consequences for the worker concerned shall not, nonetheless, naturally cause the contract to fall under the field of application of Article 141 EC or Directive 75/117, these arrangements being founded upon the narrow connection which exists between the nature of the benefit of work and increases in the salary of the worker (see, in this sense, the ruling of 11 September 2003, Steinicke, C-77/02, Compendium p. I-9027, paragraph 51). The Court concludes that, in the case of the main matter at issue in the main proceedings, it is not necessary to interpret either Article 141 EC or Directive 75/117 (paragraphs 30–34).

The Court holds that, as for the first question, the national court demands in substance if a worker were to have a labour contract stipulating that the duration of work and working schedule are a function of the quantity of work which presents itself and are not determined but are on a case-by-case basis as per the mutual agreement between the parties, such as in the case at issue in the main proceedings, it falls under the field of application of Directive 76/207 as well as the framework agreement annexed to Directive 97/81 (paragraph 35).

With regard to Directive 76/207, the Court notes that, as it stated in its preliminary observations, such a labour contract falls within the field of application of this directive. It judges, from that point on, that a worker having this contract also falls under this same directive (paragraph 36).

Having cited the pertinent clauses of the framework agreement annexed to Directive 97/81, the Court considers a worker viewed by the first question to fall equitably under the application of the framework agreement provided that:

- there is a contract or working relationship as defined by the legislation, the collective conventions or practices in force in the Member State;

- they have a salary for normal working hours, calculated on a weekly basis or averaged over a period of employment up to a year, which is as defined in clause 3, paragraph 2 of the framework agreement less than that for full time workers; and

- with regard to part-time workers who work on an occasional basis, the Member State has not, in accordance with clause 2, paragraph 2, of the same framework agreement, excluded totally or partially the said workers of the benefits of the rules of the said agreement. The Court specifies in particular, as for the latter condition, that it belongs to the jurisdiction of review proceeding to the level of scrutiny necessary to understand the situation in the company which is before this court (paragraphs 37–40).

The Court holds that, as for the second question, the national court demands in substance if in the circumstances or national arrangements where neither working hours nor duration of work are fixed, for part-time workers, clause 4 of the framework agreement annexed to Directive 97/81 and Articles 2(1) and 5(1) of Directive 76/207 must be interpreted such that they contradict an alternative rule such as that of Article 3 of the Arbeitszeitgesetz (law on working hours, henceforth 'AZG'), which fixes normal work duration in principal at 40 hours per week and 8 hours per day (paragraph 41).

On this point, the Court begins by underlining that it comes under the jurisdiction of Article 118 A of the EC Treaty (EC Treaty Articles 117 — 120 were replaced by EC Treaty Articles 136–143), which constitutes the legal basis of Directive 93/104, which of the first, fourth, seventh and eighth considerations of the same, this way in which it is worded the same as the first article, paragraph 1, which has for its objective to fix the minimum standards to improve the conditions of work and life of workers through a converging of national arrangements concerned, in particular the duration of working hours (see judgment of 26 June 2001, *BECTU*, C-173/99, Compendium P. I-4881, paragraph 37, and 9 September 2003, *Jaeger*, C-151/02, Compendium p. I-8389, paragraph 45). Then, the Court observes that, in accordance with the same arrangements, this harmonization at the Community level in the duration of work and on reorganization of working time aims to guarantee better protection of the security and health of workers, benefitting them with minimum periods of rest especially daily and weekly — in this way rest periods are adequate and they are able to set maximum weekly working hours (see judgment of 3 October 2000, *Simap*, C-303/98, Compendium p. I-7963, paragraph 49; *BECTU, supra*, paragraph 38 and *Jaeger, supra*, paragraph 46). This protection constitutes, in the opinion of the Court, a social right conferred on each worker as a minimum necessary prescription to ensure protection of their security and health (see, in this sense, the *BECTU* judgment, *supra*, paragraph 47). Finally, the Court indicates that, if it is possible that, in certain cases, the maximum duration of work and reorganization of working time coincide respectively with weekly hours worked for a full-time worker depending on the way in which working time is reorganized for this worker, Directive 93/104 applies in all cases without distinction to workers full-time and part-time and regulates thus, especially, the maximum working duration of work and reorganization of working time in that which concerns these two categories of workers (paragraphs 46–48).

It follows, in the opinion of the Court, that, to the extent that Article 3 of the AZG demands a reworking of working hours and a maximum duration of work, which is, by definition, superior to that of a part-time worker, it regulates also the maximum duration of work and reorganization of working time for full-time and part-time workers. From then on, Article 3 of the AZG does not lead to, in that which concerns clause 4 of the framework agreement annexed to Directive 97/81, salary less favourable for part-time workers than for comparable full-time workers nor does it lead to, in that which concerns Articles 2(1) and 5(1) of Directive 76/207, a difference in salary between the two categories of workers (paragraphs 49–50).

The Court holds that, as for the third question, the national court demands in substance if, in part, clause 4 of the framework agreement annexed to Directive 97/81 and, in the other part, Articles 2(1) and 5(1), of Directive 76/207 must be interpreted such that they are opposed to a contract for part-time work such as the kind in this case, which fixes neither the weekly hours worked nor the reorganization of working time, but are a function of the amount of work required to be furnished, determined on a case-by-case basis, the workers concerned have the choice to accept or refuse this work (paragraph 52).

On this point, the Court reiterates that the ban of discrimination expressed in the above-cited rulings is nothing but a specific expression of a general principle of equality which is governed by

fundamental principles of Community law, the principle that those in comparable situations shall not be treated in a different manner, unless the differentiation is objectively justified (see judgment of 26 June 2001, *Brunnhofer*, C-381/99, Compendium p. I-4961, paragraph 28, and 17 September 2002, *Lawrence e.a.*, C-320/00, Compendium p. I-7325, (12)). This principle, the Court makes clear, would not therefore be applied to persons placed in comparable situations (judgment of 31 May 2001, *D and Sweden/Counsel*, C-122/99 P and C-125/99 P, Compendium p. I-4319, (48)). The Court examines therefore in the first instance whether a part-time labour contract according to need, such as in the case at issue in the main proceedings, leads to treatment in a manner less favourable for a worker like Ms Wippel than full-time workers who find themselves in a comparable situation to hers, in the sense of clause 4 of the framework agreement annexed to Directive 97/81 (paragraphs 56–57).

In this respect, the Court observes that clause 3 of this framework agreement supplies the criteria defining 'comparable full-time worker'. This is defined as 'a full-time salary of the same establishment having the same type of contract or of relation to work and identical or similar work/employment, including consideration of all other possibly relevant factors including length of service and qualifications/competencies.' In accordance with this same clause, when there does not exist any comparable full-time worker in the same establishment, the comparison shall be made by reference to the collective convention applicable or, in the absence of an applicable collective convention, conformed to the legislation, to the collective conventions or national practices. The Court also notes that, on the one hand, a part-time worker working according to need, such as Ms Wippel, works by virtue of a contract which does not fix the weekly duration of work or reorganization of working time but which leaves them the choice to accept or refuse the work proposed P & C, and for which the worker is paid by the hour solely for the hours actually worked, and on the other hand, a full-time worker works by virtue of contract which fixes the weekly duration of work at 38.5 hours, the reorganization of working time such as the salary and which is due to the worker for P & C during all the hours worked such as determined without the opportunity to refuse such work, identically if the worker cannot or does not wish to perform it. In these conditions, rules the Court, the working relationship of a full-time worker is directed in advance at a different object and cause than that of a working relationship in which a worker such as Ms Wippel finds herself. It follows that, in the same establishment, no full-time worker has either the same type of contract or the same working relationship as that of Ms Wippel. The Court adds that it stands out from the record that, in the circumstances of the case at issue in the main proceedings, in doing so it fixes for all full-time workers to which the collective convention is applicable the weekly duration of work to 38.5 hours. In the circumstances of the case at issue in the main proceedings, there does not exist therefore, concludes the Court, any full-time worker comparable to Ms Wippel in the sense of the framework agreement annexed to Directive 97/81. It follows that a part-time labor contract according to need which fixes neither a duration of work weekly nor working schedule does not constitute treatment less favourable in the sense of clause 4 of the same framework agreement (paragraphs 58–62).

Secondly, with regard to Articles 2(1) and 5(1), of Directive 76/207, the Court observes that it repeats the record which, according to Ms Wippel, the situations of workers compared are, on the one hand, those which find themselves temporary workers on an as-needed basis of P & C under labour contracts fixing neither the weekly duration work nor a working schedule and, on the other hand, those of all other workers of P & C, which at full-time and part-time, are under contracts which fix their duration and schedule. Given the fact that the last category of workers has the characteristic obligation to work for P & C during a fixed weekly work period without the ability to refuse this work, in the hypothetical situation where the workers concerned could not or did

not wish to work, the Court repeats that, for reasons previously enumerated, the situation in which these workers find themselves does not resemble that in which part-time workers on an as-needed basis find themselves. It follows that, according to the Court, in circumstances such as in the case at issue in the main proceedings where there are two categories of workers which are not comparable, a part-time labour contract on an as-needed basis which fixes neither weekly working hours nor a work schedule does not constitute an indirectly discriminatory measure in the sense of Articles 2(1) and 5(1) of Directive 76/207 (paragraphs 63–65).

The Court considers that, in view of the answer given to the first question, it is unnecessary to answer the second and third questions (paragraph 67).

The Court (Grand Chamber) hereby rules:

1) *A worker having a labour contract which stipulates that the duration of work and working schedule are a function of the quantity of work which presents itself and are not determined but are on a case-by-case basis as per the mutual agreement between the parties, such as in the case at issue in the main proceedings, falls under the field of application of Council Directive 76/207/EEC of 9 February 1976, relative to the application of the principle of equal treatment between men and women concerning access to employment, to professional development and promotion, and working conditions.*

   Such a worker falls also under the scope of the application of the framework agreement annexed to council Directive 97/81/EC of 15 December 1997, regarding the framework agreement on part-time work concluded by UNICE, CEEP and CES, which provided that:

   - *there is a contract or working relationship as defined by the legislation, the collective conventions or practices in force in the Member State;*

   - *they have a salary for normal working hours, calculated on a weekly basis or averaged over a period of employment up to a year, which is as defined in clause 3, paragraph 2 of the framework agreement less than that for full time workers; and*

   - *with regard to part-time workers who work on an occasional basis, the Member State has not, in accordance with clause 2, paragraph 2, of the same framework agreement, excluded totally or partially the said workers of the benefits of the rules of the said agreement.*

2) *Clause 4 of the framework agreement annexed to Directive 97/81 and Articles 2(1) and 5(1) of Directive 76/207 must be interpreted in this way:*

   - *that they do not contradict a rule, such as Article 3 of the Arbeitszeitgesetz (law on working time), which fixes the maximum working duration to, in principle, 40 hours per week and 8 hours per day, and which regulates therefore also the maximum duration of work schedule for part-time work which concerns both full-time and part-time workers;*

   - *that, in these circumstances where all the labour contracts of other workers of an enterprise fix weekly hours worked and the working schedule, they do not oppose a labour contract of part-time workers of the same enterprise, such as in the case at issue in the main proceedings, by virtue of which the weekly duration of work and work schedule are not fixed, but are a function of work needed to be furnished, determined on a case by case basis, these workers having the choice to accept or refuse this work.*

Case C-284/02
LAND BRANDENBURG/URSULA SASS
Date of judgment:
18 November 2004
Reference:
2004 compendium p. I-11143
Content:
Article 141 EC — Directive 76/207/EEC (Article 2(3)) — Not counting of the entirety of maternity leave taken by virtue of the legislation of the ancient German Democratic Republic with the aim of making a category of superior remuneration — Concept of protection of women

1. Facts and procedure

Ms Sass, a German national, worked since 1 July 1982 in Potsdam. The work relationship of Ms Sass was governed by the Arbeitgesetzbuch der Deuschen Demokratischen Republik (labour code of the ancient RDA, henceforth the 'AGB-DDR'). Continuing to the reunification of Germany, the work relationship of Ms Sass was transferred to Land Brandenburg. This relationship was therefore governed by the Bundes-Angestelltentarifvertrag-Ost (collective convention of contractual agents of the public sector of East Germany) of 10 December 1990 (henceforth 'BAT-O') by virtue of a stipulation of the parties to this effect. The period of work performed by Ms Sass since her beginning the function, known to be 1 July 1982, was placed in the calculation as of the transfer.

As of 7 May 1998, Ms Sass' remuneration corresponded to category II a) of BAT-O. On 8 May 1998, she was classified in the superior category, known as category I b), group 2. In calculating the requisite 15 years under the modalities of advancement of BAT-O, Land Brandenburg imputed on this requisite period the first 8 weeks of maternity leave which Ms Sass has earned by virtue of Article 244 of AGB-DDR, but not the 12 following weeks. It emerges from the record which resulted relevant to the ruling, known to be Article 23 A, paragraph 4, third phrase, of BAT-O, makes no mention of the periods of protection called for by the Mutterschutzgesetz (henceforth the 'MuSchG'), known to be 8 weeks, and not of the maternity leave period called for by the AGB-DDR.

2. Question referred to the Court

Article 119 of the EC Treaty (actually Article 141 of the EC Treaty) and Directive 76/207/EEC make a problem of the fact that a collective convention, in virtue of the fact that those periods of suspension of the work relationship are not deducted from the requisite period, excluded equitably from deduction the period during which the work relationship was suspended, because the female worker has benefited, at the expiration of the period of protection of 8 weeks, deductable to her, under Article 6 of the MuSchG [. . .], from maternity leave up to and including the end of the 20th week after childbirth, in conformity with Article 244(1) of the AGB-DDR [. . .]?

3. Court ruling

The Commission having supported that the Community law not be found to apply in cases of this species, the Court begins by reviewing, in the first instance, that the Treaty of 31 August 1990 relative to the establishment of the united Germany was entered into force on 3 October 1990, the Community law becoming applicable at the time of the adoption, 10 December 1990, of BAT-O. Since then, the rulings adopted following the German reuinification to govern the situation of workers henceforth obedient to the legislation of the Federal Republic of Germany must respect the pertinent Community regulation. Secondly, the Court reiterates that the prohibition of discrimination between male and female workers which results in Article 141 EC is imposed not only on the action of public authorities but extends also to all conventions aiming to regulate in a collective manner salaried work (see, in particular, judgment of 8 April 1976, *Defrenne*, 43/75, Compendium p. 455, paragraph 39; 7 February 1991, *Nimz*, C-184/89, Compendium p. I-297, paragraph 11, and 21 October 1999, *Lewen*, C-333/97, Compendium p. I-7243, (26)). BAT-O has as its mission to govern the relations of contractual agents with the public collective, it would not be

otherwise, according to the Court, in the context of Directive 76/207 (see, in this sense, judgment of 2 October 1997, *Gerster*, C-1/95, Compendium p. I-5253, (18)). In this way, notes the Court, the drafters of BAT-O had been in measure examining the situation of women suffering the transition in their work relationship by reason of the German reunification moreso compared to ordinary male workers also of the ancient RDA. The Court concludes that it is right that Ms Sass invoke the Community law in order to derive profit from these rights (paragraphs 23–27).

The Court holds next that the stipulations in the case in the litigation at issue in the main proceedings establish relative rules for promotion of a worker, with respect to the issue of the required period. It follows, according to the Court, that the question asked in the species aimed to specify the access conditions to a superior level in the professional hierarchy and, consequently, under the field of application of Directive 76/207, and not of Article 141 EC paragraphs 28–31).

Having underlined that the exercise of rights conferred to a woman in conformance with Article 2(3) of Directive 76/207, which permits national arrangements of specific rights guaranteed to women by reason of pregnancy and maternity cannot be the cause of unfavourable treatment which concerns the conditions necessary for which she may proceed to a superior level in the professional hierarchy, the Court then determines that a female worker is protected, in her work relationship, against all unfavourable treatment motivated by the fact that she was on maternity leave. In this context, the Court observes that Ms Sass was disadvantaged relative to a colleague of the male gender who had commenced his work in the ancient RDA on the same day which she did, in taking her maternity leave, she did not attain the superior category of remuneration until 12 weeks later than such a colleague (paragraphs 33–37).

The Commission had nevertheless invoked Directive 92/85, in order to examine the eventual influence upon the rights bound up in the labour contract which could have a maternity leave longer than the minimal period prescribed by the same directive, and the Court mentioned, in this regard, the judgment of 27 October 1998, *Boyle e.a.* (C-411/96, ECR. p. I-6401, (79)), appearing to conclude that, the rights of the female worker being susceptible to affects from maternity leave having already gone beyond the minimal prescriptions aimed for by Article 8 of the said directive, the 20 weeks which Ms Sass freely decided to benefit from, in virtue of Article 244 of the AGB-DDR did not constitute other than an advantage proposed after the fact, the Court indicated that these could not reasonably be retained (paragraphs 40–41).

With regard initially to Directive 92/85, the Court decided that these did not have to be transposed by the Member States which on 19 October 1994 at the latest, would be at a date after the events in the case at issue in the main proceedings. The Court reiterates that, of the rest, to assume the same that one might be inspired by this directive, its Article 11 holds that rights lying within a labour contract must be ensured 'in cases which Article 8 is directed at'. However, this Article 8 calls for 'maternity leave of at least 14 continuous weeks'. Consequently, rules the Court, the fact that legislation accords women with maternity leave of more than 14 weeks does not stop that from later nonetheless being possibly considered like maternity leave aimed for by Article 8 of Directive 92/85 and, therefore, a period during which the rights within the labor contract must, as per Article 11 of the same directive, be assured. The Court specifies that, in addition, the obligatory nature or non-obligatory nature of such maternity leave cannot be decisive for the question raised in this type of case. In this regard, the Court restates that, in accordance with Directive 92/85, the suspension of a worker shall not concern a period of at least 12 weeks of the said maternity leave of 14 weeks minimum. Consequently, the fact that Ms Sass chose to benefit from in total 20 weeks of maternity leave called for under the AGB-DDR even though the 8 weeks of maternity leave called for by the MuSchG implies a suspension of work is no obstacle, in the opinion of the Court, to considering her maternity leave integrally similar to

maternity leave destined for the protection of women having given birth (paragraphs 42–46).

With regards again to the *Boyle* case, *supra*, the Court reiterates that it in no way prejudices the response to the question asked in the present case, in that it relates to, in the *Boyle* judgment, not legally prescribed maternity leave, but supplementary maternity leave given by the employer (paragraph 47).

The Court concludes of all that which precedes that, if national legislation calls for maternity leave with the aim of protecting, in the course of the period from pregnancy through childbirth, and also the special relationship between the woman and her child during the period immediately following birth, the Community right requires that the benefit of legal maternity leave protection, on the one hand, not interrupt either the working relationship of the woman concerned nor the application of rights and accruals thereto and, on the other hand, may not lead to unfavourable treatment after the fact (paragraph 48).

However, notes the Court, the BAT-O would have been taken as the sole point of reference in this regard under the national legislation of the German Federal Republic, while the leave in question comes under the legislation of the ancient RDA. On should, consequently, according to the Court, consider in the end the effect the nature of the leave actually had on Ms Sass in order to verify if the result may be similar to a period of protection, such as that called for by the MuSchG, destined to assure the protection of women who have given birth (paragraphs 49–50).

In this regard, the Court observes that the aims, on the one hand, of maternity leave for 8 weeks, called for by the MuSchG, and, on the other hand, of maternity leave for 20 weeks, called for by the AGB-DDR and taken by Ms Sass, intersect in large part. Each of the two regimes of leave aim to restore the physique of the mother after the birth and to permit her to personally occupy herself with her child, known as double protection of the woman called for by Article 2(3) of Directive 76/207. Henceforth, thinks the Court, leave for 20 weeks must be considered like leave legally intended to protect women having given birth and the law also be imputed on the period requisite giving access to a category of superior remuneration. The Court underlines, however, that it is falls to a national judge to verify, in the light of the facts of the case, that the leave taken by Ms Sass and the period of protection called for by the BAT-O be assimilated between them, in the point of view of their objectives and of their result, in order to be able to impute on the period requisite for this after the totality of legally-required leave taken in virtue of the legislation of the ancient RDA. The Court indicates that, if a national judge reaches the conclusion that the maternity leave called for by Article 244 of the AGB-DDR is legally designed for the protection of the women after childbirth, it would agree to impute the total said leave on the period required to be classified in a category of superior remuneration to avoid that a woman having taken the said leave disadvantage herself by the fact of her pregnancy and her maternity leave, compared with a male colleague having commenced his work in ancient RDA on the same day as her (paragraphs 52–58).

The Court (First Chamber) declares as law:

Council Directive 76/207/EEC of 9 February 1976 relating to the place of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, stands opposed to a collective convention, the Bundes-Angestelltentarifvertrag-Ost (collective convention of contractual agents of the public sector of East Germany), which excludes imputation on the requisite period of the period during which the female worker has benefited, in conformity with the legislation of the ancient Democratic German Republic, from maternity leave which exceeds the period of protection, called for by the legislation of the Federal Republic of Germany, aimed at the same convention, henceforth that the objectives and the result of each of these two leave periods responds to the objectives of protection of women concerned during pregnancy and maternity, protection consecrated in Article 2(3) of the said directive. Verifying whether these conditions are fulfilled belongs to national jurisdictions.

Case C-19/02
VIKTOR HLOZEK/ROCHE AUSTRIA GESELLSCHAFT MBH
Date of judgment:
9 December 2004
Reference:
2004 compendium p. I-11491
Content:
Article 141 EC — Directive 75/117/EEC — Pension of transition ('Überbruckungsgeld') under a business agreement — Granting severance benefits from a different age according to the sex of dismissed workers — Situation not comparable with regard to the intensity of the risk of unemployment

1. Facts and procedure

In Austria, during the time of the facts in the case at issue in the main proceedings, the Allgemeines Sozialversicherungsgesetz (general law on social security, BGBI. No 189/1955, in the version published at BGBI No 33/2001, hereafter the 'AVSG') accorded a right to a pension of early retirement, in particular in case of unemployment, to men aged over 60 and to women aged over 55.

Roche Austria Gesellschaft mbH (hereafter 'Roche') merged, effective 1 July 1998, with the company for which Mr Hlozek had worked since 1 January 1982. In view of this merger, and in order to lessen the negative consequences for the workers of the restructuring measures for the enterprise envisaged in the context of this merger, the employer concluded with personnel representatives the company plan of 26 February 1998. Paragraph 7 of this social plan concerns an agreed compensation for early dismissal for those workers who, at the moment when their work relationship with the enterprise was terminated, were under 55 years of age, in the case of men, and under 50, in the case of women. The total amount of this indemnity was calculated as a function of the length of service of the workers in the firm. Paragraph 8 of the said social plan was worded as follows:

'8. Pension of transition ['Überbruckungszahlung']

8.1. Field of application

Those who have a right to a pension of transition are workers who are 55 years old (men) or 50 years old (women) at the moment when the work relationship has ended and who are not yet entitled to an ASVG pension.

8.2. The pension of transition begins in the month which follows the end of the work relationship and expires at the moment when the beneficiary becomes eligible for an ASVG pension. At the latest [they expire] in all cases 5 years after the end of the work relationship.

8.3. The total amount of the pension of transition comes to 75 % (gross) of the last gross monthly salary and is paid 14 times per year. During the period of transition, the worker is exempt from service.

In addition, a severance payment under the agreement, [is granted]. This is granted according to the duration of the period of transition: […] '

Mr Hlozek was laid off on 30 June 1999, in the context of the restructuring of the enterprise. Being 54 years old at the time when his work relationship with Roche ended, Mr Hlozek came under paragraph 7 and not paragraph 8 of the social plan. He accepted the conventional severance which he was paid in conformance with paragraph 7 of the social plan. Mr Hlozek nevertheless felt that he had been the object of discrimination by reason of gender, in view of the fact that, had he been a female worker, paragraph 8 of the social plan would have been applicable to him. In this case, he would have received a conventional severance payment of a total amount inferior to the payment which he was paid. However, he would have benefitted from arrangements relative to granting a pension of transition.

2. *Questions referred to the Court*

1) a) Should Article 141 EC and Article 1 of Directive 75/117/EEC be interpreted […] in the sense that in a regime in which the employer, which lays off a large part of the workforce following a merger with another company, is obliged to conclude under its obligation to provide social protection in regard to the group of personnel to lessen the consequences of their layoffs — in particular the risk of unemployment due to age — with delegates of the personnel a social plan which has normative value for the workers, […] these provisions conflict with a social plan worded so that all the female workers 50 years or older at the time of termination and all the male workers 55 years or older at the time of termination are given a […] ['pension of transition'] of 75 % of the last monthly salary gross during 5 years but at most until the moment when they have the right to a legal pension independent of the length of service, that is to say without taking into account 'periods of affiliation', only on the basis of age — and of different risk of unemployment of long duration estimated on an inclusive basis for men and women according to age?

b) Must one understand in particular the concept of remuneration represented in Article 141 EC as well as that of Article 1 of the directive in the sense that, with regard to payments which do not result from carrying out work but arise solely from membership in the workforce and of the obligation which lies with the employer to put in place a social protection, it includes the coverage of risk of long-term unemployment, so that the remuneration must then be considered as being equal when it covers the same degree of risk — inclusively estimated — even if this risk typically arises in different age classes in the case of men and women?

c) However, if the notion of 'remuneration' appearing in these provisions only covers compensation as such, might the difference in risk thus comprised allow the Court to then justify a different regime between men and women?

2) a) Must the notion of 'occupational social security schemes' be understood in the sense of Article 2(1), of Directive 86/378/EEC […] in the sense that it encompasses also pensions of transition mentioned above?

b) Must the notion of risk of 'old age, including in the case of early retirement' appearing in Article 4 of the directive in the sense that it encompasses also ['pensions of transition'] of this nature?

c) Does the notion of 'scheme' appearing in Article 6(1)(c), of the directive cover only the conditions leading to the right to a pension of transition or does it cover also globally the membership of the personnel?

3) a) Must Directive (76/207/EEC) […] be interpreted in the sense that a ['pension of transition'] […] mentioned above is one of the terms of dismissal in the sense of Article 5 of that directive?

b) Must this directive be interpreted in this sense that it opposes a social plan with terms under which all female workers aged 50 years or older at the time of termination and all male workers 55 years or older at the time of termination are awarded a ['pension of transition'] […] of 75 % of their last monthly gross salary during 5 years or less but for no longer that the time when they have a right to a legal pension, independent of the duration of work, that is to say without taking account of their 'period of affiliation', on the sole basis of age — and of different risk of

long-term unemployment estimated on an inclusive basis for men and women as a function of age?

3. Court ruling

The Court notes that, by the first question, which it divides into 3 branches (paragraphs a) to c)), the national court is asking in substance, if a pension of transition such as those in the main proceedings come into the concept of 'remuneration' in the sense of Article 141 EC and of Article 1 of Directive 75/117 and, in the affirmative, if these arrangements oppose this pension being given in a manner which takes into account the different risk of long-term unemployment evaluated on an inclusive basis for men and women according to age or if, on the contrary, the difference in risk seen thus can justify a difference in compensation between male workers and female workers in that which concerns the age of starting from which as, in case of layoffs, they become eligible for the same pension (paragraph 33).

With regard to the first branch, the Court holds that the work pension in the main proceedings comes under the concept of 'remuneration' in the sense of Article 141 EC and of Article 1 of Directive 75/117. It further recalls in effect that, with regard to payments given by the employer to the worker on the occasion of their termination, it has already stated that these constitute a form deferred payment, to which the worker has a right by reason of their employment, but which they are paid at the time of the end of the work relationship, in the way of facilitating their adaptation to new circumstances resulting from this (judgment of 17 May 1990, *Barber*, C-262/88, Compendium p. I-1889, paragraph 13, and of 27 June 1990, *Kowalska*, C-33/89, Compendium p. I-2591, paragraph 10, as well as of February 9 1999, *Seymour-Smith and Perez*, C-167/97, Compendium p. I-623, (25)). In this instance, the Court observes that the pension of transition finds its origin in the company plan of February 26 1998 which is the result of a consultation between workers and management committee and which is due from the enterprise by reason of the work relationship which existed between it and certain workers laid off because of restructuring operations designed by the same plan. Paragraph 8.3 of the latter, according to which the total amount of the pension is calculated on the basis of the last gross monthly pay, confirms, in the view of the Court, that the pension of transition constitutes an advantage given in relation with the employment of the workers concerned. The Court adds that it is already established that the aforementioned social plan was drawn up with a view to lessening the social consequences of the restructuring operations of the enterprise. Thus, it reserves the benefit of the pension of transition for workers having attained an age close to the legal age of retirement at the time of their termination and anticipates that this pension will be paid in a periodic manner over a maximum duration of 5 years, without any obligation to provide any service. However, indicates the Court, among the advantages classed as remuneration are those advantages paid by the employer by reason of the existence of a relationship of salaried employment intended to ensure a source of revenue for workers, even though they are not doing, in specific cases any work under their contract of employment (see, in this sense, the judgment of 16 September 1999, *Abdoulaye e.a.*, C-218/98, Compendium p. I-5723, paragraph 13 and cited case law). In addition, the Court recalls, that these benefits have the nature of pay is not to be placed in doubt from the sole fact that they also conform to the considerations of a company policy (judgment of 17 February 1993, *Commission/Belgium*, C-173/91, Compendium p. I-673, (21); and of 28 September 1994, *Beune*, C-7/93, Compendium p. I-4471, paragraph 45) (paragraphs 37–40).

Examining together the second and third branches, the Court reminds us that the principle of equality in remuneration, like the general principles of non-discrimination of which it is a particular expression, presuppose that the male and female workers who benefit therefrom find themselves in identical or comparable situations (see judgment of 9 November 1993, *Roberts*,

called 'Birds Eye Walls', C-132/92, Compendium p. I-5579, paragraph 17; 13 February 1996, *Gillespie e.a.*, C-342/93, Compendium I-475, paragraphs 16 to 18; *Abdoulaye e.a.*, *supra*, paragraph 16, and of 13 December 2001, *Mouflin*, C-206/00, Compendium p. I-10201, paragraph 28) (paragraph 44).

The Court judges that this is not a case of that type. It points out on this point that it is true that the real risk of unemployment incurred by each worker does not depend only on factors like age and gender, but also other factors which are relevant, such as qualifications and professional mobility. However, notes the Court, it remains none the less that, according to general experience admitted to at the time of the enterprise restructuring, the workers and management committee could have legitimately estimated that the workers approaching the legal age of retirement constituted, with regard to the intensity of risk of not finding new employment, a different category than that of the other workers. This estimate, indicates the Court, explains the fact that, with regard to the provision of a pension of transition, the social plan has established a difference of treatment based directly on the age of the workers at the time of their termination. Given that at the time of the conclusion of the social plan, women could claim a statutory early retirement pension at the age of 55, then that the men could not claim such a pension until the age of 60, the workers and management committee estimated that, to assure equal treatment for all the workers, it was necessary that the female workers could benefit from the right to a pension of transition at an age 5 years younger than that fixed for their male colleagues. This arrangement of the social plan did not have as its object or effect to establish discrimination against male workers of the enterprise. In effect, those male workers who, like Mr Hlozek, fell into the age class comprising those between 50 and 54 years old at the time of their termination, were further than the legal age of early retirement and, therefore, did not find themselves, in the judgment of the Court, in a situation identical to that of female workers belonging to the same age class with regard to the intensity of risk of unemployment to which they were exposed. The Court notes that therefore that, in fixing different leaving age at which the right to a pension of transition is available to male workers and to female workers, the social plan planned for a neutral mechanism, which confirms the absence of all discriminatory elements (judgment of *Birds Eye Walls*, *supra*, paragraph 23) (paragraphs 47–49).

In addition, the Court underlines that the arrangements of the social plan of 26 February 1998 concerning the provision of a pension of transition are not intended to be applied generally for an indeterminate period. The Court notes that these arrangements were agreed to by the workers and management committee because of one company restructuring operation and the payment of all pensions of transition given to workers laid off in the context of this operation would finish at the latest 5 years after their redundancy. As a consequence, there is no fear, in the opinion of the Court, that the application of the social plan could have the effect of reinforcing or perpetuating the arrangements of the Austrian statutory pension scheme establishing a difference in treatment between men and women in that which concerns the age of admission to a retirement pension, even if there is a close link between the arrangements of the social plan and those of the statutory scheme (paragraph 50).

The Court feels that, in view of the reply to the first question, according to which the pension of transition comes under the concept of 'remuneration' in the sense of Article 141 EC, the interpretation of Directives 86/378 and 76/207 lacks relevance for the resolution of the litigation in the main proceedings. In these circumstances, the Court considers it unnecessary to answer the second and third interlocutory questions (paragraph 53).

The Court (First Chamber) rules:

A pension of transition such as that in the case at issue in the main proceedings falls under the notion of

'remuneration' in the sense of Article 141 EC and Article 1 of Council Directive 75/117/EEC of February 1975 concerning the approximation of the legislation of the Member States relating to the application of the principle of equal pay for men and women. In circumstances such as those of the case at issue in the main proceedings, these arrangements do not contradict the application of a company plan providing for differences in treatment between men and women in that which concerns the age of eligibility for a pension of transition, since male and female workers are, by virtue of the national legal scheme for early retirement, in a different situation with regard to the relevant factors for receiving the said pension.

Case C-356/03
ELISABETH MAYER/VERSORGUNGSANSTALT DES BUNDES UND DER LANDER
Date of judgment:
13 January 2005
Reference:
2005 compendium p. I-295
Content:
Directive 86/378/EEC (Article 6(1)(g)) — Employment in civil service — Maternity leave — Acquisition of pension rights — Directive 92/85/EEC (Article 11(2)(a)) — Non-expiration of the extension of transposition

1. Facts and procedure

Ms Mayer was, between 1 January 1990 and 30 September 1999, employed in the civil service at Land of Rhenanie-Palatinat (Germany) and compulsorily affiliated to the Versorgungsanstalt des Bundes und der Lander (retirement fund of the Federal Republic and of the Lander, hereafter the 'VBL'). She was on maternity leave from 16 December 1992 to 5 April 1993 as well as 17 January to 22 April 1994.

The amount of insurance payment which went to an insured person who found herself in a situation such as Ms Mayer constituted, according to Article 44(1), first phrase, (a), of the statutes of the VBL, a certain percentage of the part of her income which was subject to contribution to the complementary pension scheme, on which contributions had been paid. By virtue of Article 29(1) of the said statutes, the employer had to pay a monthly contribution amounting to a certain fraction of the income which was subject to deductions under the complementary retirement regime. These revenues are defined, in paragraph 7 of the said Article 29, as being the taxable revenues.

At the time of her maternity leave, Ms Mayer, who was affiliated to a private sickness insurance scheme, received maternity allowance paid by the State under Article 13(2), of Gesetz zum Schutz Schutz der erwerbstätigen Mutter (law on the protection of working mothers, hereafter 'Mutterschutzgesetz'), and the supplement to the latter, paid by the employer amounting to the difference between the State allowance and the last net wage under Article 14(1) of the same law. This employer's payment is exempted from tax. In the course of her maternity leave, Ms Mayer had not therefore received revenues subject to contribution to the complementary retirement scheme, for which her employer had to pay monthly contributions to this organization. As a consequence, in calculating the amount of the insurance payment made to Ms Mayer, the VBL had not taken into account the payments which she received from her employer over the course of her maternity leave.

Ms Mayer requested that these periods of maternity leave be included in the calculation of her right to insurance income which she had acquired in the complementary retirement regime run by the VBL.

2. Questions referred to the Court

1) Are Article 119 of the EC Treaty (becoming, after modification, Article 141 (EC) and/or Article 11(2)(a), of Directive 92/85 and Article 6(1)(g) of Directive 86/378, as modified by Directive 96/97, an obstacle to the application of the statutory arrangements of a complementary retirement regime, such as the one in the case at hand, by virtue of which a worker does not acquire in the course of statutory maternity leave (in this situation: from 16 December 1992 to 5 April 1993 and 17 January to 22 April 1994) the rights to insurance compensation paid in the event of leaving the obligatory scheme early, every month starting from the date of the materialisation of the insured risk, (retirement age, or unfitness for work or occupation) because of the fact that the acquisition of these rights is subject to the condition that the worker receive in the course of the reference period taxable revenue and that the monies paid to the

worker during maternity leave do not constitute, by virtue of national arrangements, taxable revenue?

2) Is that more particularly the case where one takes into consideration that the insurance payments are not — like the complementary retirement pension paid upon materialisation of the risk if the insured is still affiliated to the obligatory insurance scheme — intended to assure security in her old age or in case of inability to work, but is for the purpose of reimbursing the contributions paid for her in the course of her affiliation with mandatory insurance?

3. Court ruling

The Court decides to examine the two preliminary questions together. The Court points initially to the whole of Directive 96/97 Article 2(1), which provides that all measures which are transpositions of this directive, concerning salaried workers, must cover all benefits attributed to periods of employment subsequent to 17 May 1990. The maternity leave in the case at issue in the main proceedings took place after this date, in 1992, 1993, and 1994, so Directive 86/378, as modified by Directive 96/97, is therefore applicable to the said leave with regard to taking it into account in the final calculation of benefits and related accruals (paragraphs 24–26).

Having observed that the terms of Directive 86/378 Article 6(1)(g), as modified by Directive 96/97, are to list the number of clauses contrary to the principle of equality in compensation founded on sex, be it directly or indirectly, for interrupting the maintenance or acquisition of rights during periods of maternity leave or family leave, legally or conventionally prescribed and paid for by the employer, the Court holds next that the rights targeted by this clause of the directive include future pension rights whose acquisition may be interrupted by the application of national stipulations related to maternity leave. The Court believes that the VBL argument, in accordance with which the income insurance in the case at issue in the main proceedings does not come under Directive 86/378, as modified by Directive 96/97, because its object would be to supply an actuarial counterparty of paid contributions and not to provide security in case of old age or work disability, cannot be accepted. In effect, it brings out again the group of elements exposed in the order of appeal on the subject of the said income insurance, that she is a member of a complementary pension retirement regime and that was set up to provide a payment to the concerned workers in the event of the realization of the risk of old age or work disability. Such insurance income constitutes in this way, according to the Court, a complementary benefit which comes under the field of application of the said directive such as is defined in Articles 2 and 4 of the same, and is not mentioned in any of the anticipatory exclusions by the same directive (paragraphs 27–29).

The Court notes then that it brings out again the decision of appeal that, in the course of her maternity leave, disregarding the allocation of maternity assigned by the State in applying Article 13(2) of the Mutterschutzgesetz, Ms Mayer received from her employer the supplement anticipated in Article 14(1) of the same law, up to the difference between the said allocation and her last net remuneration. The maternity leave of Ms Mayer was therefore compensated for in part by her employer. These circumstances suffice, in the judgment of the Court, to establish that the leave was paid by the employer, in conformity with Article 6(1)(g) of the said directive (paragraph 31).

The Court concludes by the preceding that Directive 86/378 Article 6(1)(g), as modified by Directive 96/97, contradicts a national regulation such as Article 29(7) of the VBL, which has the effect of interrupting the acquisition of rights to income assurance during leave following from maternity in imposing as a condition that the worker be paid taxable revenue during the said leave (paragraph 32).

The Court believes, finally, that it is not necessary to examine Directive 92/85, since the maternity leave

in the case at issue in the main proceedings was taken before the expiration of the delay fixed for its transposition, to be 19 October 1994, and that, the response having been given to the prior questions founded on Directive 86/378, as modified by Directive 96/97, there is no reason to interpret Article 119 of the EC Treaty (paragraphs 33–34).

The Court (First Chamber) hereby rules:

Council Directive 86/378/EEC Article 6(1)(g), of 24 July 1986, related to the place of the principle of equality of compensation between men and women in professional regimes of social security, as modified by council Directive 96/97/EC of 20 December 1996, must be interpreted in the sense that it stands in the way of national regulations according to which a worker does not acquire rights to income insurance while taking part in a complementary retirement scheme in the course of legal maternity leave compensated on the part of the employer, by reason of the fact that the acquisition of these rights is based on the condition that the worker be paid taxable income during maternity leave.

Case C-203/03
EU COMMISSION / AUSTRIA
Date of judgment:
1 February 2005
Reference:
2005 compendium p. I-935
Content:
Violation–Directive 76/207/EEC (Articles 2 and 3) — Ban on employing women to work underground in the mining sector as well as work in a hyperbaric environment and underwater — Concept of protection of women

1. Facts and procedure

By its appeal, the Commission asks that the Court certify that, by maintaining, contrary to the provisions of Directive 76/207/EEC,

- in Article 2 of the Verordnung des Bundesministers für Wirtschaft und Arbeit über Beschäftigungsverbote und -beschränkungen für Arbeitnehmerinnen (decree of the Ministry of Economy and Labour regarding the prohibitions and restrictions on employment for female workers) of 4 October 2001 (BGBI. II, 356/2001, hereafter the 'Decree of 2001'), a general prohibition on the employment of women, outlining a limited number of exceptions, in the sector of the subterranean mining industry and

- in Articles 8 and 31 of the Druckluft- und Taucherarbeiten-Verordnung (decree on work in a hyperbaric atmosphere and diving workers) of 25 July 1973 (BGBI. 501/1973, hereafter the 'Decree of 1973'), a general prohibition on employment of women in this type of work,

Austria has failed in the obligations incumbent upon it by virtue of Articles 2 and 3 of this directive and of Articles 10 EC and 249 EC and to order Austria to pay costs.

With effect as from 1 August 2001, the employment of women in the subterranean mining industry is, in Austria, governed by the Decree of 2001. Article 2 of this decree is worded as follows:

'(1) Female workers cannot become employees in the subterranean mining industry.

(2) Paragraph 1 does not apply to:

1. to female workers who occupy a post of responsibility, being management or technical, and whose work is not physically demanding;

2. female workers whose work is an activity in the way of social service or of health;

3. female workers who must accomplish professional training in the course of their studies or comparable training, for the duration of this training;

4. female workers who are only employed on an occasional basis in the subterranean mining industry in the category of a professional activity which is not physically demanding. '

Article 8 of the Decree of 1973 provides:

'(1) Only those male workers aged 21 or over and fulfilling the medical conditions required may be employed for work carried out in a hyperbaric atmosphere. [...]

(2) [...] To the extent that medical conditions called for by paragraph 1 are fulfilled, female workers aged 21 years or over may also be employed in the way of surveillance personnel or conduct other work in a hyperbaric atmosphere as long as it does not lead to heightened stress on their body. [...]

According to the terms of Article 31 of the Decree of 1973:

(1) Only male workers aged 21 or over, fulfilling the medical conditions required and possessing the specialized knowledge and professional experience necessary from the point of view of protection of workers may be employed as divers. [...]'

2. *Court ruling*

The Court approaches first the prohibition on employing female workers in the subterranean mining industry. First, the Court examines whether the difference in treatment between men and women regarding employment in this industry, which results from Article 2(1) of the Decree of 2001, falls under Directive 76/207 Article 2(3). In this regard, the Court rules that this latter provision does not permit the exclusion of women from employment with the sole reason that they must be protected above men from risks which concern men and women in the same manner and which are different from needs for protection specific to women such as the needs expressly mentioned (see, in this sense, judgment of 15 May 1986, *Johnston*, 222/84, Compendium p. 1651 paragraph 44, and of 11 January 2000, Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 30). The Court adds that it is not permissible either to exclude women from employment for the sole reason that they are on average smaller and less strong than the average of men, as long as men having similar physical characteristics are admitted to this employment (paragraphs 45–46).

As it happens, the Court points out, although it is true that the Decree of 2001 does not prohibit the employment of women in the subterranean mining industry without having provided exceptions to this prohibition, nevertheless the scope of application of the general prohibition appearing in Article 2(1) of the same decree remains very broad in the extent to which it excludes women even from work which is not physically demanding and which, as a consequence, does not present a specific risk for preservation of the woman's biological capacities to become pregnant and give birth, or for the health and safety of pregnant women, and recently delivered or nursing mothers, or also for the foetus. The exception provided in Article 2(2)(1) of this decree only mentions, in effect, the management posts and technical work assumed by persons occupying 'a position of responsibility' and thus situated in a better position in the hierarchy. The exception provided in point 2 of the said paragraph only concerns female workers employed in social services or health, and points 3 and 4 of the same paragraph deal only with specific situations limited in time. Such regulation, concludes the Court, goes beyond what is necessary to ensure the protection of women in the sense of Directive 76/207 Article 2(3) (paragraphs 47–49).

Secondly, the Court examines the question of the impact of Article 307 EC and convention number 45 of the International Labour Organization (Hereafter the 'ILO') of 21 June 1935, regarding the employment of women in work in subterranean mines of all categories, ratified by the Republic of Austria in 1937. On this point, the Court observes that this convention contains, in its Article 2, a general prohibition on the employment of women in subterranean mines and permits, in Article 3, several exceptions of the same type as those specified by the Decree of 2001, which carry out the obligations ensuing from this convention without going beyond the restrictions on the employment of women which are provided for in it. The Court holds that, in view of the conclusion which it has previously reached, the said prohibition is incompatible with Articles 2 and 3 of Directive 76/207. The Court recalls then that, as is shown under paragraph 50 of the judgment of 4 July 2000, *Commission/Portugal* (Case C-62/98, Compendium p. I-5171), among the appropriate means for eliminating such an incompatibility as is given in Article 307, line 2, EC, figures notably the denunciation of the convention at issue in the main proceedings. However, the court points out that the only occasion for Austria after its joining the European Community, to denounce convention number 45 of the ILO presented itself, in accordance with the regulations detailed in Article 7(2) of this convention, in the course of the year fol-

lowing 30 May 1997. Now, notes the Court, at this time, the incompatibility between the prohibitions provided by this convention and the provisions of Directive 76/207 were not established in a sufficiently clear manner for the Member State to be obliged to denounce the said convention. It follows that, having maintained in force national provisions such as those contained in the Decree of 2001, Austria has not failed in the obligations incumbent upon it in virtue of Community law (paragraphs 58–64).

The Court next approaches the prohibition on employment of women for work in a hyperbaric atmosphere or diving. With regard to these matters, the Court feels that absolute prohibition on the employment of women in this work does not constitute a difference in treatment allowed by virtue of Article 2(3) of Directive 76/207, because it excludes the women from work which does not represent an important physical burden and appears therefore to go beyond what is necessary to ensure the protection of women. With regard to work in a hyperbaric atmosphere, the Court observes that the Decree of 1973 excludes female workers from work that puts a high degree of strain on their bodies. The Court notes that, despite the fact that the Austrian government invokes, regarding women, an inferior respiratory capacity and a less high number of red blood cells, in order to justify this exclusion, it relies on an argument which is based on average measurements women by comparison with those given for men. However, notes the Court, as the said government has admitted itself in the course of the pre-litigation procedure, with regard to these variables, the zones of overlap between female individual values and of male individual values are considerable. This being the case, concludes the Court, a regulation, which precludes proceeding to an individual evaluation and prohibits all women from the work in question because, although said employment does not prohibit men with vital capacity and a number of red blood cells equal or less than the average value of these variables measured for women, is not authorised by virtue of Article 2(3) of Directive 76/207 and constitutes discrimination based upon sex (paragraphs 69–74).

The Court (Grand Chamber) declares and rules:

1) *In maintaining, in Articles 8 and 31 of the Druckluft- und Taucherarbeiten-Verordnung (decree on work in hyperbaric atmosphere and diving work), of 25 July 1973, a general prohibition on the employment of women in hyperbaric atmosphere and diving work, providing for in the first case a limited number of exceptions, Austria has failed in the obligations incumbent upon it in virtue of Articles 2 and 3 of Council Directive 76/207/EEC of 9 February 1976, relating to the implementation of the principle of equal treatment between men and women with regard to access to employment, to professional training and promotion, and working conditions.*

2) *The appeal is rejected for the surplus.*

3) *Each party shall bear its costs.*

Case C-196/02
VASILIKI NIKOLOUDI/ORGANISMOS TILEPIKOINONION ELLADOS AE
Date of judgment:
10 March 2005
Reference:
2005 compendium p. I-1789
Content:
Article 141 EC — Directives 75/117/EEC and 76/207/EEC — Temporary, part-time employment — Exclusion from integration in tenured personnel — Calculation of length of service — Burden of proof

1. Facts and procedure

The general articles of the personnel of the Greek corporation Organismos Telepikoinonion Ellados AE (national telecommunications organization, hereafter 'NTO') provide that the said personnel are composed of tenured personnel and temporary personnel. NTO's tenured personnel only include persons employed full-time. Temporary personnel are composed of workers hired by a fixed-term contract or, according to Article 24a(2), the same statute and, as an exception, by open contract, either on the one hand, as technicians working outside part-time [under a]] and, on the other hand, as the dependant of a deceased employee, engaged by reason of family economic problems resulting from the death. Article 3(v)(d), of the general articles of NTO reserves for women the function of technicians working outside. Article 5(9) of the general statute of NTO, in its version applicable as of 1 January 1996, disregarded completely the periods of part-time work from calculating length of service, while with one modification, brought in at that date, provided for, at the time of the calculation, proportional imputation of the period of part-time employment. The collective agreements by category of 2 November 1987 and 10 May 1991 (hereafter the 'Disputed Agreements'), concluded between NTO and l'Omospondia Ergazomenon OTE (NTO labour union), govern the integration, on certain conditions, of NTO's temporary personnel with tenured personnel. These agreements are founded on Article 66(1) of the general articles of NTO, which provide for the engagement 'on a permanent basis' of temporary personnel working full-time by virtue of an open contract. The first of the disputed agreements did not envisage applications for tenure from temporary personnel having accomplished less than 2 years of continuous service in full-time employment. However, the second of these agreements, by which any duration of service beforehand was not required, was nevertheless interpreted and applied by NTO as not applying to personnel working full-time.

On 1 September 1978, Ms Nikoloudi was hired by NTO, as a temporary agent, in the form of an open labour contract. She was employed as an outdoor technician, working part-time, until 27 November 1996. On 28 November 1996, her contract was transformed to a full-time contract. Having attained the age limit, she was placed in retirement around 17 August 1998. None of the disputed agreements were applied to Ms Mikoloudi up to and including her retirement by reason of her employment as a part-time worker. Having been excluded from the possibility, provided by the said agreements, of integration with the tenured personnel, Ms Nikoloudi claims that this exclusion constituted discrimination based upon sex, prohibited by Community law. She considers also that Article 5(9) of the general articles of NTO, both in the original version and in the version modified on 1 January 1996, were contrary to Community law and, from this fact, inapplicable.

2. Questions referred to the Court

1) Must one consider as compatible with the demands which follow from [Article 119 of the Treaty] and from Directives 75/117 and 76/207 the existence and the application of a regulatory clause such as, in this case, the stipulation of Article 24a(2a) of the general articles of personnel [of NTO], which provides that (only) women be employed as outdoor

technicians by an open labour contract for part-time or intermittent employment?

In view of the case law of the Court, and taking into account the fact that part-time employment is tied to reduced remuneration, can one interpret the disputed clause to constitute straightaway direct discrimination by reason of sex, given that it directly links part-time employment to the sex of the employees (women) and that it therefore places women at a disadvantage?

2) Is the fact that the clauses of the collective agreements by category concluded on 2 November 1987 between NTO and l'Omospondia Ergazomenon OTE (NTO labour union) have excluded, as in this case, temporary outdoor technicians, working part time under an open contract, from the possibility of being integrated with tenured personnel (independent of the duration of the part-time work contract), by reason that the said agreement required at least 2 years of service in full-time employment, contrary to [Article 119 of the Treaty] and the directives cited above or another rule of Community law by reason of indirect discrimination based on sex, if one supposes that this clause (in spite of its apparent neutral character — it does not in fact mention the sex of the employees) has excluded solely and exclusively female outdoors technicians, given that there were no men employed part-time by open contract either in the 'general services' branch (that relevant to outdoors technicians) or in any other branch of personnel at NTO?

3) When they applied the collective agreement by category concluded on 10 May 1991 between NTO and l'Omospondia Ergazomenon OTE, NTO, aiming for integration (done in stages) of temporary workers, insisted on a full-time open labour contract.

Must it be considered that the exclusion of outdoor part-time technicians (independent of the duration of their contract), like in the present case, constitutes indirect, inadmissible discrimination based on sex, governed by the stipulations of Community law ([Article 119 of the Treaty] as well as Directives 75/117 and 76/207), in view of the fact that the collective agreement by category excludes only female outdoors technicians, given that no men were engaged part-time for an indeterminate duration in any branch of personnel at NTO?

4) In conformity with the stipulations of Article 5(9) of the general articles of personnel of NTO, in the version applicable up to and including 1 January 1996, employment part-time was not taken in consideration at all in calculating length of service for establishing better wage conditions. Since 1 January 1996, this stipulation was modified by means of a collective agreement by category and it was decided that part-time employment is taken into account as equivalent to half of full-time employment of the same duration.

If one supposes that part-time work concerned exclusively or essentially women, the stipulations providing the total exclusion of part-time employment (up to 1 January 1996) or its 'inclusion in the calculation pro rata' by comparison with a full-time employee (counting from 1 January 1996), could they, also in the light of the case law of the Court, be interpreted to mean that they introduced indirect discrimination, based on sex, prohibited (according to the rules of Community law) and, as a consequence, that it is advisable to include in their length of service the entire duration of their part-time employment?

5) If the Court responds affirmatively to questions 1 through 4, above, in the sense that the disputed clauses apparent in the regulation and the collective agreements are effectively contrary to the Community legal order, where does the burden of proof lie when a wage-earner asserts that the principle of

equal treatment was violated to their detriment?

3. Court ruling

The Court points out that by first question, the national court is asking, in substance, if the Community law conflicts with a clause such as Article 24a(2)(a) of the general articles of NTO, which reserves solely for outdoor technicians and, therefore, for women, employment for an indeterminate duration when it is a question of part-time employment and, more particularly, whether such a clause constitutes, in and of itself, direct discrimination, based on sex, given that it is linked to part-time employment of female persons, financially disadvantaging them (paragraph 25).

The Court first inquires as to the existence of same work, or of work of equal value. The Court indicates that the fact that there does not exist within NTO a man engaging in the same work which was accomplished by Ms Nikoloudi is no obstacle to the application of the principle of equal treatment. With regard to equality of remuneration, the Court notes in effect that the work which may serve as comparison need not be necessarily the same as that accomplished by the person who invokes the said principle of equality to their benefit (see, notably, judgment of 30 March 2000, *JämO*, Case C-236/98, Compendium p. I-2189, paragraph 49, and 17 September 2002, *Lawrence e.a.*, C-320/00, Compendium p. I-7325, paragraph 4). It is, the Court rules, for the national court to determine whether, taking into account the factual elements relative to the nature of work done and the conditions in which it was done, work of the same value as that done by Ms Nikoloudi exists within NTO, and without necessarily taking into account the work schedule (see, in this sense, judgment of 31 May 1995, *Royal Copenhagen*, Case C-400/93, Compendium p. I-1275, (4), and *JämO*, *supra*, paragraphs 20 and 49) If it is the case and, therefore, if situations comparable to that of Ms Nikoloudi exist, it is advisable to consider next the claimed difference in treatment so as to verify if it was directly based on sex (paragraphs 26–30).

Having summarized the pertinent clauses of the general articles of NTO, the Court observes that only women concluded an open contract for part-time work. The Court notes, in this regard, that, although categories of workers composed of persons of a single sex were authorized, notably by Directive 76/207 Article 2(2) and (4), and that, therefore, the creation of a category of workers which is exclusively female does not constitute, in and of itself, direct discrimination to the detriment of women, the establishment, later, of unfavourable treatment by reference to this category, be it relative to equality of treatment or of remuneration, may be considered to amount to discrimination (paragraphs 31–34).

With regard first to equality of treatment, the Court notes that, in the case at issue in the main proceedings, all workers having an open contract were given tenure, with the exception of those working part-time, namely the outdoor technicians. It follows, according to the Court, that the criterion of full-time employment, as a precondition to tenure, while apparently neutral as to the sex of the worker, amounts to excluding a category of workers which can only be composed of women. Such criteria constitute, in the judgment of the Court, discrimination directly based on sex (paragraphs 35–36).

With regard next to equal pay, the Court notes, in the first place, that nothing in the file suggests that there exists a difference in the hourly rate of remuneration between part-time workers as compared with those working full-time. In the second place, the Court observes that it appears that nothing stopped women from working full-time. In effect, this was the case with Ms Nikoloudi from 28 November 1996 up to her retirement. Therefore, according to the Court, the simple fact that women who had chosen to benefit from the option to work part-time are paid less than their colleagues working full-time, in that they work less than the latter, does not constitute, in and of itself, direct discrimination, the same even when only women work part-time (paragraphs 37–39).

The Court holds that, for the second and third questions, which are proper to examine together, the national court asks, in substance, if the exclusion, brought about by means of the disputed agreements, of the possibility of integration with tenured personnel of personnel temporarily working part-time constitutes indirect discrimination based on sex (paragraph 41).

The Court points out that it emerges from the record that NTO claims to have, repeatedly, taken on men in open contracts for part-time work, and that moreover, the judge of appeal indicates that the part-time work might only concern mainly women, rather than be done exclusively by women. Therefore, an answer to these two questions is still useful, according to the Court, insofar as the group of workers having been excluded from the possibility of tenure could be composed also of men as well as women. The Court observes then that in this type of situation, the disputed agreements are less favourable, within the category of temporary agents with an open contract, to part-time workers by comparison with full-time workers because only these latter may benefit from the possibility of tenure offered by the said agreements. The Court indicates that it is for the national judge to verify whether NTO has indeed proceeded to employ men by the said contracts to work part-time and, should this have happened, to observe whether, within the less favoured category of workers employed part-time for an indeterminate duration, a much higher percentage of women than men were excluded from the possibility of tenure in implementing the clauses of the disputed agreements. In such a case, it is advisable, according to the Court, to observe whether clauses such as those at issue in the main proceedings did not in fact result in discrimination against female employees in comparison to male employees, and must be considered, in principle, as contrary to Article 3 of Directive 76/207 in that they relate to access to tenured positions of employment in the sense of Article 3 of the same. The Court specified that this would always be the case unless the difference in treatment between the two categories of workers was justified by factors far removed from any discrimination based on sex (see, to that end, judgments of 13 July 1989, *Rinner-Kühn*, 171/88, Compendium p. 2743, paragraph 12, and of 11 September 2003, *Steinicke*, Case C-77/02, Compendium p. I-9027, paragraph 57)) (paragraphs 43–47).

In that regard, the Court holds that, despite the fact that only part-time workers, in their entirety, have been excluded from the possibility of tenure, it is not aware of any justification for that choice. The Court believes, notably, that the justification according to which the difference in treatment in cause is founded on objective reasons of general public and social interest, in that the national public utility enterprise ought not to have to pay excessive costs, cannot be upheld. In effect, even supposing that this argument of NTO aims to put forward one legitimate goal relevant to the policy of economic development and the creation of employment, it constitutes in any case, the court holds, a simple affirmation of a general order insufficient to make it appear that the objective of the measures in this case is far removed from all discrimination based on sex (see, in this sense, judgment of 9 February 1999, *Seymour-Smith and Perez*, Case C-167/97, Compendium p. I-623, paragraph 76). The Court recalls moreover that, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures that it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against either sex (see judgments of 24 February 1994 *Roks and Others* Case C-343/92 [1994] ECR I-571, (35), and *Steinicke*, *supra*, paragraph 66) (paragraphs 50–53).

Therefore, pursues the Court, if the national judge believes that a justification of the clauses in the case at issue in the main proceedings is lacking, it remains to decide whether the first of the disputed agreements should have been applied to Ms Nikoloudi, which requires length of service of two years of work at full time, or the second. Regarding length of service, the Court reminds us that, al-

though it goes hand in hand with experience and that generally makes the worker better able to do his job, the objectivity of such criteria depends on all the circumstances of each case (see, in this sense, judgment of 7 February 1991, *Nimz*, Case C-184/89, Compendium p. I-297, (14); *Gerster*, *supra*, paragraph 39, and *Kording*, *supra*, paragraph 23). It follows, according to the Court, that the national court must think about what the objective aimed for by the first of the disputed agreements was when it subjected the possibility of tenure to a condition of two years of full-time work. In effect, it is incumbent upon it to verify, with regard to this objective, if the said condition ought to have been applied to part-time workers as well or whether the circumstances in the case at issue in the main proceedings justify that this condition be applied proportionally to the time worked. This way, in the case of employment carried on part-time, such as that of Ms Nikoloudi, this condition of length of service would have been four years. The Court observes that in these two hypothetical situations, Ms Nikoloudi would have fulfilled the said condition. The Court notes that, in any case, the second of the disputed agreements stipulates granting tenure without condition of duration of service and, consequently, should have been applied also to part-time workers (paragraphs 54–56).

The Court notices that, for the fourth question, the national court asks, in substance, whether the total or proportional exclusion of part-time employment from the calculation of length of service of personnel constitutes discrimination indirectly based on sex, it being given that it exclusively or essentially impacts on female personnel. As a consequence, should the entire duration of part-time employment be taken into the total calculation (paragraph 58)?

With regard next to the total exclusion of part-time employment from the calculation of length of service, exclusion provided for by Article 5(9) of the general articles of NTO, in the version prior to 1 January 1996, the Court notices that the very wording of the same question indicates that 'part-time employment [concerns] exclusively or essentially women'. Therefore, assesses the Court, the exclusion, from the calculation of length of service, of any period of part-time employment appears to be contrary to Directive 76/207, unless NTO can establish that the stipulation in this case is not explained by factors objectively justified and far away from all discrimination founded upon sex (paragraph 60).

Regarding next the proportional attribution provided for by the modification introduced on 1 January 1996 of the said article, of part-time employment's inclusion in calculation of length of service, the Court reminds us that the objectivity of the criteria of length of service depends upon all the circumstances of each case and, notably, of the relation between the nature of the function performed and the experience which the exercise of this function brings after a certain number of hours of actual work. The Court notes that, in the case at issue in the main proceedings, the taking into account of length of service is based, according to NTO, on a need of the administration to assess the professional experience of the workers. The Court notes that this objective does not at all exclude assessment of workers performing their tasks part-time, as well and rules that the only question, that identified previously, is whether it should extend, proportionally to the reduction of working time, the period over the course of which this assessment is done. Now, the pertinence of this approach depends, according to the Court, on the objective aimed for by taking into account the length of service: this objective may be a reward for loyalty to the enterprise or recognition of experience acquired. If, concludes the Court, the national court observes that taking the outdoor technician's part-time work into account proportionally is justified by objective reasons far removed from all discrimination based on sex, the fact alone that national legislation impacts on a higher percentage of female workers than male workers would not be considered a violation of Article 5 of Directive 76/207 (see, in this sense, judgments cited above, *Rinner-Kühn*, paragraph 14, as well as *Seymour-Smith and Perez*, paragraph 69) (paragraphs 61–65).

On the fifth question, the Court recalls that Directive 97/80, which is applied in situations covered by Article 119 of the Treaty as well as by Directives 75/117 and 76/207, lays down in its Article 4, that Member States take the necessary measures to ensure that, when a person believes that they have been wronged by a violation of the principle of equal treatment, and brings before a court, or other competent body, facts which give rise to the presumption that direct or indirect discrimination has taken place, it is incumbent upon the defendant to prove that there has been no violation of the said principle. The Court underlines that it falls to the national court to verify whether Greek regulation is in conformity with Directive 97/80, and reminds us on this point of its case law as to the direct effect of the directives. The Court indicates in this regard that it is the national judge who must reflect on the legal nature of NTO and the circumstances of the internal organization of the latter in order to guard against Directive 97/80 being invoked against an individual. The Court reminds us finally of the principle of standard interpretation (paragraphs 68–74).

The Court (First Chamber) hereby rules:

1) *Community law, notably Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by EC Articles 136–143) and Council Directive 76/207/EEC of 9 February 1976, relating to the implementation of the principle of equal treatment between men and women regarding access to employment, to professional training and promotion, and working conditions, must be interpreted in the sense that the existence and the application of a clause such as Article 24a(2)(a) of the general articles of Organismos Tilepikoinonion Ellados, which reserves solely outdoor technicians and, therefore, uniquely for women, employment by open contract for part-time work, does not constitute, in and of itself, direct discrimination, based on sex, to the detriment of women. However, the exclusion, later, of a possibility of tenure by reference, apparently neutral to the sex of the worker, to a category of workers who, by virtue of a national regulation having the force of law, is composed exclusively of women constitutes discrimination based directly on sex in the sense of Directive 76/207. For there to be no direct discrimination based upon sex, the element characterizing the category to which the excluded worker belongs must be of a nature to place the worker in an objectively different situation, with regard to tenure, from those who may benefit from it.*

2) *In the hypothetical situation where the premise according to which only the outdoor technicians working part time were excluded from the possibility of tenure is revealed to be erroneous and, therefore that a much higher percentage of women than men were impacted on by the provisions of the collective agreements by category of 27 November 1987 and 10 May 1991, the exclusion, operated by them, from integration into the tenured personnel of temporary part-time workers, constitutes indirect discrimination. Such a situation is contrary to Article 3 of Directive 76/207, except to the extent that the difference in treatment between these workers and those working full-time is justified by factors far removed from any discrimination based on sex. It falls to the national judiciary to verify if this is the case.*

3) *When it impacts on a much higher percentage of female workers than male workers, the total exclusion of part-time employment from the calculation of length of service constitutes indirect discrimination based on sex contrary to Directive 76/207, unless this exclusion is explained by factors which are objectively justified and far removed from discrimination based on sex. It falls to the national judiciary to verify if this is the case. A proportional attribution of part-time employment, when this calculation is being made, is also contrary to that directive, unless the employer can establish that it is justified by factors which objectively depend notably on purposes for which a calculation of length of service was made and, if it relates to recognition of experience acquired, on the rela-*

tion between the nature of the work performed and the experience that the performance of this work brings after a certain number of actual hours of work.

4) *When an employee asserts that the principle of equal treatment has been violated to their detriment and they establish facts which permit the presumption of the existence of indirect or direct discrimination, Community law, notably Council Directive 97/80/EC of 15 December 1997, related to the burden of proof in the case of discrimination based on sex, must be interpreted in the sense that it is incumbent on the respondent to prove that there was no violation of the said principle.*

Case C-519/03
COMMISSION OF THE EUROPEAN COMMUNITIES/GRAND DUCHY OF LUXEMBOURG
Date of judgment:
14 April 2005
Reference:
2005 compendium p. I-3067
Content:
Framework agreement on parental leave — Substitution of maternity leave for parental leave — Date at which an individual right to parental leave is granted

1. Facts and procedure

By its appeal, the Commission requests that the Court note that, in adopting Articles 7(2) and 19, fifth indent, of the law of 12 February 1999 introducingparental leave and family leave (hereafter the 'Law of 1999'), introduced in the Luxembourg legal order by Article XXIV of the law of 12 February 1999, implementation of the national action plan in favor of employment 1998 (Notice A 1999, p. 190), the Grand Duchy of Luxembourg has failed in its obligations following from clause 2, point 1, of the framework agreement on parental leave (hereafter, the 'framework agreement') which appears in an annex to Council Directive 96/34/EC of 3 June 1996, concerning the framework agreement on parental leave concluded by UNICE, CEEP and CES (OJ L145, p. 4).

Article 7(2), of the Law of 1999 sets forth:

'In the case of pregnancy or fostering a child during parental leave giving a right to maternity leave, or fostering leave respectively, that leave is substituted for parental leave which comes to an end'.

Article 19(5) of the same law provides:

'The stipulations of the first chapter on parental leave may be invoked by the parents in respect of children born after 31 December 1998 or those whose adoption procedure is brought before a competent tribunal after that date'.

2. Court ruling

In the first grievance, the Court observes successively that an individual right to parental leave of a duration of three months at the least is accorded to workers, male and female, by clause 2, point 1, of the framework agreement, that by virtue of point 9 of the general considerations of this framework agreement, the parental leave is distinct from maternity leave, that parental leave is accorded to parents so that they may spend time with their child, that this leave may be taken up until the latter reaches a certain age, which may be up to 8 years old, and that it has a different purpose from maternity leave, which is to ensure the protection of the biological condition of the woman and the special relationship between the latter and her infant in the course of the period which follows pregnancy and birth, avoiding the possibility that this relationship be troubled by the accumulation of stresses resulting from simultaneous professional activity (see, in this sense, judgment of 29 November 2001, *Griesmar*, Case C-366/99, Compendium p. I-9383, paragraph 43). It results, according to the Court, that each parent has the right to parental leave of a minimal duration of three months and that this may not be reduced when it is interrupted by another leave which pursues a different end from that of parental leave, such as maternity leave. The Court reminds us that it has already ruled that leave guaranteed by Community law cannot affect the right to take another leave guaranteed by this law. This way, in the judgment of 18 March 2004, *Merino Gómez*, (Case C-342/01, Compendium p. I-2605, paragraph 41), the Court ruled that taking maternity leave could not affect the right to complete annual leave (paragraphs 31–33).

The Court notes that, in demanding that parental leave end at the date on which it is interrupted by maternity leave or birth leave without the possibility for the parent to carry forward the portion of the said parental leave that they were not able

to benefit from, the Grand Duchy of Luxembourg has not ensured to all parents a parental leave of a minimum duration of three months, and that, therefore, this Member State has fallen short of its obligations which are incumbent upon it by virtue of Directive 96/34 (paragraph 34).

On the second grievance, the Court recalls that clause 2, point 1, of the framework agreement accords to workers an individual right to parental leave so that they may spend time with their child and that this leave may be taken up to a given age up to 8 years, to be determined by the Member States. The Court remarks that, according to the regulation of Luxembourg, this leave may be taken up until the child has attained the age of 5 years old. As a result, according to the Court, the right to parental leave is accorded by Directive 96/34 to all parents having a child of an age below a certain limit. As a consequence of the fact that this directive provides that a right to parental leave is open during a certain period, up to and including when the child has attained the age fixed by the Member State concerned, the fact that a child is born before or after the date limit provided for the transposition of this directive is not, holds the Court, pertinent in this regard. The right to parental leave does not derive from, specifies the Court, the date on which birth or adoption of the relevant child, considered as facts giving rise to the right to benefit from such leave, occur. True, the wording of the framework agreement says that the right to parental leave is attributed 'by reason of the birth or the adoption' of a child, but such a formulation, observes the Court, does not reflect more than the fact that the bestowing of parental leave is dependent upon the condition that the infant be born or adopted. This does not imply that, in order for the right to parental leave to be valid, the birth or adoption of the child must have taken place after the entrance into force of the said directive in the Member State concerned (paragraphs 46–47).

The Court concludes that, in requiring that the child which entitles a parent to be eligible to benefit from parental leave must have been born after 31 December 1998 or that the procedure of adoption of this child must have been introduced after that date, the Grand Duchy of Luxembourg has excluded the possibility for the parents of children born or adopted before that date, but who have not attained the age of 5 years at the date of entry into force of the Law of 1999, to benefit from such a law. Such a modality of implementation of Directive 96/34 is, in the judgment of the Court, contrary to the ends of the same, which aims to accord a right to parental leave to the parents of children who have not yet attained a certain age. Thereby, the said Member State has added a condition to the right to parental leave provided for by this directive which is not authorized by the latter (paragraph 48).

The Court (Third Chamber) declares and rules:

1) *In providing for the right to maternity leave or to adoption leave falling during parental leave and substituting for the latter, which must end, without the possibility for the parent to carry forward the portion of parental leave that they were not able to benefit from, and, in limiting the bestowal of the right to parental leave to parents of children born after 31 December 1998 or those for whom the procedure of adoption of this child was introduced after that date, the Grand Duchy of Luxembourg has failed in the obligation incumbent upon it by virtue of Council Directive 96/34/EC of 3 June 1996, concerning the framework agreement on parental leave concluded by the UNICE, CEEP, and the CES.*

2) *The Grand Duchy of Luxembourg is ordered to pay costs.*

Case C-207/04
PAOLO VERGANI/AGENZIA DELLE ENTRATE, UFFICIO DI ARONA
Date of judgment:
21 July 2005
Reference:
2005 compendium p. I-7453
Content:
Directive 76/207/EEC — Compensation for voluntary departure — Fixed Imposition as a function of age, different between the sexes — Concept of remuneration — Concept of dismissal — Concept of benefit of social security

1. Facts and procedure

In Italy, Law No 155, of 23 April 1981 (ordinary supplement to GURI No 114, of 27 April 1981), authorizes the salaried workers of enterprises declared in crisis to benefit from admittance to early retirement at the age of 55 for men and 50 for women. Article 17(4) bis, of decree No 917 of the President of the Republic of 22 December 1986 (ordinary supplement to GURI No 302, of 31 December 1986), as modified by Legislative Decree No 314, of 2 September 1997 (ordinary supplement to GURI No 219, of 19 September 1997, hereafter the 'DPR No 917/86') sets forth:

'For the orders to pay on the occasion of the cessation of the work relationship, in order to encourage voluntary departure of workers who have attained the age of 50 for women and 55 for men, aimed for by Article 16(1)(a), the application of taxes to the rate equal to half of that which applies for the tax treatment of the end of the work relationship and of other compensation and pay mentioned in Article 16(1)(a)'.

Mr Vergani brought an appeal against the view by the fiscal administration which refused him reimbursement of tax deposits on the income of physical persons (imposta sui redditi delle persone fisiche, hereafter the 'IRPEF') which he had been liable for. He claimed that the application of the final tax rate of the IRPEF, in accordance with the fiscal regime provided for in Article 17(4) of the DPR No 917/86, brought about an unjustified inequality of treatment.

2. Questions referred to the Court

Regarding Article 17(4) bis, of the [DPR No 917/86], which accords, under equal conditions, to workers who have attained the age of 50, with regard to female workers, and 55, with regard to male workers, the advantage constituted by the imposition of a reduced tax of 50 % of the incentive to voluntarily depart and of the amounts granted on the occasion of termination of the work relationship, does it infringe, does it contradict, or, in any cause, does it create the conditions of an inequality of treatment between men and women prohibited by Article 141 [EC] […] and Directive 76/207[…]?

3. Court ruling

The Court begins by noting that the advantage in the case at hand, a tax reduction, is not paid by the employer, and that such an advantage does not therefore fall under EC Article 141. The Court specifies that the judgments invoked by Mr Vergani in favour of a contrary legal definition (judgments of 9 February 1982, *Garland*, 12/81, Compendium p. 359, paragraph 4, of 17 May 1990, *Barber*, C-262/88, ECR. I-1889, paragraph 10, and of 27 June 1990, *Kowalska*, C-33/89, Compendium p. I-2591, paragraph 7) do not contradict that assessment being given with regard to advantages paid by the employer to the worker by reason of their past employment. The Court decides on the other hand that the advantage in the case at hand comes under the field of application of Directive 76/207. The Court reminds us in this regard that, in the framework of that directive, the term 'dismissal' must be heard in a broad sense, of a manner which includes the termination of the employment relationship between the worker and their employer, the same in the framework of a voluntary departure system (see, in this sense,

judgment of 16 February 1982, *Burton*, 19/81, Compendium p. 555, paragraph 9) (paragraphs 21–29).

The Court observes next that a difference in treatment resulting in taxation at a reduced rate of one half the amount allotted on the occasion of the termination of the work relationship, applied to workers who have attained the age of 50, in the case of female workers, and 55, in the case of male workers, constitutes an inequality of treatment based on the sex of the workers. The Court examines whether such a difference in treatment is covered by the exception provided in Directive 79/7 Article 7(1)(a), according to which that directive is no obstacle to the ability that the Member States have to exclude from the scope of application the fixation of the retirement age to benefit from old age pensions and from retirement and the consequences which may follow from other benefits. On this point, the Court reminds us that the said exception must be interpreted in a strict manner (see, notably, judgments of 26 February 1986, *Marshall*, 152/84, Compendium p. 723, paragraph 36, and of 30 March 1993, *Thomas and others*, C-328/91, ECR p. I-1247, paragraph 8). The Court may not in effect apply it to the fixation of the age of retirement for receiving old age pensions and retirement pensions and the consequences which may follow from other benefits relevant to social security (judgment of 26 February 1986, *Roberts*, 151/84, Compendium p. 703, paragraph 35; in this sense equally, judgment of 4 March 2004, *Haackert*, C-303/02, Compendium p. I-2195, paragraph 30). This exception to the prohibition on discrimination based on sex is not therefore applicable, indicates the Court, to a tax reduction such as in the case at hand, which does not constitute a social security benefit (paragraphs 31–33).

The Court (First Chamber) hereby rules:

Council Directive 76/207/EEC of 9 February 1976, related to the place of the principle of equal treatment between men and women with regard to access to employment, to professional training and promotion, and work conditions, must be interpreted in the sense that it contradicts a clause such as in the case at principle, which accords to workers who have attained the age of 50, with regard to female workers, and of 55, with regard to male workers, by way of incentive for voluntary departure, an advantage constituting a reduced tax rate of one half of the amount allocated on the occasion of the termination of the employment relationship.

Case C-191/03
NORTH WESTERN HEALTH BOARD/MARGARET MCKENNA
Date of judgment:
8 September 2005
Reference:
2005 compendium p. I-7631
Content:
Article 141 EC — Directive 75/117/EEC — Illness taking place before maternity leave — Illness tied to the state of pregnancy — Subjection to the general system of sick leave — Effect on pay — Deduction of absence from the total maximum number of sick days compensated in the course of a fixed period

1. Facts and procedure

Ms McKenna, employed in the Irish public sector by the North Western Health Board (hereafter the 'Board'), found herself pregnant in the month of January 2000. During nearly the entire duration of her pregnancy, she was on sick leave on medical advice, by reason of a pathological state connected to her pregnancy.

In the framework of the system of sick leave of the Board, the members of the personnel of the Board have the right to 365 days of paid sick leave per period of four years. At maximum, 183 days of incapacity per 12-month period are completely paid for. The days of supplementary sick leave taken during the same period of 12 months are at half pay, in the limit of 365 days of paid sick leave per four-year period. The system in question did not distinguish between pathological states connected with pregnancy and illnesses not connected to a pregnancy. It compares inability to work consecutive to the first to sick leave accorded by reason of the second, the general conditions of the said system providing that 'All incapacity caused by a pathological state related to pregnancy arising within the 14 weeks of maternity leave shall be considered as related to the sick leave system of the Board'.

In the application of these clauses, Ms McKenna was considered as having exhausted her right to full pay on 6 July 2000. This pay had therefore been reduced to half counting from that up to 3 September 2000, the date of the beginning of her maternity leave, which lasted until 11 December 2000. In the course of her maternity leave, Ms McKenna had received full pay in accordance with the regulation applicable to Health Boards by the Ministry of Health and Childhood. At the end of her maternity leave, she was still unable to work for medical reasons. By virtue of the system of medical leave, her remuneration was again reduced by half.

2. Questions referred to the Court

1) Does a system of sick leave which treats in an identical fashion the employees suffering from a sickness related to pregnancy and those who find themselves in a pathological state fall under the scope of application of Directive 76/207?

2) If the answer to the first question is affirmative, does the fact that an employer deducts a period of absence from work, due to an incapacity caused by an illness connected with to pregnancy and arising during the latter, from the full set of rights to benefits provided by a system of sick leave in the framework of a contract of employment contravene Directive 76/207?

3) If the response to the first question is affirmative, does Directive 76/207 require that the employer implement special arrangements to cover work absences due to inability to work caused by an illness linked to pregnancy and arising during the duration of the same?

4) Does a system of sick leave which treats [in an identical fashion] the employees suffering from a sickness related to pregnancy and those who find themselves in a pathological state fall under the scope of application of EC Article 41 and Directive 75/117?

5) If the response to the fifth question is affirmative, is it contrary to EC Article 141 and Directive 75/117 for an employer to reduce pay for a woman after an absence from work for a given period where the absence is due to inability to work caused by an illness linked to pregnancy and arising during the duration of the same, in the circumstances where if a woman who is not pregnant or a man, in either case were absent from work for the same period following an inability to work caused by a purely pathological state, they would suffer the same reduction?

3. *Court ruling*

The Court notices that, for the first and fourth questions, which are appropriate to examine together, the national court asks, in substance, whether a system of sick leave which treats in an identical manner female workers suffering from an illness linked to pregnancy and other workers affected by an illness far removed from a state of pregnancy fall under the scope of application of Directive 76/207 or that of EC Article 141 and Directive 75/117. In this regard, the Court recalls that the maintenance of the worker's pay in case of illness falls under the concept of 'pay' in the sense of EC Article 141 (see judgment of 13 July 1989, *Rinner- Kühn*, 171/88, Compendium p. 2743, paragraph 7), and that a payment in the sense of EC Article 141 and Directive 75/117 could not also be covered by Directive 76/207 (paragraphs 29–30).

The Court notes that, for the second, third and fifth questions, which are appropriate to examine together, the national court asks, in substance, whether EC Article 141 and Directive 75/117 must be interpreted in the sense that the following constitute discrimination based on sex:

- a rule of a system of sick leave which stipulates, with regard to female workers absent before maternity leave by reason of illness linked to their state of pregnancy, as with regard to male workers absent following any other illness, that their compensation be reduced when the absence exceeds a certain duration;

- a rule of a system of sick leave which stipulates the charging of absences by reason of illness on a total maximum number of days of paid sick leave to which a worker has a right over the course of a fixed period, whether the illness be linked to a state of pregnancy or not (paragraph 37).

The Court believes that it is necessary to examine these questions by the light of the economy and the evolution of the rules of Community law governing equality between men and women in the domain of the rights of women who are pregnant or have given birth. In this regard, the Court notes first that the Community law assures a specific protection against dismissal up to the end of maternity leave, and recalls on this point its judgments of 8 November 1990, *Handels-og Kontorfunkionærernes Forbund* (C-179/88, Compendium p. I-3979), and of 30 June 1998, *Brown* (C-394/96, Compendium p. I-4185), as well as Article 10 of Directive 92/85. The Court notes also that, as well as protection against the loss of employment, the Community law ensures, within certain limits, a protection of the income of a worker who is pregnant or has given birth, and recalls on this point its judgments of 13 February 1996, *Gillspie et al*. (C-342/93, ECR. p. I-475), and of 19 November 1998, *Høj Pedersen et al* (C-66/96, ECR. p. I-7327), as well as Article 11(2)(b) and (3) of the previously cited directive. The Court holds that it results from the foregoing that, in the present state of Community law, a female worker:

- cannot be subject to dismissal during her maternity leave, by reason her state nor, before this leave, by reason of an illness linked to pregnancy and arising before the said leave;

- may, in the event, be dismissed by reason of an illness linked to pregnancy or to childbirth and suffered after maternity leave;

- may, should this happen, suffer a reduction in her pay be it during maternity leave, or be it af-

ter this leave, in the event of illness linked to pregnancy or childbirth and suffered after the said leave. According to the Court, it also results from the foregoing that the Court has not, at present, had to specify whether female workers have the right, in any event, to the keep their full pay in case of illness linked to their state of pregnancy before maternity leave, even if the disputed national regulation stipulates the application of the same size of reduction in the amount paid to a worker in case of illness far removed from a state of pregnancy. According to the Court, it results finally from the foregoing that the state of pregnancy is not comparable to a pathological state and that the troubles and complications suffered during pregnancy and leading to an inability to work pertain to the inherent risks of the state of pregnancy and are therefore part of the specificity of that state (paragraphs 41–56).

In approaching the question of the pay of the female worker in the course of pregnancy, the Court considers that it does not necessarily follow from the observation of the specificity of illnesses related to a pregnancy that a female worker absent by reason of an illness linked to her pregnancy should have a right to continue to receive full pay when a worker absent by reason of an illness not linked to a pregnancy would not enjoy that right. In this regard, the Court first notes that, with regard to dismissal, the specificity of an illness linked to a pregnancy can only be taken into consideration in denying to the employer the right to dismiss a female worker for that reason. On the other hand, with regard to pay, continuing to pay the latter in full is not the only way to take into consideration the specificity of an illness linked to pregnancy. In effect, it is not precluded to take into consideration that specificity in the framework of a system which, in case of absence of a female worker by reason of an illness linked to pregnancy, stipulates a reduction in pay. The Court next recalls that, in the present state of Community law, no stipulation or general principle requires the integral maintenance of the pay of a female worker during her maternity leave, on the condition that the amount of benefits granted not be minimal to the point of endangering the objective, pursued by Community law, of protecting female workers, notably, before giving birth (see, in this sense, judgment in *Gillespie* et al, *supra*, paragraph 20). Now, the Court underlines, if a rule stipulating, within certain limits, a reduction of benefits paid to a female worker in the course of her maternity leave does not constitute discrimination based on sex, a rule stipulating, in the same limits, a reduction of benefits paid to a female worker who is absent during her pregnancy by reason of an illness related to it, would not be considered to constitute such discrimination either. In these conditions, the Court concludes that, in its present state, Community law does not require the complete maintenance of pay of a female worker absent during her pregnancy by reason of an illness linked to the latter. The Court holds that, during an absence resulting from such an illness, a female worker may therefore suffer a reduction in her pay, on condition that, on the one hand, she be treated in the same fashion as a male worker absent by reason of illness and that, on the other hand, the total benefits paid not be minimal to the point of endangering the objective of protection of pregnant workers (paragraphs 57–62).

With regard to deducting absences by reason of illness from the total number of days of paid sick leave to which a worker has a right in the course of a fixed period, the Court observes that the system in the case at issue in the main proceedings stipulates the deduction of absences by reason of illness from the total number of days of paid sick leave to which a worker has a right during a fixed period, and that thus this system treats in an identical fashion all illnesses, be they linked to a state of pregnancy or not. The Court holds that such a system does not take into account at all the specificity of illnesses linked to pregnancy. Nevertheless, the Court notes that this specificity does not forbid that the absences by reason of illness linked to a pregnancy be, within certain limits, deducted from the total number of days of compensated sick leave. In effect, the exclusion, in all circumstances, of such deduction could not be recon-

ciled with the possibility of a reduction in pay in the course of pregnancy. It would be difficult to reconcile, moreover, with the case law resulting from the judgments cited above, *Handels- og Kontorfunktionærernes Forbund* and *Brown,* according to which, after maternity leave, an illness arising from pregnancy or childbirth falls under the generally applicable system in case of illness. In any event, the Court specifies, deducting absences during pregnancy by reason of illness linked thereto to the total maximum number of paid days of sick leave to which a worker has a right over the course of a fixed period must not have the effect that, during the absence affected by the deduction after maternity leave, the female worker would be paid an amount less than the minimum total sum to which they had the right in the course of illness suffered during pregnancy. Special provisions, the Court concludes, must in consequence be implemented in order to avoid to such effects (paragraphs 63–68).

The Court (Second Chamber) hereby rules:

1) *A system of sick leave which treats in an identical manner female workers suffering from an illness linked to pregnancy and other workers affected by an illness far removed from a state of pregnancy falls under the scope Council Directive 75/117/EEC of 10 February 1975, regarding the reconciliation of the laws of the Member States relative to the application of the principle of equal pay between male and female workers.*

2) *Article 141 EC and Directive 75/117 must be interpreted in the sense that the following do not constitute discrimination based on sex:*

   - *a rule of a system of sick leave which provides, with regard to female workers absent before maternity leave by reason of illness linked to their state of pregnancy, as with regard to male workers absent by reason of any other illness, a reduction in pay, where the absence exceeds a certain duration, on the condition that, on the one hand, the female worker be treated in the same fashion as a male worker absent by reason of illness and that, on the other hand, the total benefits paid not be minimal to the point of placing the endangering the principle of the protection of pregnant workers;*

   - *a rule of a system of sick leave which provides for deduction of absences by reason of illness from the total maximum number of paid days of sick leave to which a worker has a right over the course of a fixed period, be the illness linked to a state of pregnancy or not, on condition that the deduction of absences by reason of illness linked to pregnancy not have the effect that, during the absence affected by that charge after maternity leave, the female worker would be paid less than the minimal total sum to which they had the right to in the course of illness suffered during pregnancy.*

Case C-294/04
CARMEN SARKATZIS HERRERO/INSTITUTO MADRILEÑO DE LA SALUD (IMSALUD)
Date of judgment:
16 February 2006
Reference:
2006 compendium p. I-1513
Content:
Directive 76/207/EEC — Temporary agent in maternity leave named to a permanent post of functionary by consequence of their admission to a competition — Calculating length of service

1. Facts and procedure

Ms Sarkatzis Herrero was employed as a temporary agent by the Instituto Nacional de la Salud (National Institute of Health, Insalud) then, by consequence of a transfer of competencies and the health services concerned accompanied by a transfer of personnel, by the Instituto Madrileño de la Salud (Madrid Institute of Health, Imsalud). While Ms Sarkatzis Herrero was already employed by Insalud, the latter organized competitive examination for the recruitment of permanent staff. Having already passed this examination, the petitioner in the main proceedings was nominated to a post of auxiliary administrative civil servant by a decision published on 20 December 2002. This decision was assigning an appointment which she must take up within one month. Ms Sarkatzis Herrero, who was at the time on maternity leave, immediately requested an extension in the time limit for entry into service until the end of this leave, while at the same time asking that the said leave be taken into consideration for calculating her length of service. Imsalud acceded to the request for extension, without, however, mentioning the question of the calculation of length of service concerned. Ms Sarkatzis Herrero intended that her length of service in as a public servant would be calculated starting from the date of her appointment, not from the date at which she actually began the work after her maternity leave.

2. Questions referred to the Court

1) Must the clauses of Community law relating to maternity leave and equal treatment between men and women regarding access to employment be interpreted in the sense that a woman who is on maternity leave and who obtains, in the course of this period, a post as a civil servant must benefit from the same rights as those given to other candidates who have passed the civil service competitive examination?

2) Without prejudice to the solution which would be imposed in the case of a worker who is just starting work, in the hypothetical situation where the connection of work is ongoing but is suspended by reason of maternity leave, does the access to the status of staff employee or of worker under open contract constitute one of the rights to promotion in employment of which the effect must not be hindered by the fact that the worker is on a period of maternity leave?

3) Concretely, by virtue of the above-cited clauses, notably those relating to equal treatment between men and women regarding access to employment and after this has been obtained, does a worker engaged on a temporary basis who is on maternity leave at the moment when she obtains a permanent post have the right to take possession of the same and to acquire the status of public servant with the advantages attached to this status, such as the start date for the calculation of her length of service, straight away and in the same conditions as the other candidates who have obtained such a post, independently of the fact that, in virtue of the applicable clauses of internal law, the exercise of these rights, which is linked to the actual performance of work, may be suspended until the actual commencement of such performance?

3. Court ruling

The Court begins by identifying the pertinent Community rules. The Court first eliminates Di-

rective 96/34, related only to parental leave. The Court notes next, regarding Directive 92/85, that it does not emerge from the record that the petitioner in the main proceedings had invoked the violation of rights protected by this directive in the framework of the existing work relationship. In effect, the Court observes, the situation of Ms Sarkatzis Herrero, characterized by the beginning of a new work relationship during maternity leave, is clearly distinguished from the return to prior employment or an equivalent employment after exiting a period of such leave. Directive 92/85 is therefore no more pertinent, holds the Court, for responding to the questions raised, and, therefore, there is no need to respond to the second preliminary question (paragraphs 23–32).

The Court notes while, for the first and third questions, which are appropriate to be examined together, the national court asks, in substance, whether the Community law contradicts national legislation which provides that, for calculating length of service of a civil servant, only the person's date of taking up the job is taken into consideration, without providing for an exception regarding women who are on maternity leave on the date where they are called to take up the post to which they have been appointed (paragraph 33).

In that regard, the Court recalls that, with regard to the taking into consideration of a period of maternity leave for the access to a higher position in the professional hierarchy, the court held that a female worker is protected, in her work relationship, against all unfavourable treatment motivated by the fact that she is or was on maternity leave and that a woman who suffers unfavourable treatment by reason of an absence for maternity leave is a victim of discrimination by reason of her pregnancy and leave (see judgment of 18 November 2004, *Sass*, C-284/02, Compendium p. I-11143, paragraphs 35 and 36). The Court recognizes that the facts at the origin of the *Sass* judgment, *supra*, are clearly distinguished from those of the case at issue in the main proceedings in that, in the case of Ms Sass, maternity leave coincided with a career development, since the dispute concerned a change in pay category. On the other hand, in the case at issue in the main proceedings, Ms Sarkatzis Herrero acceded to a new job during maternity leave, the date of her entry into service having been deferred to the end of this leave. The Court underlines nevertheless that, since Directive 76/207 aims for a substantial rather than formal equality, the clauses of Article 2(1) and (3), and Article 3 of that directive must be interpreted in the sense that they prohibit all treatment unfavourable to a female worker by reason of maternity leave or in relation to such leave, which aims to achieve protection of pregnant women, without the need to take account of whether the said treatment may concern an existing work relationship or a new work relationship (paragraphs 39–41).

The Court specifies that neither the elements of the file nor the information given by the Spanish government at the hearing permit one to determine with certainty whether these officers who, like the complainant in the main proceeding, have been employed as temporary agents before being appointed as civil servants, had, at the moment of their accession to the status of public servant, their length of service in their previous job carried over, including any maternity leave, and, in the affirmative, whether that length of service is taken into consideration for progression through the grades in the career of the said agents. The Court indicates that it belongs therefore to the national court to investigate whether Ms Sarkatzis Herrero has actually been the object of unfavourable treatment. If the premises put forward in the referral decision are accepted, the Court adds, however, there is reason to consider that the deferment of the entry into service of Ms Sarkatzis Herrero as a civil servant, until after maternity leave that she had taken, constitutes unfavourable treatment in the sense of Directive 76/207. The fact that other persons, notably of the male sex, may, for other reasons, be treated in the same manner as Ms Sarkatzis Herrero is, the Court again specifies, without effect on the evaluation of the situation of the latter, since the deferment

of the date on which the person concerned started work resulted exclusively from her having taken maternity leave (paragraphs 43–46).

The Court (Second Chamber) hereby rules:

Council Directive 76/207/EEC of 9 February 1976, related to implementation of the principle of equal treatment between men and women with regard to access to employment, to professional training and promotion, and work conditions, is in opposition to national legislation which does not accord the same rights that are accorded to others who achieved high marks in the same competitive recruitment exam, to a female worker on maternity leave with regard to the conditions of access to the career of civil servant by delaying her entry into work at the end of her leave without taking into consideration the duration of the said leave for calculating length of service of this worker.

Case C-423/04
SARAH MARGARET RICHARDS/SECRETARY OF STATE FOR WORK AND PENSIONS
Date of judgment:
27 April 2006
Reference:
2006 compendium p. I-3585
Content:
Directive 79/7/EEC (Article 4(1)) — Transsexual having undergone a male to female sex change operation — Refusal to grant a retirement pension at the age of retirement for women — Limitation in the time of effects of the judgment

1. Facts and procedure

Ms Richards was born on 28 February 1942 and, in her birth certificate, she was registered as being of the male sex. Having been diagnosed with gender dysphoria, she underwent on 3 May 2001 a surgical sex change operation. On 14 February 2002, she asked to benefit from a retirement pension calculated on 28 February 2002, the date on which she was 60 years of age, which is the age at which, under national law, a woman born before 6 April 1950 may obtain a retirement pension. The said request was rejected by reason that it 'had been introduced more than four months before when the applicant would attain the age of 65 years' which is the age of retirement for men in the United Kingdom.

2. Questions referred to the Court

1) Does Directive 79/7 forbid the refusal to accord the benefit of a retirement pension to a transsexual formerly male of the female sex before the age of 65, although she would already have the right to such a pension at the age of 60 were she considered to be a woman according to national law?

2) In the affirmative, at what date will the effects of the decision of the Court on the first question be produced?

3. Court ruling

On the first question, the Court recalls that, in conformance to settled case law, the law of not being discriminated against by reason of one's sex constitutes one of the fundamental rights of human beings, that the Court is charged with assuring the respect of (see judgments of 15 June 1978, *Defrenne*, 149/77, Compendium p. 1365, paragraphs 26 and 27, as well as 30 April 1996, P./S., C-13/94, ECR. p. I-2143, paragraph 19). The Court held that the field of application of Directive 79/7 could not be reduced to solely discrimination following from membership in one or the other sex, and that, taking account of its object and of the nature of the rights that it aims to protect, that directive needs to be applied to discrimination which finds its origin in the sex change of the complainant (see, relevant to Council Directive 76/207/EEC of 9 February 1976, regarding implementation of the principle of equal treatment between men and women with regard to access to employment, to professional training and promotion, and work conditions (OJ L 39, p. 40), judgment *P./S.*, *supra*, paragraph 20) (paragraphs 23–24).

The Court rejects the argument of the government of the United Kingdom, which asserts that the facts at the origin of the case in the main proceedings follows from the choice operated by the national legislature to fix the age of retirement in a different manner for men and women, that, one such ability being expressly accorded to Member States in virtue of Article 7(1)(a) of Directive 79/7, the latter is authorized to depart from the principle of equal treatment between men and women in the domain of retirement pensions, and that the circumstance that, as in the issue in the main proceedings, the distinction in the retirement pension scheme according to sex affects the rights of transsexuals is devoid of importance. The inequality of treatment in the issue in the main proceedings resides, the Court notes, in the impossibility for Ms Richards to gain recognition of the new gender which she acquired by a surgical operation. Unlike those women whose gender

is not the result of a surgical sex change operation, who may benefit from a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of access to the said pension, the one, as it happens, which is related to the age of retirement. As it has arisen because of a change in sex, the inequality of treatment that Ms Richards suffered must be considered, the Court believes, as discrimination prohibited by Article 4(1) of Directive 79/7. In effect, the Court recalls, the Court has already ruled that national legislation which prevents a transsexual, by failing to recognize their new gender, from fulfilling a condition necessary to benefit from a right protected by the Community law must be considered as being, in principle, incompatible with the requirements of Community law (see judgment of 7 January 2004, *K.B.*, C-117/01, Compendium p. I-541, paragraphs 30 to 34). The government of the United Kingdom asserts that no right conferred by the Community law has been violated, as the right to benefit from a retirement pension follows from no law but national law, the Court recalls that, although in the terms of settled case law, Community law does not challenge the power of the Member States to adapt their systems of social security and although, in the absence of a harmonization of the new Community, it is up to the legislature of each Member State to determine, on the one hand, the conditions of the right or the obligation to affiliate oneself with a social security system and, on the other hand, the conditions which give rise to a right to its benefits; nevertheless, in the exercise of this power, the Member States must respect Community law (judgment of 12 July 2001, *Smits and Peerbooms*, C-157/99, Compendium p. I-5473, paragraphs 44 to 46; and of 4 December 2003, *Kristiansen*, C-92/02, ECR. p. I-14597, paragraph 31) (paragraphs 25–33).

The Court indicates, moreover, that discrimination contrary to Article 4(1) of Directive 79/7 does not fall under the exemption provided in Article 7(1)(a) of the same directive unless it is necessary to reach the objectives that the said directive had in mind when it gave Member States the power to maintain a different retirement age for men and for women (judgment of 7 July 1992, *Equal Opportunities Commission*, C-9/91, Compendium p. I-4297, paragraph 13). The Court believes that, although the preamble of Directive 79/7 does not specify the raison d'etre of the exceptions that it provides, it may be inferred from the nature of the exceptions appearing in Article 7(1) of the said directive that the Community legislature intended to authorize the Member States to maintain temporarily, in the matter of retirement, the advantages granted to women, so as to permit them to progressively proceed to a modification of the pension systems on this point without perturbing the complex financial equilibrium of these systems, whose importance cannot fail to be acknowledged. Among these advantages, the Court observes, figures, precisely, the possibility for female workers to benefit from pension rights earlier than male workers, as is called for in Article 7(1)(a) of the same directive (judgment of *Equal Opportunities Commission*, *supra*, paragraph 15). The Court finally notes that, according to settled case law, the exception to the prohibition on discrimination based on sex, provided in Article 7(1)(a) of Directive 79/7, must be interpreted in a strict manner (see judgments of 26 February 1986, *Marshall*, 152/84, Compendium p. 723, paragraph 36, and *Beets-Proper*, 262/84, Compendium p. 773, paragraph 38, as well as 30 March 1993, *Thomas and others*, C-328/91, ECR p. I-1247, paragraph 8), and that, therefore, it is appropriate to interpret this clause in the sense that it does not aim to fix different retirement ages for men and women. The Court notes, nevertheless, that the issue in the main proceedings does not relate to such a measure (paragraphs 34–37).

On the second question, the Court recalled that it is only in exceptional cases that it may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying upon a provision which it has interpreted with a view to calling in question legal relationships established in good faith (judgment of 2 February 1988, *Blaizot* (Case 24/86 [1988] ECR 379, paragraph 28, and of 23 May 2000, *Buchner*

and others, C-104/98, ECR p. I-3625, paragraph 39). The Court recalls as well that it is settled case law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of such a ruling (judgments of 20 September 2001, *Grzelczyk*, C-184/99, Compendium p. I-6193, paragraph 52, and of 15 March 2005, *Bidar,* Case C-209/03, Compendium p. I-2119, paragraph 68). The Court observes that it had only had recourse to this solution in the specific circumstances, where, on the one hand, there existed a risk of grave economic repercussions due in particular to a high number of court relationships constituted in good faith on the basis of the regulation considered as being validly in force and which, on the other hand, it appeared that individuals and the national authorities had been incited to a behaviour not in conformance with Community regulation by reason of a major objective uncertainty with regard to the scope of Community stipulations, an uncertainty which may have been contributed to by the very behaviour adopted by other Member States or by the Commission of the European Community (judgment of *Bidar*, *supra*, paragraph 69) (paragraphs 40–42).

In the occurrence, the Court notes, the entry into force, on 4 April 2005, of the law of 2004 regarding the recognition of gender (Gender Recognition Act 2004) which permits persons who have already changed their sex or who envisage such a surgical operation to ask for the issue of a certificate of recognition of gender ('gender recognition certificate'), on the basis of which they may be able to obtain a quasi-total recognition of their sex change, is likely to do away with disputes such as that which has given rise to the case at issue in the main proceedings. Moreover, the Court holds, as neither in the written observations that the government of the United Kingdom submitted to the court nor at the time of the hearing, has the latter persisted in the application that it had presented during the main proceedings, aiming to limit in time the effects of the judgment (paragraph 43).

The Court (First Chamber) hereby rules:

1) *Article 4(1) of Council Directive 79/7/EEC of 19 December 1978, related to the implementation of the principle of equal treatment between men and women with regard to social security, must be interpreted in the sense that it contradicts legislation which refuses for the reason that she has not attained the age of 65, the benefit of a retirement pension to a person who has, in conformity with the conditions determined by national law, changed sex from male to female, though this same person would have had the right to such a pension at the age of 60 were she already considered as being a woman according to national law.*

2) *There is no need to limit in time the effects of the present judgment.*

Case C-17/05
B. F. CADMAN/HEALTH & SAFETY EXECUTIVE
Date of judgment:
3 October 2006
Reference:
2006 compendium p. I-9583
Content:
Article 141 EC — Seniority as an element directly involved in determining pay — Objective justification — Burden of proof — Time limitation on effects of the ruling

1. Facts and procedure

Mrs Cadman is employed by the Health and Safety Executive (British agency for Health and Safety, hereafter the 'HSE'). Since she has been actively employed within this institution, the payment system has been modified on several occasions. Before 1992, this system relied on index-linked pay increases, that is to say, each employee benefited from an annual pay-rise until they reached the highest step of their grade. In 1992, the HSE introduced a performance-related pay element, which allowed the increase in the annual pay-rise to reflect the individual performance of the employee. In this system, the best-performing employees could reach the highest step more quickly. After a long-term pay agreement came into force in 1995, the annual pay-rises were established according to the attribution of performance-related quotas known as 'equity shares'. The effect of this change was to slow down the rate for the reduction of pay-differentials between employees of the same grade with greater seniority and those whose seniority was less significant. Finally, in 2000, the system was modified once again with the aim of allowing employees at lower levels of grades to benefit from greater annual pay-rises and, consequently, from faster progress within a given step.

In June 2001, Mrs Cadman put an appeal before the Employment Tribunal which was based on the 1970 Law concerning equal pay (Equal Pay Act 1970). At the date of her petition, she had occupied a managerial post in the capacity of a grade 2 inspector for nearly five years. She had taken four male colleagues, also grade 2 inspectors, as reference cases. Although they were of the same grade as Mrs Cadman, these four people had benefited from substantially higher wages than those received by the interested party. It is accepted that, at the date of the petition presented before the Employment Tribunal, the four male comparators had greater seniority than that of the interested party, earned in part in junior roles.

2. Questions referred to the Court

1) If an employer applies the principle of seniority as a factor linked to pay, and this application leads to disparities between the relevant male workers and female workers, does Article 141 EC have the effect of obliging the aforementioned employer to specifically justify their recourse to this principle? If the answer depends on the circumstances, what circumstances would these be?

2) Would the answer to the previous question be different if the employer applied the criterion of seniority to employees in an individualised way so that there is a genuine and effective appreciation of the extent to which greater seniority justifies better pay?

3) Could a relevant distinction be established between application of the principle of seniority to part-time workers and the application of the same principle to full-time workers?

3. Court ruling

Regarding the first and second questions, which are jointly examined, the Court begins by summarizing the general rules resulting from Article 141(1) EC. It recalls that this arrangement sets out the principle according to which the same work should be remunerated in the same way, whether accomplished by a male worker or a female work-

er (ruling of 17 September 2002, *Lawrence e.a.*, C-320-00, Compendium p. I-7325, paragraph 11), and that, as judged in the 8 April 1976 ruling, *Defrenne* (43/75, Compendium 455, paragraph 12), this principle, which constitutes the specific expression of the general principle of equality forbidding different treatment of comparable situations, unless the differentiation is objectively justified, is a part of what underpins the Community (see also the rulings of 26 June 2001, *Brunnhofer*, C-381/99, Compendium p. I-4961, paragraph 28, and *Lawrence e.a.*, aforementioned, paragraph 12). It furthermore recalls the general rule of the first article, first paragraph of Directive 75/117, which is essentially meant to facilitate the concrete application of the principle of equal pay appearing in Article 141(1) EC, without affecting its contents or its scope (see the 31 March 1981 ruling, *Jenkins* 96/80, Compendium p. 911, paragraph 22). This rule, the Court observes, prescribes the elimination, in the overall package of aspects and conditions of pay, of all gender-based discrimination for the same work or for work to which equal value is attributed (see 1 July 1986 ruling, *Rummler*, 237/85, Compendium p. 2101, paragraph 11). The Court recalls that not only direct discriminations but also indirect discriminations enter into the scope of Article 141(1) EC of direct discriminations, but also indirect discriminations (see, notably to this effect, *Jenkins*, aforementioned, paragraphs 14 and 15, as well as the 27 May 2004 ruling, *Elsner Lakeberg*, C-285/02, Compendium p. I-5861, paragraph 12). It states that it results from a well-established precedent that Article 141 EC must be interpreted in the sense that, as soon as the appearance of discrimination exists, the onus is on the employer to demonstrate that the practice in question is justified by factors that are objective and independent of all gender-based discrimination (see to this effect in particular, the rulings of 17 October 1989, *Danfoss*, 109/88, Compendium p. 3199, paragraphs 22 and 23, and of 27 June 1990, *Kowalska*, C-33/89, Compendium p. I-243, paragraph 31; dated June 17 1988, *Hill and Stapleton*, C-243/95, Compendium p. I-1759, paragraph 43, and of 23 October 2003, *Schönheit and Becker*, C-4/02 and C-5/02, Compendium p. I-12575, paragraph 71), that the justification brought must be based upon a legitimate aim, and that the means chosen in order to reach this aim must be suitable and necessary to this end (see, to this effect, the 13 May 1986 ruling, *Bilka*, 170/84, Compendium p. 1607, paragraph 37) (paragraphs 27–32).

The Court then broaches the question of recourse to the seniority criterion. It observes, with respect to this, that in paragraphs 24 and 25 of the aforementioned Danfoss ruling, it has stated, after having noted that it is not out of the question that recourse to the seniority criterion might lead to less favourable treatment of female workers than male workers, that the employer does not have to specifically justify recourse to this criterion. It indicates that in taking this position, it has recognised that the act of rewarding, in particular, experience acquired which puts the worker in a better position to deliver their services, constitutes a legitimate aim of wage policy. As a general rule, the Court judges that use of the seniority principle is suitable for the attainment of this objective. Indeed, seniority goes hand in hand with experience, and this generally puts the worker in a better position to discharge their duties. Therefore it is, according to the Court, permissible for the employer to reward seniority, without having to explicitly set out the importance that it has for the execution of specific tasks which are entrusted to the worker (paragraphs 33–36).

The Court highlights that, however, in this same ruling, it has not ruled out the idea that some situations may exist in which the use of the seniority criterion must be justified by the employer in a detailed fashion. That is particularly the case, the Court elaborates, when the worker displays elements likely to cause serious doubt as to their suitability for the attainment of the aforementioned aim to which, in this particular case, the seniority criterion is relevant. The Court feels that it then falls to the employer to prove that what is true as a general rule, that is to say that seniority goes hand in hand with experience and that this puts the worker in a better position to discharge

their duties, is equally true about the job in question. The Court adds that, when a system of professional classification based upon an evaluation of the work to be done is used for the determination of pay, it is not required that the justification of recourse to a certain criterion bears upon the situation of the workers concerned in an individualised way. This being so, if the aim pursued by use of the seniority criterion is recognition of acquired experience, it does not have to be demonstrated in the context of such a system that a worker taken individually has, during the relevant period, acquired experience which has allowed them to accomplish their work more satisfactorily. On the other hand, it is appropriate to objectively take into consideration the nature of the work to be accomplished (*Rummler* ruling, aforementioned, paragraph 13) (paragraphs 37–39).

The Court considers that, having taken into account the response given to the first and second questions, it is not necessary to respond to the third question (paragraph 41).

The Government of the United Kingdom and Ireland having felt that, if the Court were to have to envisage departing from the principles that it has laid down in the *Danfoss* ruling, aforementioned, considerations of legal certainty would require a time-limit on the effects of the forthcoming ruling, the Court therefore judges that, its ruling only consisting of one clarification of the relevant case-law, it is not necessary to limit its effects over time (paragraphs 42–43).

The Court (Grand Chamber) hereby rules:

Article 141 EC must be interpreted in the sense that, on the supposition that use of the seniority criterion as an element directly involved in determining wages leads to discrepancy in rates of pay, for the same work or for work of the same value, between male workers and female workers due to be included in the comparison:

- *use of the seniority criterion being, as a general rule, appropriate in order to achieve the legitimate end of rewarding acquired experience which puts the worker in a better position to discharge their duties, the employer does not have to specifically set out that use of this criterion is suitable for the achievement of the aforesaid aim concerning a given job, unless the worker displays features likely to cause serious doubts in this respect;*

- *when a system of professional classification based upon an evaluation of work to be accomplished is used to set rates of pay, it is not necessary to demonstrate that a worker taken individually has, during the relevant period, acquired experience which has allowed them to improve the way that they do their job.*

Joined Cases C-231/06 and C-233/06
NATIONAL PENSIONS OFFICE/EMILIENNE JONKMAN AND HELENE VERCHEVAL AND NOËLLE PERMESAEN/NATIONAL PENSIONS OFFICE
Date of judgment:
21 June 2007
Reference:
2007 compendium p. I-5149
Content:
Directive 79/7/EEC — Statutory Pension Scheme — Air hostesses — Issue of pensions equal to those of stewards — Payment of adjustment contributions all at once — Payment of interest — Principle of effectiveness — Obligations of a Member State arising from a preliminary ruling

1. Facts and procedure

Ms Jonkman, Ms Vercheval and Ms Permesaen, after having worked as air hostesses for Sabena SA, a Belgian public limited air navigation company, applied for a pension as civil aviation crew, to claim their pension rights, from 1 March 1993, 1 July 1996 and 1 February 1997 respectively. The National Pensions Office (hereafter the 'NPO') granted them a pension. However, Mesdames Jonkman, Vercheval and Permesaen challenged the decisions of the NPO, claiming that the calculation of their pensions was based on discriminatory provisions and that they ought to receive a pension calculated according to the same rules as those applied to male cabin personnel. More specifically, a comparison of the interested parties' pension calculation notes showed that the amounts of pay taken into consideration by the NPO were, for the period from 1 January 1964 to 31 December 1980, markedly lower for the air hostesses than for the stewards, despite the fact that their base pay was the same.

This was explained by a difference in salary between the air hostesses on one hand, and the other members of cabin personnel on the other, during the aforementioned period. Indeed, by Royal Decree of 10 January 1964, which came into force on 1 January 1964, a special pension scheme had been introduced in aid of the civil aviation crew — from which air hostesses were excluded, however. The latter remained subject to the general employee pension scheme, which was characterised by the taking into account, for the collection of contributions and the calculation of pensions, of a less significant portion of financial reward than those who were used as the basis of calculation in the special civil aviation crew scheme.

By Royal Decree of 27 June 1980, which came into force on 1 January 1981, air hostesses had finally been integrated into the special civil aviation crew scheme. Thereafter, the Belgian legislator, by Royal Decree of 28 March 1984, introduced an adjustment in favour of the air hostesses for the period from 1 January 1964 to 31 December 1980. This royal decree having been annulled by the Council of State, a new royal decree was adopted to this effect on 25 June 1997. According to this royal decree, the air hostesses engaged in this job during the period from 1 January 1964 to 31 December 1980 had from then on the right to a pension calculated according to the same rules as those applied to stewards, on condition that they pay the adjustment contributions all at once, increased by interest at a rate of 10 % per year. The aforementioned adjustment contributions are essentially comprised of the difference between the contributions paid by the air hostesses during the period from 1 January 1964 to 31 December 1980 and the higher contributions paid by the stewards during the same period.

Ms Jonkman, Ms Vercheval and Ms Permesaen feel that the adjustment scheduled by the Royal Decree of 25 June 1997 does not allow for the elimination of all discrimination between air hostesses and stewards.

2. Questions referred to the Court

1) Should Directive 79/7 be interpreted as authorising a Member State to adopt regula-

tions which aim to allow a category of people of a given gender, originally discriminated against, to benefit from the pension scheme applicable to the category of people of the other gender, under the retroactive payment of contributions (payment, all at once, of a very large sum) which, by virtue of the applicable legislation in this State, are prescribed in favour of the latter category of people?

If so, should Directive 79/7 not be interpreted as demanding that a Member State adapts legislation contrary to this arrangement as soon as a European Court of Justice ruling ascertains this conflict of standards and, at least, within the limitation period which applies to the contribution debt born of the adoption of these regulations?

2) Should Directive 79/7 be interpreted as authorising a Member State to adopt regulations which aim to allow a category of people of a given gender, originally discriminated against, to benefit from the pension scheme applicable to the category of people of the other gender, under the retroactive payment of considerable late-payment interest which, by virtue of the legislation applicable in that state, are prescribed in favour of the latter category of people?

If so, should Directive 79/7 not be interpreted as demanding that a Member State adapts legislation contrary to this arrangement as soon as a European Court of Justice ruling ascertains this conflict of standards and, at least, within the limitation period which applies to the interest charged for late payment that is born of the adoption of these regulations?

3. Court ruling

On a preliminary basis, the Court observes that it is not contested by the parties in the case that the initial exclusion of air hostesses from the civil aviation crew special pension scheme was discriminatory. It notes equally that Article 141, paragraphs 1 and 2, EC is not applicable in this particular case, given that the aforementioned article only applies to professional pension schemes and not to statutory pension schemes (rulings of 25 May 1971, *Defrenne*, aforementioned, paragraphs 10–13; 16 October 1993, *Ten Oever*, C-109/91, Compendium p. I-4879, paragraph 9, and of 21 July 2005, *Vergani,* C-207/04, Compendium p. I-7453, paragraphs 22 and 23), and that it is therefore with good reason that the tribunal which referred the question to the Court has raised its questions regarding Directive 79/7, which applies to statutory schemes in the matter of social security, including statutory pension schemes (1 July 1993 ruling, *van Cant*, C-154/92, Compendium p. I-3811, paragraphs 10 and 11). The Court notes lastly that Article 4(1) of this directive may be invoked by individual interests before national courts so as to cause these to put aside all national regulations that do not conform (rulings of 13 December 1989, *Ruzius-Wilbrink*, C-102/88, Compendium p. 4311, paragraph 19, and of 27 October 1993, *van Gemert–Derks*, C-337-91, Compendium p. I-5435, paragraph 31) (paragraphs 16–19).

The Court notes that, from the first part of these questions, the court which referred the case asks in essence if Directive 79/7 is opposed to a Member State, when it adopts regulations aiming to allow people of a given gender, originally discriminated against, to benefit from the pension scheme applicable to people of the other gender, making such affiliation depend on payment all at once and with interest added at a rate of 10 % per year, of adjustment contributions made up of the difference between contributions paid by people originally discriminated against over the course of the period during which the discrimination took place and the higher contributions paid by the other category of people during the same period (paragraph 20).

In this regard, the Court begins by emphasising that the principal condition to which the air hostesses are made subject by the Royal Decree of 25 June 1997 in order that their professional activity during the period of 1 January 1964 to 31 Decem-

ber 1980 be taken into account in the same way as that of the stewards, that is to say the payment of a sum representing the difference between the contributions paid by the women over the course of the aforementioned period and the contributions paid by the stewards during the same period, is not in itself discriminatory. Indeed, as the Court has already ruled in the context of disputes concerning professional pension schemes, the fact, for a worker, of being able to claim a retroactive affiliation to a given scheme does not allow them to evade payment of contributions associated with the period of affiliation concerned (rulings of 28th September 1994, *Fisscher*, C-128/93, Compendium p. I-4583, paragraph 37; of 24 October 1996, *Dietz*, C-435/93, Compendium p. I-5223, paragraph 34, and of 16 May 2000, *Preston e.a.*, C-78/98, Compendium p. I-3201, paragraph 39). The Court observes that this jurisprudence is applicable by analogy to the cases of affiliation to a statutory pension scheme. It adds that, so as to avoid all reverse discrimination, interest may be added to the adjustment contributions with the aim of compensating monetary depreciation. Indeed, such increases guarantee that the contributions paid by new affiliates are not in reality lower than those paid by workers affiliated from the outset of the pension scheme. The Court clarifies, however, that the preceding considerations are limited to the supposition that the adjustment of pension rights will be effective from the date of entry into retirement. Indeed, an adjustment offered to people who are already retired that demands the payment of a sum representing the difference between the contributions paid by the women over the course of the period during which they were discriminated against and the higher contributions paid by the other category of people during the same period does not put an end to the unequal treatment unless it results in the same calculation of pension rights for the entire duration of the retirement of each of the interested parties (paragraphs 21–26).

Broaching the question of knowing if the Member State may demand that the payment of adjustment contributions be effected all at once and at an added interest rate of 10 % per year, the Court notes that any measure taken by a Member State to conform to the norms of Community law, such as the principle of equal treatment of men and women, must be effective (see regarding this point the aforementioned *Fisscher* ruling, paragraph 31; the aforementioned *Preston e.a.* ruling, paragraphs 40–42; the ruling of 20 March 2003, *Kutz-Bauer*, C-187/00, Compendium p. I-2741, paragraph 57, the 4 July 2006 ruling, *Adeneler e.a.*, C-212/04, Compendium p. I-6057, paragraph 95) and that, consequently, it fell to the Belgian legislator, when it had adopted the Royal Decree of 25 June 1997 to replace the air hostesses in the same situation as that of the stewards, to fix the adjustment arrangements in such a way that they should not be practically impossible or excessively difficult. Yet, notes the Court, taking into account the long duration of the period of discrimination, which extends from 1 January 1964 to 31 December 1980, and the many years that passed between the end of this period and the adoption of the Royal Decree of 25 June 1997 introducing an adjustment (1981 to 1997), the adjustment contributions represent a particularly large sum, and so the payment, all at once, of such a sum could well prove to be impossible, or mean taking out a loan from a financial organization which would in turn require interest payments. In such circumstances, the Court concludes, it is necessary to consider that the obligation imposed on the interested parties to pay adjustment contributions all at once has had the effect of making the adjustment of the air hostesses' pension rights excessively difficult. Concerning the interest rate of 10 % per year, the Court observes that the fixing of an interest rate exceeding that necessary to compensate for monetary depreciation has the consequence that contributions paid by new affiliates are in reality higher than those paid by workers that were affiliated from the outset of the pension scheme, and that consequently, far from leaving the air hostesses in the same situation as that of the stewards, this interest rate has contributed to the continuation of the unequal treatment of the air hostesses. It judges however that it falls to the court which referred the case,

which is alone in having a complete knowledge of national law, to determine in what measure the interest rate of 10 % per year envisaged by the Royal Decree of 25 June 1997 might contain a percentage of interest aiming to compensate for monetary depreciation (paragraphs 28–34).

Having noted, from the second part of the questions, read in the context of the disputes in question, the court that referred the case asks in essence if a Member State has the obligation to adapt its legislation following a ruling made by the Court following a request for a preliminary ruling from which comes the incompatibility of the aforementioned legislation with Community law, the Court recalls its precedents regarding, on one hand, the obligation of the Member State concerned to take general or specific measures likely to assure the respect of Community law on its territory (rulings of 7 January 2004, *Wells*, C-201/02, Compendium p. I-723, and of 25 March 2004, *Azienda Agricola Giorgio, Giovanni and Luciano Visentin e.a.*, C495/00, Compendium p. I-2993), and on the other hand, the obligation of Member States to compensate for damages caused to individuals by the violation of Community law (rulings of 22 April 1997, *Sutton*, S-66/95, Compendium p. I-2163, paragraph 35, and of 30 September 2003, *Köbler*, C-224/01, Compendium p. I-10239, paragraphs 51 and 52) (paragraphs 36–40).

The Court (First Chamber) declares:

1) *Council Directive 79/7/EEC of 19 December 1978, concerning the progressive implementation of the principle of equal treatment of men and women in matters of social security, when a Member State adopts regulations aiming to allow people of a specific gender, originally discriminated against, to benefit for the entire duration of their retirement from the pension scheme applicable to members of the other gender,*

   - *is not opposed to the idea that the aforementioned Member State makes such affiliation depend on the payment of adjustment contributions made up of the difference between the contributions paid by the people that were originally discriminated against over the course of the period during which the discrimination took place and the higher contributions paid by the other category of people during the same period, increased by interest compensating for monetary depreciation,*

   - *is opposed to, on the other hand, the notion that the aforementioned Member State demands that the aforementioned payment of adjustment contributions is increased by interest payments other than those having the purpose of compensating monetary depreciation,*

   - *is equally opposed to the notion that it might be demanded that this payment be made all at once, when this condition renders the planned adjustment practically impossible or excessively difficult. This is especially the case when the sum to be paid is in excess of the annual pension of the interested party.*

2) *Following a ruling given on request for a preliminary ruling, from which arises the incompatibility of national legislation with Community law, it falls to the authorities of the Member State concerned to take general or specific measures likely to assure the respect of Community law, taking especial care that, at the earliest opportunity, national law should be made to conform to Community law and that full effect should be accorded to individual rights and interests drawn from Community law.*

   When discrimination contrary to Community law has been shown to exist, for as long as measures re-establishing equal treatment have not been adopted, the national judge must set aside any discriminatory national arrangement, without having to ask or wait for the prior elimination of this last by the legislator, and apply the same scheme to members of the disadvantaged group as that from which people of the other category benefit.

Case C-227/04 P
MARIA-LUISE LINDORFER/COUNCIL OF THE EUROPEAN UNION
Date of judgment:
September 11, 2007
Reference:
2007 compendium p. I-6767
Content:
Appeal — Civil servant — Calculation of annuities following transfer, to the Community system, of the lump-sum from redemption of pension rights acquired by means of professional activity before entry into the service of the Communities — General principle of equal treatment — Comparable situation approach

1. Facts and procedure

By her appeal, Mme Lindorfer requests the cancellation of the judgment of the Court of First Instance of the European Communities of 18 March 2004, *Lindorfer v Council* (T-204/01, Compendium FP p. I-A-83 and II-361, hereafter the 'contested judgment'), by which the latter rejected her action tending towards the cancellation of the Council of the European Union's decision of 3 November 2000 bearing on the calculation of her annuities following transfer, to the Community system, of the lump-sum from redemption of pension rights acquired by her by means of the Austrian system (hereafter the 'contested decision').

Article 1a, paragraph 1, of the Staff Regulations of Officials of the European Communities, as inserted in these Staff Regulations by the regulation (CE, CECA, Euratom) No 781/98, of 7 April 1998 (OJ L 113, p. 74, hereafter the 'Staff Regulations'), states:

'Civil servants have the right, in the application of the Staff Regulations, to equal treatment without reference, direct or indirect, to race, political, philosophical or religious convictions, gender or sexual orientation, without prejudice to the provisions of the relevant Staff Regulations requiring a particular marital status.'

Article 11, paragraph 2 of Annex VIII of the Staff Regulations states that the civil servant who enters the service of the Communities after having ceased their activities for a national or international administration or organisation, or after having been engaged in gainful or non-gainful employment, is entitled, from the time of their appointment, to pay to the Communities the actuarial equivalent or the lump-sum from redemption of pension rights from seniority that they have acquired by means of the aforementioned employment. This same provision adds that, in this case, the institution where the civil servant is in service determines, considering the grade of their appointment, the number of annuities that it takes into account according to its own system by means of the period of previous service on the basis of the sum of the actuarial equivalent or of the sums repaid (from the pension fund).

Mrs Lindorfer, who is of Austrian nationality, entered the service of the Council on 16 September 1996. On 16 June 1997, she was appointed to her job and classed at grade A 5, level 2. Before entering the service of the Council, she had worked in Austria for 13 years and three months. During this period, she had made contributions to the Austrian pension system. On 15 May 1999, Mrs Lindorfer sought, on the basis of Article 11, paragraph 2, of Annex VIII of the Staff Regulations, the transfer, to the Community pension system, of the sums to be redeemed from the seniority pension rights that she had acquired by means of the Austrian system. On 28 March 2000, the 'Pensions' service of the General Secretariat of the Council addressed a memorandum to Mrs Lindorfer, to which was attached a calculation form. It emerges from this form that the annuities corresponding to the transferable amount were from 5 years, 3 months and 24 days. According to the memorandum dated 12 September 2000, Mrs Lindorfer indicated to the Pensions service that she marked her 'agreement in principle' on the transfer of the

sums to be redeemed from her Austrian pension rights. She contested, however, the number of annuities indicated in the aforementioned calculation form, on the basis that the method of calculation used by the Council was discriminatory and not transparent. According to the memorandum dated 3 November 2000, received by Mrs Lindorfer on 7 November 2000, this last has been informed of the contested decision.

2. Court ruling

After having stated that, in the contested ruling, the Tribunal eliminated the claimant's argument according to which, in the Community pension scheme, no gender-based discrimination is made concerning the contributions of civil servants and the age required for the obtaining of a seniority pension, in judging, notably, that the use of differentiated factors based on gender and age for the purpose of calculating annuity premiums is objectively justified by the necessity of guaranteeing sound financial management of the Community pension scheme, the Court observes that, according to her first plea, Mrs Lindorfer maintains that the Tribunal violated Article 141 EC and, more generally, the principle of non-discrimination on the basis of gender, considering that the use of differentiated factors based on gender for the purpose of calculating annuity premiums is objectively justified by the necessity of guaranteeing sound management of the Community pension scheme. According to Mrs Lindorfer, the Court notes, gender-based discrimination, supposedly taking into account the longer life-expectancy of women, would not be necessary to guarantee the financial equilibrium of the aforementioned regime, to which would attest the fact that neither the contributions of civil servants nor the age required for the obtaining of their seniority pension are determined in a way that is contingent on their gender. The Tribunal would certainly have dismissed the plea of the claimant in affirming that she compared two categories of civil servant which were not comparable, but without explaining, however, why such a comparison could not be made (paragraphs 31 and 47–48).

The Court states that Mrs Lindorfer, in invoking the Tribunal's disregard of the principle of non-discrimination and that of equal treatment of the genders, feels that one of the general principles protected by the Community legal system has been violated. In this regard, the Court notes that Article 141 EC and the various legal provisions derived therefrom to which Mrs Lindorfer refers, such as Article 1a, paragraph 1 of the Staff Regulations, are specific expressions of the general principle of gender equality. The Court subsequently recalls that it has stressed that the Community legislator, when it established rules concerning the transfer, to the Community system, of pension rights acquired in a national system by Community civil servants, finds itself obliged to respect the principle of equal treatment. It must, consequently, avoid laying down rules that treat civil servants in an unequal manner, unless the situation of the interested parties, at the time of their entry into the service of the Communities, justifies differences of treatment based on particular characteristics of the system of pension rights acquired or of the absence of such rights (see, concerning the principle of equal treatment, the 14 June 1990 ruling, *Weiser*, C-37/89, Compendium p. I-2395, paragraph 14) (paragraphs 50–51).

The Court observes, then, that the Tribunal has not considered discriminatory the fact that, actuarial values being more elevated for women, these last receive less in annuities than men in the case that their pension rights are transferred to the Community scheme. It states that it has considered that Mrs Lindorfer would not be able to find grounds for her argument from the fact that, in this system, no gender-based discrimination is made concerning the contributions of civil servants, insofar as the civil servants who contribute thus to the Community pension scheme by the fact of their employment at a Community institution would find themselves in a different situation from that of civil servants who transfer to the Communities the actuarial equivalent or the sums to be repaid from seniority pension rights that they have acquired from employment previous to their entry into the service of the Communities.

The Court notes again that, in any case, in the opinion of the Tribunal, the use of factors differentiated according to gender for the purpose of calculating annuity premiums is objectively justified by the necessity of guaranteeing sound financial management of this scheme (paragraph 52).

In this regard, the Court notes, firstly, that the Tribunal has not explained why these two categories of civil servant would find themselves in situations which would not be comparable from the perspective of the appraisal that it would be called upon to effect regarding the potential existence of gender-based discrimination in the event of a transfer of pension rights to the Community scheme. In effect, the Tribunal does not explain upon what criteria, other than that of gender, it is understood to base a distinction between the treatment of men and the treatment of women who are transferring their pension rights to the Community system, as such a distinction does not exist concerning contributions deducted in the treatment of male and female civil servants. Furthermore, the Court adds that, notwithstanding the fact that Article 1a, paragraph 1 of the Staff Regulations has not been mentioned, this provision, introduced by rule No 781/98 and applicable at the time that Mrs Lindorfer's annuities were calculated, lays down that 'civil servants have the right, in the application of the Staff Regulations, to equality of treatment without reference […] to gender […]' (paragraphs 53–55).

The Court concludes, secondly, concerning the justification of this difference of treatment between men and women as a result of the necessity of sound financial management of the Community pension scheme, that such an argument would not be invoked to support the case for the necessity for higher actuarial values for women. In effect, it recalls, in this regard, that the identical level of contributions deducted from the remuneration of male and female civil servants does not put the aforementioned management back into question. In addition, it stresses that the fact that the same equilibrium could be attained with 'unisex' actuarial values is equally demonstrated by the circumstance that, subsequent to the facts of the matter at issue, and as shown by the responses of the council and of the Commission to the Court's questions, the institutions decided to use such values (paragraphs 56–58).

The Court consequently feels that it is wrong that the Tribunal has not concluded that Mrs Lindorfer was subject to gender-based discrimination. Therefore, it concludes that the first plea is well-founded (paragraphs 59–60).

The Court subsequently rejects the two other pleas developed before it by Mrs Lindorfer.

Regarding the first of these, drawn principally from the fact that the Tribunal, in not admitting that Mrs Lindorfer was subjected to unfavourable treatment compared with civil servants who had been employed for longer, due to the fact that she embarked upon her career with the Communities at a later stage, would have disregarded the principle of equal treatment, seeing as the transfer system disadvantaged civil servants starting a career in a Community institution late compared with those who entered far earlier, the Court begins by recalling that the principle of equality of treatment or of non-discrimination demands that comparable situations are not treated in a different manner and that different situations are not treated in the same manner, unless such treatment is objectively justified (rulings of 10 January 2006, *IATA and ELFAA*, C-344/04, Compendium p. I-403, paragraph 95, and 12 September 2006, *Eman and Sevinger* C-300/04, Compendium p. I-8055, paragraph 57). Given that Mrs Lindorfer, entering the service of a Community institution after having made contributions during a certain period to the Austrian pension system, claims to have been subject to treatment unequal to that of a civil servant who had entered into the same service earlier and who had made contributions to the Community pension scheme during a certain period, there are grounds, according to the Court, for verifying if these two situations are comparable (paragraphs 61–64).

The Court observes that, in the Community pension scheme, retired civil servants are paid a percentage of their last salary. Therefore, the amount of this retirement benefit depends, on one hand, on the accomplishment by the civil servant of their career in the service of the Communities, reflected in their last salary, and on the other hand, on the duration of their engagement with the Communities. In such a system, retirement benefit is not at all determined by the total amount of pre-payments made during the years of service. The Court confirms that the case of a civil servant who transfers pension rights previously acquired in a national system, in the form of capital, to the Community system, does not fall within the scope of the above statement. In effect, the number of annuities taken into account for this civil servant depends, in conformity with Article 11, paragraph 2 of Annex VIII of the Staff Regulations, on the capital transferred and the grade of establishment of the civil servant. Therefore, the amount of retirement benefit to which the civil servant will have a right at the end of their career is defined by their last salary and by the length of their employment in the service of the Communities, to which annuities are added that are determined in a way that is contingent upon capital supplied. The Court feels, however, that a sum of money by which this civil servant contributes to the Community budget and a period of time devoted to the service of Community institutions do not constitute comparable values. The Court states, therefore, that Mrs Lindorfer, having transferred to the Community pensions scheme, at the time that she took up a post in the Communities, capital corresponding to the rights that she acquired in a national scheme, does not find herself in a situation comparable to that of a civil servant who had entered the service of the Communities at an earlier date, who contributed to the Community pension scheme from that time via deductions from their salary (paragraphs 65–68).

The Court (Grand Chamber) declares and rules:

1) *The ruling of the Court of First Instance of the European Communities of 18 March 2004, Lindorfer/Council (I204/01), is annulled, insofar as it has rejected the action of Mrs Lindorfer, on the basis that there was no gender-based discrimination.*

2) *The decision of the Council of the European Union of 3 November 2000, applying to the calculation of Mrs Lindorfer's annuities, is annulled.*

3) *The appeal is rejected for the surplus.*

4) *The Council of the European Union is ordered to pay costs before the departments.*

Case C-116/06
SARI KIISKI/TAMPEREEN KAUPUNKI
Date of judgment:
20 September 2007
Reference:
2007 compendium, p. I-7643
Content:
Directives 76/207/EEC (Article 2) and 92/85/EEC (Articles 8 and 11) — Rights to maternity leave — Implications for the right to obtain an alteration to the period of educational leave

1. Facts and procedure

In Finland, according to chapter 4, paragraph 3 of the law concerning the labour contract (Työsopimuslaki (26.1.2001/55)), the worker can, for a legitimate reason, change the date and duration of educational leave by notifying the employer of the change one month beforehand at the latest.

Under the terms of Articles 11 and 12 of document V of the communal collective employment agreement governing employment conditions of public officials and contract civil servants in 2003–2004 (Kunnallinen yleinen virka-ja työehtosopimus 2003–2004, hereafter the 'collective agreement'), the civil servant has the right, for an unforeseeable and legitimate reason, to obtain, on demand, a change to the date and duration of the educational leave that they have been granted. Any change that is unforeseeable and essential to the practicalities of coping with a child, change that the civil servant was not able to take into account at the time that they requested educational leave, is considered a legitimate reason.

According to the application circulars of the collective agreement, among 'legitimate reasons' are mentioned the serious illness or death of the child or the other parent and divorce. On the other hand, in principle, moving to another area, the emergence of another employment relationship, or a new pregnancy are not considered to be legitimate reasons. Interruption of educational leave entails that the civil servant returns to their duties.

Mrs Kiiski is a teacher at the Tampereen Lyseon Lukio (Tampere High School). Her employer is the Tampereen kaupunki (Tampere town), which engaged her in a public law employment relationship subject to the collective agreement. On 3 May 2004, the head of the school granted her the educational leave that she had requested in order that she be able to look after her child, born in 2003, for the period from 11 August 2004 to 4 June 2005. Pregnant once again, Mrs Kiiski sought, on 1 July 2004, an alteration to the decision concerning the aforementioned educational leave, with the aim that it should from then on cover the period from 11 August 2004 to 22 December 2004. The head of the school, however, made the interested party aware that her request made no mention of an unforeseeable and legitimate reason allowing for the alteration of the duration of the educational leave in line with the collective agreement. On 9 August 2004, Mrs Kiiski finalized her request, indicating that she was 5 weeks pregnant and that her pregnancy entailed an essential change to the practicalities of caring for her child. She broke the news of her intention to take up work once again from 23 December 2004, as she felt that the educational leave could not be completely cancelled. The father of the child understood that he himself would take such leave in Spring 2005. The head of the school rejected this request by his decision of 19 August 2004, in which he reserved the right to conclude that, invoking the application circulars of the collective agreement and Finnish case-law, a new pregnancy did not constitute a legitimate reason for change to the duration of educational leave. The father of the child did not obtain educational leave for Spring 2005, since, according to the general collective agreement concluded between the State and its public officials and contract civil servants (valtion yleinen virka-ja työehtosopimus), only one parent at a time may have a right to educational leave. Mrs Kiiski then declared that she wished to interrupt her educational leave on 31 January 2005 and take her maternity leave from

this date, so that her spouse might himself be able to obtain educational leave. The head of the school, however, rejected this new request on 10 December 2004, on the basis that the decision of the spouse's employer to refuse educational leave would not constitute a legitimate reason in the sense of the collective agreement or of Finnish law.

2. Questions referred to the Court

1) Does the refusal by an employer to change the date of educational leave awarded to a female worker or to interrupt this leave due to a new pregnancy of which the worker had been aware before the start of the aforementioned leave, in application of a consistent interpretation of the national provisions according to which a new pregnancy does not generally constitute an unforeseeable and legitimate reason on the basis of which the date and duration of educational leave may be altered, constitute direct or indirect discrimination contrary to Article 2 of Directive 76/207 […]?

2) Can an employer sufficiently justify their conduct, described above [see first question], potentially constituting indirect discrimination, with regard to Directive [76/207], on the basis that altering the organisation of labour of teaching staff and continuity of teaching would be matched by problems engendering ordinary, non-serious inconveniences or on the basis that the employer would be obliged, based on national provisions, to compensate the replacement for the teacher on educational leave for the loss of salary suffered, if the teacher returns to their duties before the end of their educational leave?

3) Is Directive 92/85 […] applicable and, if yes, is the conduct of the employer described above (see first question) contrary to Articles 8 and 11 of the aforementioned directive when, in continuing to be on educational leave, the female worker has lost the potential to obtain the wage benefits of maternity leave based on their employment relationship in the public sector?

3. Court ruling

The Court states, by its first and third questions, that the Court which referred the case asks, in substance, if Article 2 of Directive 76/207 as well as Articles 8 and 11 of Directive 92/85 are in opposition to national provisions governing educational leave which generally exclude the state of pregnancy, including its final part which corresponds to the period of maternity leave, from the legitimate reasons authorising an alteration to the period of the aforesaid educational leave (paragraph 21).

Having observed that the answer thus sought assumes first of all that the person who aspires to the benefits inherent in maternity leave stated in the scope of application of Directive 92/85 is a''pregnant worker' in the sense of Article 2(a) of this directive, the Court notes that it follows from this that the Community legislator has agreed to provide a Community definition of the notion of 'pregnant worker', even if, for one of the aspects of this definition, concerning the procedures according to which the worker informs her employer of her state, he/it has proceeded to a referral to national legislation and/or practices. It recalls that the notion of the worker cannot have an interpretation that varies according to national legal systems, but has scope in the Community as a whole, and that this notion must be defined according to objective criteria which characterise the employment relationship in considering the rights and duties of the people concerned, and that the essential characteristic of the employment relationship is the circumstance whereby a person accomplishes, during a certain time, for the benefit of another and under the direction of this same, services for which payment is received in return (see, in particular, judgments of 3 July 1986 *Lawrie-Blum,* Case 66/85, Compendium p. 2121, paragraphs 16 and 17; and of 13 April 2000, *Lehtonen and Castors Braine*, C-176/96, Compendium p.

I-2681, paragraph 45; and of 23 March 2004, *Collins*, Compendium p. I-2703, paragraph 26; of 7 September 2004, *Trojani*, C-456/02, Compendium p, I-7573, paragraph 15). The Court thus records that, if it is accepted that Mrs Kiiski, before benefiting from her educational leave, found herself in an employment relationship thus characterised, and had therefore the status of a female worker in the Community law sense of the notion, it is still necessary, in order that she be able to lay claim to the rights authorised by Directive 92/85, that benefiting from educational leave has not stripped her of this status. In his regard, the Court first concludes that Directive 92/85 does not exclude from the scope of its application the situation of female workers who already benefit from leave such as educational leave. Secondly, it observes that, according to clause 2, point 7 of the framework agreement on parental leave concluded on 14 December 1995 by UNICE, CEEP and the CES (OJ L 145, p. 4, hereafter the 'framework agreement'), the Member States and/or social partners will define the arrangements of the contract or employment relationship for the period of parental leave provided for by this agreement. It thus follows, according to the Court, that the Community legislator, in adopting Directive 96/34, which implements the aforesaid agreement, considered that, during the period of this leave, the employment relationship between the worker and their employer was maintained. As a consequence, the beneficiary of such leave remains, during this period, a worker in the sense of Community law. Furthermore, the Court adds, it is not disputed that, at the time that 10 Decmber 2004 decision was taken, which had the effect, according to the Court that referred the case, of depriving Mrs Kiiski in part of the right to payment or to the adequate provisions laid out by Article 11 of Directive 92/85, the interested party had informed her employer of her pregnancy in line with the national legislation or practices. On this date, the Court concludes, she therefore fell within the scope of application of this directive (paragraphs 22–33).

The Court next broaches the question of knowing if the rules governing educational leave, in particular those defining the conditions in which this period of leave may be modified, were likely to deprive Mrs Kiiski of rights inherent in maternity leave (paragraph 34).

In this regard, it concludes that, considering that the granting of such leave has an impact on the organisation of the business or service of which the duties of the worker benefiting from this leave are a part and may necessitate, in particular, the recruitment of a replacement, it is legitimate that national law fixes, in a strict fashion, the conditions in which an alteration to the period of aforesaid leave may take place. It feels that, however, taking into account the objective of the framework agreement which opens up to workers, men and women, by reason of the birth or adoption of a child, the individual right to take leave in order to be with the child, it is equally legitimate that the events which, subsequently to the request for or granting of this leave, indisputably render the worker unable to be with the child in the conditions foreseen initially may be invoked by the interested party in order to obtain an alteration to the period of the aforementioned leave (paragraphs 37–38).

Having recalled the provisions of the collective agreement and of its application circulars, the Court notes that, if the event of moving to another area or the incidence of another employment relationship, which depends on the will of the interested parties alone, can justifiably be considered as not being unforeseeable, the state of pregnancy cannot be compared, from this point of view, to such events. It adds that pregnancy develops ineluctably and that the woman concerned will necessarily undergo, in the period leading up to labour and in the first weeks following it, changes in their living conditions so significant that they will constitute an obstacle to the possibility of the interested party being able to look after their first child. The Court notes that it is precisely this development that the Community legislator has taken into account in opening up to pregnant workers a special right, that is to say the right to maternity leave as set out by Directive

92/85, which aims, on one hand, to protect the woman in the biological condition that she undergoes in the course of her pregnancy and in the period following it, and on the other hand to protect the particular relationship between mother and child over the course of the period following pregnancy and labour, by avoiding the unsettling of this relationship through the onerous accumulation of responsibilities resulting from simultaneous engagement in professional activity (see the rulings of 29 November 2001, *Griesmar*, C-366/99, Compendium p. I-9383, paragraph 43; of 18 March 2004, *Merino Gómez*, C-342/01, Compendium p. I-2605, paragraph 32, and of 14 April 2005, *Commission/Luxembourg*, C-519/03, Compendium. p. I-3067, paragraph 32) (paragraphs 39–46).

The Court stresses that the Member States consequently must, under Article 8 of Directive 92/85, take the measures necessary in order that female workers may benefit from maternity leave of at least 14 weeks. It states for this purpose that it emerges from the fifth and sixth preambles of this directive that the Community legislator is thus in conformity with the objectives of the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, and that Article 136 EC refers equally to the European Social Charter, signed at Turin on 18th October 1961 and revised at Strasbourg on 3 May 1996, of which all the Member States are a part insofar as they have adhered to it in its original version, in its revised version or in its two versions, and, in essence, that Article 8 of the European Social Charter, dedicated to the right of workers to maternity protection, aims to assure them of their right to maternity leave of a minimum duration, in its original version, of 12 weeks and, in its revised version, of 14 weeks. In these conditions, the Court concludes, the right to maternity leave awarded to pregnant workers must be considered a means of protection from social legislation of special importance. It indicates that the Community legislator has thus felt that the essential changes in the living conditions of the interested parties during the period limited to at least 14 weeks which precedes and follows labour constitute a legitimate reason for the suspension of their professional activities, without the legitimacy of this reason being put into question, in any way, by public authorities or employers (paragraphs 47–49).

The Court again specifies that, as long as it follows from the case-law mentioned previously, the protection accorded to the mother in the form of maternity leave aims to avoid the onerous accumulation of her responsibilities. Nonetheless, the care to be given to the first child in line with the objective assigned to parental leave foreseen by the framework agreement represents, for the mother, in the final stage of her pregnancy, a responsibility that has the character of an extra burden and is of comparable importance. It is therefore legitimate, according to the court, to demand that such an accumulation of responsibilities should be avoided, by allowing the interested party, by virtue of this state, to make a change to the aforementioned period of leave. Based on all that is written above, the Court concludes that the period limited to at least 14 weeks which precedes and follows labour must be regarded as a situation which, in the light of the objective of parental leave envisaged by the framework agreement, constitutes an obstacle to the realisation of this objective, and is therefore a legitimate reason authorising an alteration to this leave period (paragraphs 50–51).

However, the Court notes, national provisions such as those primarily in question generally exclude the state of pregnancy from the number of these legitimate reasons, whereas they accept the death or grave illness of the child or other parent, along with divorce, as reasons authorising an alteration to the period of educational leave. The Court considers that, in these conditions, in not treating in an identical manner a situation which, with regard to the objective of parental leave envisaged by the framework agreement and the obstacles which might compromise its realisation, is however comparable to that which results from the grave illness of the child or spouse, of the death of the child or spouse, or of divorce, such

provisions entail direct discrimination based on gender forbidden by Article 2 of Directive 76/207 (see the ruling of 27 February 2003, *Busch*, C-320/01, Compendium p. I-2041, v 38), without such treatment being objectively justified (paragraphs 52–55).

The Court thus feels that, the second question only having been put for the case where the Court would feel that the national provisions principally in question would contain indirect discrimination, there is no grounds for an answer to this question (paragraphs 59–61).

The Court (Fourth Chamber) hereby rules:

Article 2 of Council Directive 76/207/EEC of 9 February 1976 on the on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, prohibiting all direct and indirect discrimination on the grounds of sex as regards working conditions, as well as Articles 8 and 11 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), which govern maternity leave, preclude provisions of national law concerning childcare leave which, in so far as they fail to take into account changes affecting the worker concerned as a result of pregnancy during the period of at least 14 weeks preceding and after delivery, do not allow the person concerned to obtain at her request an alteration of the period of her childcare leave at the time when she claims her rights to maternity leave and thus deprive her of the rights attaching to that maternity leave.

Case C-460/06
NADINE PAQUAY/SOCIETE D'ARCHITECTES HOET + MINNE SPRL
Date of judgment:
11 October 2007
Reference:
2007 compendium p. I-8511
Content:
Directives 76/207/EEC (Articles 2 and 5) and 92/85/EEC (Article 10) — Decision to dismiss a pregnant worker taken during the period of protection but made known and implemented after the expiry of this period — Effectiveness of the period of protection — Penalty

1. Facts and procedure

In Belgium, in the terms of Article 40 of 16 March 1971 Labour Law (Belgian Monitor of 30 March 1971, p. 3931):

'An employer who employs a pregnant worker may not act in such a way as to unilaterally end the employment relationship from the time that they were informed of the pregnancy until the end of a month-long period starting from the end of post-natal leave, except in the case that there are reasons irrelevant to the physical state resulting from pregnancy or labour.

The burden of proof regarding these reasons fall to the employer. At the request of the worker, the employer must make them aware of these reasons in writing.

If the reason invoked as the reason for dismissal does not correspond to the limitations of paragraph 1, or in the absence of a reason, the employer will pay the worker a flat-rate benefit equal to six months' gross payment, without detriment to payment due to the worker in the event of breach of contract.'

The appellant, employed in the architecture office of the respondent from 24 December 1987, was on maternity leave from the month of September until the end of the month of December 1995. Her maternity leave had ended on 31 December 1995, and the period of protection against dismissal, which went from the beginning of the pregnancy until the end of maternity leave, ended, in line with Belgian law, on 31 January 1996. The appellant was dismissed by a registered letter of the 21 February 1996, at a point where the period of protection had ended, subject to six months advance notice starting from 1 March 196. The respondent put an end to the completion of the contract on 15 April 1996 subject to the payment of an indemnity corresponding to the notice pay. The decision to dismiss the appellant had been taken while she was pregnant and before 31 January 1996, that is to say before the end of the period of protection against dismissal, and this decision was implemented in due course. During the pregnancy, the respondent had, on 27 May 1995, put an advertisement in a newspaper with the aim of recruiting a secretary and, on 6 June 1995, responded to a candidate that the 'post would be vacant from mid-September 1995 to January 1996', which corresponds to the period of the planned maternity leave, 'and then from August 1996', being from the expiry of what would be the six-months advance notice that is normally made known after the period of protection. It is not disputed that on the date of 27 May 1995, the society was aware of the pregnancy, and that the advertisement concerned the position occupied by the appellant. The respondent also put out a second advertisement in October 1995, being a short time after the start of maternity leave, which was worded as follows: 'accounting, MacIntosh available 1mm, opportunity to make a career, ds pet. equip'. It is not disputed that the phrase 'pr.carr.' signifies 'to make a career', which confirms that the intention of the society was to effect the definitive replacement of the appellant and the decision in this case was taken at the time of her pregnancy. In terms of the reasons for dismissal, and taking into account that the burden of proof falls to the employer, the court that referred the case has specified, in a judgment of 26 April 2006, that the justifications

that the respondent attempts to give for the dismissal, that is to say a lack of adaptation to developments in the architectural craft, are, notably, not set out on the documents from 1 March 1996, which indicate that the appellant had always worked to the 'complete satisfaction of her employer'. It therefore considered that the dismissal of the appellant was not irrelevant to the pregnancy, or at least, to the circumstance of the birth of a child.

2. Questions referred to the Court

1) Should Article 10 of Directive 92/85 be interpreted as only forbidding the notification of a dismissal decision during the period of protection included in paragraph 1 of this article or does it forbid, also, the actual taking of the dismissal decision and preparation for the definitive replacement of the worker, before the expiry of the period of protection?

2) Is dismissal that is notified after the period of protection laid out in Article 10 of Directive 92/85, but which is not irrelevant to maternity and/or birth of a child, contrary to Article 2(1) or Article 5(1) of Directive 76/207, and, assuming this to be the case, should the penalty be at least equivalent to that which national law lays out in the implementation of Article 10 of Directive 92/85?

3. Court ruling

Regarding the first question, the Court begins by recalling its case-law on the dismissal of workers who are pregnant or who have recently given birth (paragraphs 28–31).

It then notes that, in view of the objectives pursued by Directive 92/85 and, more specifically, those pursued by Article 10, the prohibition of dismissal of women who are pregnant, nursing, or who have recently given birth during the period of protection is not limited to the notification of the dismissal decision. The protection granted by this provision to the aforementioned workers excludes, according to the Court, both the taking of the dismissal decision and the adoption of measures that prepare for dismissal, such as the search for and anticipation of a definitive replacement for the employee concerned for the reason of pregnancy and/or birth of a child. Effectively, an employer, such as the one relevant to the present case, who decides to replace a worker who is pregnant, nursing, or who has recently given birth for the reason of their condition and who, with a view to replacing them, takes concrete steps beginning from the time when they were made aware of the pregnancy, is pursuing precisely the objective forbidden by Directive 92/85, that is to say the dismissal of a worker for the reason of their pregnancy or of the birth of a child. A contrary interpretation, limiting the prohibition of dismissal to the mere notification of a dismissal decision during the period of protection set out in Article 10 of Directive 92/85, would deprive, the Court specifies, this article of its effectiveness and could engender a risk of circumvention by employers of this prohibition to the detriment of the laws dedicated by Directive 92/85 to women who are pregnant, nursing or who have recently given birth (paragraphs 33–35).

The Court recalls, however, that a worker who is pregnant, nursing or who has recently given birth may, in line with the provisions of Article 10(1) of Directive 92/85, be dismissed during the period of protection set out in this provision in exceptional cases that are not linked to their condition, as permitted by national legislation and/or practices, and furthermore, regarding the burden of proof applicable in these circumstances such as those in question in the present case, it is incumbent upon national justice to apply the provisions relevant to Council Directive 97/80/EC of 15 December 1997 concerning the burden of proof in cases of gender-based discrimination which, by reason of Article 3(1)(a), applies to situations covered by Directive 92/85, to the extent where there is in fact gender-based discrimination. The Court stresses, on this point, that it emerges from Article 4(1) of Directive 97/80 that, as soon as a person believes themselves to be wronged by non-re-

spect in their regard to the principle of equality of treatment and establishes, before a court or another competent authority, facts which allow the existence of direct or indirect discrimination o be presumed, it is incumbent upon the respondent to prove that there has been no violation of the principle of equality of treatment (paragraphs 36–37).

Regarding the first part of the second question, the Court feels that, as is the case with the answer to the first question, the fact that a decision to dismiss a female worker over the course of her pregnancy or during her maternity leave for reasons linked to the pregnancy and/or to the birth of a child is conveyed after the end of the period of protection set out in Article 10 of Directive 92/85 does not at all change the fact that there is direct gender-based discrimination contrary to Articles 22(1) and 5(1) of Directive 76/207. Any other interpretation of these provisions, the Court concludes, would limit the scope of the protection accorded by Community law to women who are pregnant, nursing or who have recently given birth, contrary to the pattern and development of the rules of Community law governing equality between men and women in this domain (paragraphs 40–41).

Regarding the second part of the second question, the Court recalls, with reference to Article 6 of Directive 76/207, its ruling of 2 August 1993, *Marshall* (C-271/91, Compendium p. I-4367). It recalls also that, in line with Article 12 of Directive 92/85, the Member States are obliged to take the necessary measures allowing any person who believes themselves to have been damaged by non-respect of the obligations that follow from this directive, including those following from Article 10, to make good their rights by judicial process, and notes that Article 10, point 3 of Directive 92/85 specifically sets out that Member States must take the measures necessary to protect workers who are pregnant, nursing or who have recently given birth against the consequences of a dismissal that would be illegal by reason of this provision, point 1 (paragraphs 43–47).

The Court thus concludes, whilst recognising that Member States are not required, neither by reason of Article 6 of Directive 76/207 nor by reason of Article 12 of Directive 92/85, to adopt a fixed measure, that this does not detract from the fact that the measure chosen must be of such a nature as to assure effective and efficient legal protection, must have a real dissuasive effect with regard to the employer and must be in any case appropriate to the damage suffered. If, the Court continues, by reason of Articles 10 and 12 of Directive 92/85 and in order to be in line with the demands established by the case-law of the Court in the matter of penalties, a Member State chooses to penalise non-respect of obligations that follow from Article 10 by the granting of a fixed pecuniary indemnity, it follows that the measure chosen by the Member State, in the case of violation, in identical circumstances, of the prohibition of discrimination in Articles 2(1) and 5(1) of Directive 76/207 must be at least equivalent. Yet, the Court observes, if the indemnity chosen by a Member State by reason of Article 12 of Directive 93/85 is judged to be necessary for the protection of the workers concerned, it is difficult to understand how a reduced indemnity adopted in order to be in conformity with Article 6 of Directive 76/207 could be considered appropriate to the damage suffered if the aforementioned prejudice lies in a dismissal in identical circumstances and contrary to Articles 2(1) and 5(1) of the latter directive. The Court further recalls that in choosing the solution that is appropriate for guaranteeing the objective of Directive 76/207, the Member States must take care that violations of Community law are penalised according to the basic conditions and procedures that are analogous to those applicable to violations of national law of a similar nature and significance (rulings of 21 September 1989, *Commission/Greece*, 68/88, Compendium p. 2965, paragraph 24, and dated 22 April 1997, *Draehmpaehl*, C-180/95, Compendium p. I-2195, paragraph 29). This reasoning is applicable mutatis mutandis, the Court specifies, to violations of Community law of a similar nature and significance (paragraphs 49–52).

The Court (Third Chamber) hereby rules:

1) *Article 10 of Council Directive 92/85/EEC of 19 October 1992, on the introduction of measures to encourage improvements in the health and safety at work of workers who are pregnant, nursing or who have recently given birth (10th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), is to be interpreted to the effect that it forbids not only the notification of a dismissal decision for the reason of pregnancy and/or the birth of a child during the period of protection set out in paragraph 1 of this article, but also the taking of measures in anticipation of such a decision before the expiry of this period.*

2) *A dismissal decision taken for the reason of pregnancy and/or the birth of a child is contrary to Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976, concerning the implementation of the principle of equal treatment of men and women regarding access to employment, vocational training and promotion, and working conditions, whatever the time that this dismissal decision is notified and even if it is notified after the end of the period of protection set out in Article 10 of Directive 92/85. Since such a dismissal decision is contrary as much to Article 10 of Directive 92/85 as it is to Articles 2(1) and 5(1) of Directive 76/207, the measures chosen by a Member State by reason of Article 6 of this last directive to penalise the violation of these provisions must be at least equivalent to those set out by national law in the implementation of Articles 10 and 12 of Directive 92/85.*

Case C-300/06
URSULA VOS/LAND BERLIN, in the presence of: VERTRETERIN DES BUNDESINTERESSES BEIM BUNDESVERWALTUNGS-GERICHT
Date of judgment:
6 December 2007
Reference:
2007 compendium p. I-10573
Content:
Article 141 EC — Civil servant working part-time — Payment for overtime — Indirect gender-based discrimination compared with full-time employees — Use of statistics to establish the existence of discrimination

1. Facts and procedure

Mrs Voß is a civil servant employed as a teacher by Land Berlin. During the period from 15 July 1999 to 29 May 2000, her engagement in professional activity was part-time, by reason of taking 23 hours of lessons per week. The number of hours of lessons owed by a teacher employed full-time stood at 26.5 hours at that time. Between 11 January and 23 May 2000, Mrs Voß undertook, each month, between 4 and 6 hours of extra lessons relative to her individual working timetable. The payment received by Mrs Voß for the aforementioned period stood at DEM 1 075.14. According to the court which referred the case, the payment received for the same number of hours of work by a teacher employed full-time stood at DEM 1 616 for the same period.

2. Question referred to the Court

Is Article 141 EC opposed to national regulations according to which the level of payment for overtime is the same for civil servants working full-time and those working part-time, this payment being inferior to the part of a full-time civil servant's salary corresponding to an identical period of work undertaken in the context of their normal working hours, when part-time employees are predominantly women?

3. Court ruling

The Court notes that, by its question, the court that referred the case asks in essence if Article 141 EC ought to be interpreted as being at odds with national regulations regarding payment of civil servants such as that in question here, which, on one hand, define overtime undertaken, whether by civil servants employed full-time or civil servants employed part-time, as hours of work that they accomplish over and above their individual working hours, and, on the other hand, recompense these hours at a lower rate than the hourly rate applied to hours undertaken within the limits of the individual working week, such that part-time employees are paid less than full-time workers in terms of the hours of work that they undertake over and above their individual timetables and up to the amount of hours owed by a full-time worker in the context of their timetable, when the civil servants who work part time are predominantly women (paragraph 21).

The Court recalls that Article 141 EC states the principle of equal pay for male workers and female workers for the same work, and that this principle is part of the foundations of the European Community (see the ruling of 8 April 1976, *Defrenne*, 43/75, Compendium p. 455, paragraph 12)). It recalls also its case-law on indirect gender-based discrimination (rulings of 13 May 1986, *Bilka-Kaufhaus*, 170/84, Compandium p. 1607, paragraphs 29 and 30; of 15 December 1994, *Helmig et al*, C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, Compendium p. I-5727, paragraph 20, along with that of 27 May 2004, *Elsner-Lakeberg*, C-285/02, Compendium p. I-5861, paragraph 12), then verifies whether the regulations in question in the substantive case are likely to give rise to indirect discrimination contrary to Article 141 EC (paragraphs 24–26).

In this regard, the Court recalls that there is inequality of treatment each time the payment to full-time workers is higher than that given to part-time workers, at parity of hours spent undertaking the same work by reason of the exist-

ence of a paid employment relationship (*Helmig et al* ruling, aforementioned, paragraph 26). It recalls also that it has twice already pronounced on the question of the existence of a difference in salary between part-time workers and full-time workers as regards payment for overtime. Regarding paragraphs 26 to 30 of its ruling on *Helmig et al*, aforementioned, the Court has concluded that there is no difference in treatment between the part-time workers and the full-time workers, when the national provisions that are applicable do not provide for the payment of salary increases for overtime except in the case where it exceeds the normal duration of work as fixed by a collective agreement, and not in the case that the individual's timetabled working hours are exceeded. The Court has stated, in such circumstances, that the part-time workers do indeed receive, at parity of working hours undertaken, the same payment as that received by full-time workers, with this being the case as well when the normal duration of work as fixed by the collective agreements is only exceeded when hours are undertaken over and above this, the pay increases for overtime benefiting, in this second hypothesis, the two categories of workers. On the other hand, regarding paragraph 17 of its *Elsner-Lakeberg* ruling, aforementioned, the Court considered that there is a difference of treatment between part-time workers and full-time workers, when the applicable national provisions anticipate that all workers are obliged to effect a minimum of three hours of lessons per month over and above their individual work timetable in order to be able to claim payment for overtime (paragraphs 29–32).

The Court observes that, in the case in question, Mrs Voß, who works part-time, receives payment which, at parity of hours worked, is inferior to that paid to a teacher engaged in full-time professional activity as regards the hours that she has accomplished over and above her individual work timetable and up to the normal length of time for full-time work. Thus, the Court notes, a part-time teacher whose indivdual working week comprises 23 hours of lessons per week receives, in undertaking 3.5 hours of lessons over and above this working week, inferior pay compared with that obtained by a teacher working full-time for 26.5 hours of lessons. The Court notes that an examination of pay elements shows that this situation follows from the fact that overtime, which is less well-paid than so-called 'normal' hours, is defined as hours undertaken over and above the normal working week as fixed by the individual timetable of the teacher, a timetable which evidently varies depending on whether the employee works part-time or full-time. Consequently, the lower wage-rate for overtime only applies to teachers working full-time over and above 26.5 hours teaching per week, whilst, for part-time workers, this rate is applied as soon as they go over their individual working week which is, by definition, less than 26.5 hours. In the case of Mrs Voß, the lower wage-rate is applied for hours undertaken over and above 23 hours of lessons per week. From the above, the Court concludes that the national regulations in question in the main proceedings, according to which payment for overtime undertaken by part-time civil servants over and above their individual working week and up to the normal duration of full-time work is lower than that for hours worked by full-time workers, entail a difference of treatment between the two categories of civil servants to the detriment of those who work part-time (paragraphs 34–37).

The Court thus indicates that, supposing that this difference of treatment affected a considerably greater number of women than of men, and to the extent that objective factors irrelevant to any gender-based discrimination likely to justify such a difference of treatment did not exist, Article 141 EC is at odds with the aforementioned national regulations (paragraph 38).

On the first point, the Court states that, according to the court that referred the case, around 88 % of teachers employed on a part-time basis by Land Berlin in Spring of the year 2000 were women. It indicates however that, in order to verify whether the stated difference in treatment between full-time workers and part-time workers affects a con-

siderably higher number of women than of men, it falls to the court that referred the case to take into consideration the body of workers subject to national regulation in which the difference of treatment stated above finds its source. To this effect, the court specifies, it is their responsibility to determine if the aforesaid difference in treatment finds its source in the federal laws on civil servants' pay (Bundesbesoldungsgesetz) and/or the regulations concerning pay for overtime undertaken by civil servants (Verordnung über die Gewährung von Mehrarbeitsvergütung für Beamte), since, in principle, it is the field of application of the regulations in question which determines the circle of people likely to be included in the comparison (ruling of 13 January 2004, *Allonby*, C-256/01, Compendium p. I-873, paragraph 73). The Court recalls also that, as it has ruled at paragraph 59 of its ruling of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, Compendium p. I-623), the best method of statistical comparison consists of comparing the proportion of workers affected by the aforementioned difference in treatment, on one hand, within the male working body, and on the other hand, within the female working body. If the statistical data available indicate that the percentage of part-time workers within the female working body is considerably higher than the percentage of part-time workers within the male working body, there will be grounds for considering that such a situation has the appearance of gender-based discrimination, unless the regulations in question in the main proceedings are justified by objective factors that are unrelated to all gender-based discrimination (see, to this effect, the *Seymour-Smith and Perez* ruling, aforementioned, paragraphs 60-63) (paragraphs 39–42).

On the second point, the Court notes that, in the main proceedings, it is not obvious from the referral decision that lower pay for overtime undertaken by part-time workers is based on factors that are objectively justified and irrelevant to any gender-based discrimination. It stresses that it falls, however, to the court that referred the case to verify this point (paragraph 43).

The Court (First Chamber) hereby rules:

Article 141 EC must be interpreted in the sense of being at odds with national regulations regarding payment of civil servants such as that in question here, which, on one hand, define overtime undertaken, whether by civil servants employed full-time or civil servants employed part-time, as hours of work that they accomplish over and above their individual working hours, and, on the other hand, recompense these hours at a lower rate than the hourly rate applied to hours undertaken within the limits of the individual working week, so that part-time civil servants are paid less than full-time workers as regards the hours of work that they undertake over and above their individual timetables and up to the amount of hours owed by a full-time worker in the context of their timetable, in the case where:

- *among the body of workers subject to the aforementioned regulations, a considerably higher percentage of female workers than male workers is affected;*

and

- *the difference in treatment is not justified by objective factors that are far removed from gender-based discrimination.*

Joined Cases C-128/07 and C-131/07
ANGELO MOLINARI, GIOVANNI GALEOTA, SALVATORE BARBAGALLO AND MICHELE CIAMPI/AGENZIA DELLE ENTRATE — UFFICIO DI LATINA
Date of judgment:
January 16 2008
Reference:
2008 compendium p. I-4 (summary publication)
Content:
Directives 76/207/EEC and 79/7/EEC — Voluntary retirement benefits — Tax relief set relative to different ages depending on gender — Application of a reduced charge on sums received at the time of ceasing work with the aim of encouraging workers of a certain age to leave — Vergani ruling

1. Facts and procedure

In Italy, Law No 155, of 23 April 1981 (ordinary supplement to GURI No 114, of 27 April 1981), authorizes the employees of enterprises declared in crisis to benefit from admittance to early retirement at the age of 55 for men and 50 for women. Article 17(4) bis, of decree No 917 of the President of the Republic of 22 December 1986 (ordinary supplement to GURI No 302, of 31 December 1986), as modified by Legislative Decree No 314, of 2 September 1997 (ordinary supplement to GURI No 219, of 19 September 1997, hereafter 'Presidential Decree No 917/86') sets forth:

'For sums paid on the occasion of the cessation of the work relationship, in order to encourage voluntary retirement of workers who have attained the age of 50 for women and 55 for men, aimed for by Article 16(1)(a), tax is applied at the rate equal to half of the applicable rate for the payment at the end of the work relationship and of other compensation and pay mentioned in Article 16(1)(a)'.

The claimants in the main proceedings received, between the month of May and the month of November of the year 2002, following the cessation of the work relationship with their employer, sums paid as incentives to voluntary departure. They were aged from 53 to 54 years at the time. The employer made a deduction at source in respect of the personal income tax on natural people, without applying the 50 % reduction set out in Article 17, paragraph 4(a) of Presidential Decree No 917/86.

In basing their argument on the ruling of 21 July 2005, *Vergani* (C-207/04, Compendium p. I-7453), the claimants in the main proceedings intended to obtain the reimbursement of half of the sums that were deducted by the employer in the guise of the aforementioned tax.

2. Questions referred to the Court

1) Should the ruling (*Vergani*, aforementioned) be interpreted to the effect that the Italian legislator should have extended to the men the benefit of the more favourable age limit recognised for women?

2) Is it appropriate in this particular case to rule that there are grounds for applying, from the age of 50 years for men, a tax rate equal to 50 % of that which is applied for the tax on wages of the end of the work relationship [...] to indemnities paid as an incentive to voluntary departure […]?

3) Considering the fact that the amount of the tax paid by the taxpayer as tax on natural persons does not constitute part of their salary, since it is not paid by the employer by means of the work relationship, and that the amount paid by the employer, to encourage the departure of the worker, is not of a remunerative nature, is it in line with Community law to state a ruling to the effect that the thresholds of 50 and 55 years applicable to men and women respectively are contrary to Community law, when Directive 79/7 allows Member States to maintain different age limits for the purpose of retirement?

4) Is, or is not, the interpretation of Community law (Directive […] 76/207 […]) at odds with the application of the national provision which underlies the case in point submitted to the judgment of the Court, with the consequence that the court currently judging the case will or will not have to declare the provisions of national law incompatible with Community law (Article 17, now Article 19, paragraph 4 (a) of Presidential Decree No 917/86?

3. Court ruling

The Court notes, by its first, second and fourth questions, which it would be appropriate to examine jointly, that the court that referred the case asks, in essence, what the obligations are that the aforementioned *Vergani* ruling imposes on the Italian legislator and, notably, if it is obliged, in the context of the case in the main proceedings, to set aside Article 17, paragraph 4(a) of Presidential Decree No 917/86 and to apply the same tax system to men aged from 50-55 years at the date of payment of of the sums allotted by way of incentive to depart voluntarily as that reserved for women for the imposition of such sums (paragraph 19).

In this regard, the Court recalls first of all the direct effect of Article 5(1) of Directive 76/207 (ruling of 26 February 1986, *Marshall*, 152/84, Compendium p. 723, paragraph 55)). It next recalls that, in the *Vergani* ruling, aforementioned, it ruled that Directive 76/207 must be interpreted as being at odds with a provision such as that in question in the main proceedings, that is to say Article 17, paragraph 4(a) of Presidential Decree No 917/86, which grants workers who have reached the age of 50, if concerning female workers, and the age of 55 years, if concerning male workers, for the purpose of encouraging voluntary departure, a benefit constituted by the taxation, at half the usual rate, of the sums allotted on the cessation of the work relationship. It recalls finally that, following a judgment delivered on request for a preliminary ruling from which follows the incompatibility of national legislation with Community law, it falls to the authorities of the Member State concerned to take the general or specific measures appropriate to assure the respect of Community law on their territory (see, to this effect, the rulings of 7 Jauary 2004, *Wells*, C-201/02, Compendium p. I-723, paragraphs 64 and 65; of 25 March 2004, *Azienda Agricola Giorgio, Giovanni and Luciano Visentin et al*, C495/00, Compendium p. I-2993, paragraph 39, along with that of 21 June 2007, *Jonkman et al*, C-231/06 to C-233/06, Compendium p. I-5149, paragraph 38), that the aforementioned authorities are free to choose the measures to be taken in order that national law should be brought into line with Community law and that full effect be given to the rights that individual interests claim from the latter (see the *Jonkman et al* ruling, aforementioned, paragraph 38), so that, in cases of discrimination that are contrary to Community law, for as long as measures re-establishing equal treatment have not been adopted, respect for the principle of equality will only be assured by the granting to people in the disadvantaged category the same advantages as those enjoyed by the privileged category, and that, in such a hypothesis, national justice is obliged to put aside any discriminatory national provision, without having to ask for or wait for the prior elimination of this last by the legislator, and to apply to the members of the disadvantaged group the same system as that enjoyed by the people of the other category (rulings of 28 September 1994, *Avdel Systems*, C-408/92, Compendium p. I-4435, paragraphs 16 and 17; and of 12 December 2002, *Rodríguez Caballero*, C-442/00, Compendium. p. I-11915, paragraphs 42 and 43; and 7 September 2006, *Cordero Alonso*, C-81/05, Compendium p. I-7569, paragraphs 45 and 46, along with *Jonkman et al,* aforementioned, paragraph 39) (paragraphs 20–23).

The Court notes that, by its third question, the court that referred the case asks, in essence, if the sums paid as an incentive to voluntary retirement have the nature of social security benefits and if, consequently, the difference in treatment between men and women in question in the main proceedings is likely to be covered by the derogation set

out in Article 7(1)(a), of Directive 79/7. In this regard, the Court observes that, after having recalled that the aforementioned Article 7(1)(a), can only be applied to the fixing of retirement age for the awarding of old-age and retirement pensions and the way it could affect other benefits relevant to social security, it has concluded, on paragraph 33 of the *Vergani* ruling, aforementioned, that this exception to the prohibition of gender-based discrimination is not applicable to tax relief such as that set out in Article 17, paragraph 4a) of Presidential Decree No 917/86, which does not constitute social security benefit (paragraphs 25–26).

The Court (Seventh Chamber) hereby rules:

1) *Following the Vergani ruling of 21 July 2005 (C-207/04), from which arises the incompatibility of national legislation with Community law, it falls to the authorities of the Member State concerned to take general or specific measures likely to assure the respect of Community law on their territory, the aforementioned authorities being free to choose the measures taken in order that national law should conform to Community law and that full effect should be given to individual rights and interests drawn from the latter. When discrimination contrary to Community law has been shown to exist, for so long as measures re-establishing equal treatment have not been adopted, the national judge must put aside any discriminatory national provision, without having to ask or wait for the prior elimination of this last by the legislator, and apply the same scheme to members of the disadvantaged category as that from which people of the other category benefit.*

2) *The derogation set out in Article 7(1)(a), of Council Directive 79/7/EEC of 19 December 1978, relating to the progressive implementation of the principle of equal treatment of men and women in matters of social security, is not applicable to a fiscal measure such as that set out in Article 17, paragraph 4a of Decree No 917 of the President of the Republic of 22 December 1986, such as that modified by Legislative Decree No 314 of 2 September 1997.*

Case C-506/06
SABINE MAYR/BACKEREI UND KONDITOREI GERHARD FLOCKNER OHG
Date of judgment:
26 February 2008
Reference:
2008 compendium p. I-1017
Contents:
Directives 76/207/EEC (Articles 2 and 5) and 92/85/EEC (Article 10) — Female worker dismissed when her ovules had been fertilised in vitro but not yet transferred into her uterus — Notion of the pregnant worker — Scope of the prohibition of dismissal

1. Facts and procedure

Mrs Mayr had been employed by Bäckerei und Konditorei Gerhard Flöckner OHG (hereafter 'Flöckner') from 3 January 2005 as a waitress. In the context of an in vitro fertilisation attempt and after hormonal treatment lasting around a month and a half, follicular puncture was carried out on Mrs Mayr on 8 March 2005. The doctor treating Mrs Mayr prescribed sick-leave for Mrs Mayr lasting from 8 to 13 March 2005. On 10 March 2005, during telephone communication, Flöckner informed Mrs Mayr that she had been dismissed with effect from 26 March 2005. By a letter of the same day, Mrs Mayr informed Flöckner that, in the context of artificial fertilisation treatment, the transfer into her uterus of of fertilised ovules was planned for 13 March 2005. It is accepted that, on the date of the delivery of Mrs Mayr's dismissal, that is to say 10 March 2005, Mrs Mayr's collected ovules had already been fertilised by spermatozoa of her partner and, therefore, there already existed, on this same date, fertilised eggs in vitro. On 13 March 2005, being three days after Mrs Mayr had been informed of her dismissal, two fertilised eggs were transferred into Mrs Mayr's uterus.

2. Question referred to the Court

Is a worker who subjects herself to in vitro fertilisation, if, at the time that her dismissal notice is delivered, her ovules are already fertilised by the spermatozoa of her partner and therefore if embryos already exist in vitro, but have not yet been transferred to the woman, a 'pregnant worker' in the sense of Article 2(a), first part, of Directive 92/85?

3. Court ruling

The Court begins by recalling its case-law on the dismissal of workers who are pregnant or who have recently given birth (paragraphs 31–35).

It then notes that, in view of the objectives pursued by Directive 92/85 and, more specifically, those pursued by Article 10 of the same, to benefit from protection against dismissal granted by this article, the pregnancy in question must already have begun. It stresses in this regard that it is evident that it is the earliest date possible for the existence of the pregnancy which must be allowed to assure the security and protection of pregnant workers. It concludes, however, supposing that the aforesaid date is the date of transfer of fertilised ovules to the womb of the woman when an in vitro fertilisation is concerned, that it would not be accepted, for reasons of respect to the principle of legal certainty, that the protection instituted by Article 10 of Directive 92/85 should be extended to a female worker when, on the date that her dismissal notice is delivered, the transfer of these in vitro-fertilised ovules into the uterus of the woman has not yet been carried out. In effect, the Court observes, before their transfer into the uterus of the woman concerned, the aforesaid ovules may, in certain Member States, be stored for a more or less lengthy time period, with the national regulations in question in the main proceedings setting out the possibility of storing the fertillised eggs for a maximum period of 10 years. Therefore, the application of protection against dismissal enacted by Article 10 of Directive 92/85 to a female worker before the transfer of fertilised eggs could have the effect of granting the benefits of this protection even when this transfer is deferred, for whatever reason, over several years or even until those in question had finally decided against such a transfer,

the in vitro fertilisation having been done as a mere precaution (paragraphs 37–42).

The Court considers nonetheless that, even if Directive 92/85 is not applicable to a situation such as that in question in the main proceedings, it is no less the case that, in line with the case-law of the Court, it can be brought to take into consideration the norms of Community law to which the national court has not made reference in the wording of its question (rulings of 12 December 1990, *SARPP*, C-241/89, Compendium p. I-4695, paragraph 8, and of 26 April 2007, *Alevizos*, C-392/05, Rec. p. I-3505, paragraph 64). The Court examines, therefore, the question of whether a female worker in a situation such as that in question in the main proceedings could possibly claim protection against gender-based discrimination accorded by Directive 76/207. In this regard, it notes that, the referral decision not specifying the reasons for which Flöckner dismissed Mrs Mayr, it falls to the court which referred the case to determine the circumstances pertinent to the dispute before it and, insofar as the dismissal of the appellant in the main proceedings was carried out at the time when she was on sick-leave in order to have in vitro fertilisation treatment, to verify if such a dismissal is essentially based on the fact that she subjected herself to such treatment. On the supposition that this was the reason for the dismissal of the appellant in the main proceedings, the Court specifies, it would be appropriate to determine if this reason is applied without distinction to workers of both sexes or, on the contrary if it is exclusively applied to one of them. The Court notes, then, that the interventions in question in the main proceedings, that is to say follicular puncture and the transfer into the uterus of ovules from this puncture immediately after their fertilisation, only directly concerns women. It follows, according to the Court, that the dismissal of a worker for the reason, essentially, that she submits herself to this important phase of in vitro fertilisation treatment constitutes direct gender-based discriminaton. To allow that an employer may dismiss a worker in circumstances such as those in question here would moreover be contrary, the Court adds, to the objective of protection that Article 2(3) of Directive 76/207 pursues, always providing that the dismissal is essentially based on the fact of in vitro fertilisation treatment having been undertaken and, notably, on the specific interventions mentioned above, that such treatment entails (paragraphs 43–51).

The Court (Grand Chamber) hereby rules:

Council Directive 92/85/EEC of 19 October 1992, concerning the implementation of measures aiming to promote the improvement of the health and safety at work of workers who are pregnant, nursing or who have recently given birth (tenth specific directive in the sense of Article 16(1) of Directive 89/391/EEC), and, notably, the prohibition of dismissal of pregnant workers set out in Article 10(1) of this directive, must be interpreted to the effect that they are not meant for a worker who undergoes in vitro fertilisation when, at the time that her dismissal notice is delivered, the fertilisation of the ovules of this worker by the spermatozoa of her partner has already taken place, with the result that fertilised ovules exist in vitro, but have not yet been transferred into the uterus of the latter.

Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 19 February 1976, concerning the implementation of equal treatment between men and women concerning access to professional employment, training and promotion, and working conditions, is opposed to the dismissal of a worker who, in circumstances such as those in the main proceedings, is at an advanced stage of in vitro fertilisation treatment, that is to say between follicular puncture and the immediate transfer of ovules that had been fertilised in vitro into the uterus of this worker, provided that it is demonstrated that the dismissal was essentially based on the fact of the interested party having undergone such treatment.

Case C-46/07
EU COMMISSION v. ITALIAN REPUBLIC
Date of judgment:
13 November 2008
Reference:
Available at http://curia.europa.eu
Content:
Article 141 EC — Civil servants' pension scheme — Different retirement ages for different sexes — Notion of pay — Absence of justification for discrimination

1. Facts and procedure

The Commission asks the Court, by its petition, to verify whether, in maintaining provisions by virtue of which civil servants have the right to receive the old-age pension at a different age depending whether they are male or female, the Italian republic has failed to meet its obligations as set out by Article 141 EC.

Law No 421 of 23 October 1992 (ordinary supplement to GURI No 257 of 31 October 1992), provides the legal context of the pension scheme in question. This scheme applies to civil servants and public sector workers as well as workers whose employers were previously public bodies. The aforementioned pension scheme is managed by the Istituto nazionale della previdenza per i dipendenti dell'amministrazione pubblica (National Institute of Security for the Employees of the Public Administration, hereafter the 'INPDAP').

The Commission considers that the pension scheme managed by INPDAP constitutes a discriminatory occupational scheme contrary to Article 141 EC insofar as it provides a civil servants' retirement age of 65 years for men and 60 years for women.

2. Judgment of the Court

The Court recalls first of all the following elements of its case-law. To appreciate whether a retirement pension falls into the scope of application of Article 141 CE, the only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment based on the terms of Article 141 themselves (rulings of 28 September 1994, *Beune*, C-7/93, Compendium p. I-4471, paragraph 43; of 29 November 2001, *Griesmar*, (C-366/99, ECR. p. I-9383, paragraph 28), of 12 September 2002 (Case C-351/00 *Niemi* [2002] ECR I-7007, paragraph 44) along with that of 23 October 2003 (C-4/02 and C-5/02 *Schönheit Becker* [2003] ECR I-12575, paragraph 56). Certainly, this criterion could not be of an exclusive nature, since the pensions paid by statutory sytems of social security may, in entirety or in part, take into account the pay for the job (aforementioned rulings: *Beune*, paragraph 44; *Griesmar*, paragraph 29; *Niemi*, paragraph 46, as well as *Schönheit and Becker*, paragraph 57). However, such pensions do not constitute payment in the sense of Article 141 EC (see, to this effect, the rulings of 25 May 1971, *Defrenne*, 80/70, Compendium p. 445, paragraph 13, *Bilka-Kaufhaus,* C-170/84, 13 May 1986, Compendium p. 1607, paragraph 18) aforementioned rulings: *Beune*, paragraphs 24 and 44; *Griesmar*, paragraph 27, and *Schönheit and Becker*, paragraph 57). However, considerations of social policy, of organisation of the State, of ethics or even preoccupations of a budgetary nature which have had or which could have had a role in the establishment of a pension scheme by the national legislature cannot prevail if the pension concerns only a particular category of workers, if it is directly related to length of service and if its amount is calculated by reference to the last salary of the civil servant (aforementioned rulings: *Beune*, paragraph 45, *Griesmar*, paragraph 30; *Niemi*, paragraph 47, and *Schönheit and Becker*, paragraph 58) (paragraphs 35–37).

The Court concludes, consequently, that arguments of the Italian Republic drawn from the means of financing the pension scheme managed by INPDAP, its organisation and benefits other than pensions that it confers, aiming to demon-

strate that this scheme constitutes a social security scheme in the sense of the Defrenne ruling, aforementioned, not falling within the scope of Article 141 EC, could not succeed. It feels, likewise, that the circumstance that the retirement age is established in a uniform manner for workers falling within the scheme in question and for those falling within the general scheme is not relevant for the definition of the pension paid by the pension scheme managed by the INPDAP (paragraph 38).

With these particulars in mind regarding the meaning of the term 'payment' in the domain of retirement pension schemes, the Court examines whether the pension paid by virtue of the pension scheme managed by the INPDAP corresponds to the three aforementioned criteria (paragraph 39).

With regard to the first criterion, the Court notes that the civil servants who benefit from a pension scheme must be considered to constitute a particular category of workers. They are distinguished from employees grouped within an undertaking or group of undertakings in a particular sector of the economy, or in a trade or inter-trade sector, only by reason of the specific features governing their employment relationship with the State, or with other public employers or bodies (aforementioned rulings: *Griesmar*, paragraph 31, and *Niemi*, paragraph 48). It thus follows, according to the Court, that the civil servants who benefit from the retirement pension scheme managed by the INPDAP constitute a particular category of workers (paragraphs 40–41).

This result, the Court concludes, could not be invalidated by the arguments advanced by the Italian Republic. Firstly, this Member State claims that the pension scheme managed by the INPDAP covers, as well as civil servants, workers in the public sector and workers whose employers were previously public bodies. In this regard, the Court recalls that the appeal before it only concerns civil servants, such that it does not deal with determining whether public sector workers and workers whose employers were previously public bodies also constitute a particular category of workers or if they constitute, taken together with civil servants, a single particular category of workers. Furthermore, the Court adds, the circumstance that the pension scheme managed by the INPDAP applies not only to civil servants but also to other categories of workers could not deprive the civil servants of protection conferred by Article 141 EC when the other criteria recalled previously are present. As it follows from paragraph 49 of the *Niemi* ruling, aforementioned, the circumstance that a pension scheme covers not only a cetain category of civil servants but also State employees in general has not, in effect, the consequence that the category of civil servants concerned could not be considered as being a particular category of workers in the sense of the case-law of the Court. The Italian Republic claims, secondly, that the numerous and varied groups of civil servants could not be grouped into a single professional category. In this regard, the Court observes that the pension scheme managed by the INPDAP applies to civil servants constituting a particular category of workers. It indicates that the circumstance that, within the category of civil servants, different categories could be identified, is not relevant insofar as this category is distinguished, as recalled previously, from other groups of workers in the private or public sectors by the particular characteristics governing the work relationship of civil servants with the State (paragraphs 42–45).

Concerning the two other criteria upheld by the case-law cited above, that is to say the pension must be in direct proportion the time of service accomplished and its amount must be calculated on the basis of the last salary of the civil servant, the Court states that the Italian Republic recognises that the pension in question takes into consideration the average of the salaries received over the course of the past 10 years and the corresponding contributions paid. With this finding in mind, it examines whether this means of calculation fulfils the two aforementioned criteria. On this subject, the Court recalls that it has deemed,

in paragraphs 33 and 34 of the *Griesmar* ruling, aforementioned, payment in the sense of Article 141 EC to be a pension whose amount results from the rate product of a base, the base being the salary corresponding to the last wage rate index applicable to civil servants during the last six months of employment. It recalls that payment in the sense of Article 141 EC, a pension of which the amount is calculated on the basis of the mean value of the payment received over the course of a period limited to a certain number of years directly preceding retirement, also counts as pay in the sense of Article 141 EC (see the *Niemi* ruling, aforementioned, paragraph 51) as well as a pension of which the amount is calculated on the basis of the amount of the sum of the contributions paid by the worker over the full length of the affiliation and to which is applied an adjustment factor (see the ruling of 1 April 2008, *Maruko*, C-267/06, Compendium p. I-1757, paragraph 55). It follows, according to the Court, that the pension paid under the pension scheme managed by the INPDAP is to be classed as payment in the sense of Article 141 EC. In effect, the basis of calculation of this pension fulfils the criteria upheld by the Court in the aforesaid *Griesmar*, *Niemi* and *Maruko* rulings (paragraphs 47–53).

Noting then that the pension scheme managed by the INPDAP sets out a different age condition according to gender for the awarding of the pension paid under this scheme, the Court rejects the argument of the Italian Republic according to which the adoption of such an age condition, which differs according to gender, is justified by the objective of eliminating discrimination to the detriment of women. It feels that, even if Article 141(4) EC authorises Member States to maintain or to adopt measures allowing specific advantages intended to compensate for or prevent career disadvantages, in order to ensure full equality between men and women at work, it cannot be deduced from this that this provision allows the adoption of such an age condition, which differs according to gender. In effect, the national measures covered by the aforesaid provision must, in any case, contribute to helping women lead their professional lives on an equal footing to men (see, concerning the interpretation of Article 6, paragraph 3, of the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland (OJ 1992, C191, p. 91), judgment *Griesmar*, *supra*, paragraph 64]. However, the adoption, for retirement, of different age conditions according to gender is not of such a nature as to compensate for disadvantages to which the careers of female civil servants are exposed by helping these women in their professional lives and by remedying the problems that they might encounter during their professional career (paragraphs 56–58).

The Court (Fourth Chamber) declares and rules:

1) *By maintaining provisions by virtue of which civil servants have the right to receive the old-age pension at a different age depending whether they are male or female, the Italian republic has failed to meet its obligations as set out by Article 141 EC.*

2) *The Italian Republic is ordered to pay the costs.*

Case C-559/07
EU COMMISSION v. HELLENIC REPUBLIC
Date of judgment:
26 March 2009
Reference:
Available at http://curia.europa.eu
Content:
Article 141 EC — Pension scheme for civil servants and military personnel — Differing ages of retirement and minimum service required according to gender — Notion of payment — Absence of justification for discrimination — Relevance of Directive 2006/54/EC — Time limitation on the effects of the ruling

1. Facts and procedure

By its petition, the Commission asks the Court to verify that, by keeping in force provisions under which differences between male workers and female workers in terms of retirement age and minimum service required by virtue of the Greek code of civil and military pensions set up by Presidential Decree No 166/2000, of 3 July 2000, in the version applicable to the present case (hereafter the 'code'), the Hellenic Republic has failed to fulfil its obligations according to Article 141 EC.

2. Judgment of the Court

Concerning the question of knowing whether the pension scheme established by the code falls within the scope of application of Article 141 EC or of that of Directive 79/7, the Court indicates that, if the circumstance, raised by the Hellenic Republic, that the disputed pension scheme is directly fixed by the law undoubtedly gives an indication according to which the benefits paid by this scheme are social security benefits (see in particular the rulings of 25 May 1971, *Defrenne*, 80/70, Compendium p. 445, paragraphs 7 and 8, as well as 6 October 1993, *Ten Oever*, C-109/91, Compendium p. I-4879, paragraph 9), in itself it is not sufficient to exclude such a scheme from the scope of application of Article 141 EC (see, in particular, the rulings of 28 September 1994, *Beune*, C-7/93, Compendium p. I-4471, paragraph 26, and of 12 September 2002, *Niemi*, C-351/00, Compendium p. I-7007, paragraph 41). The Court concludes that the same applies to the argument of the Hellenic Republic according to which the general and obligatory character of the disputed pension scheme does not have the characteristics of an occupational or supplementary scheme. In effect, the circumstance that a particular pension scheme, such as that established by the code, is inserted into the general harmonised legislative context of pension schemes does not suffice to exclude the pension benefits provided by means of such a scheme from the scope of application of Article 141 EC (see, to this effect, the aforementioned *Niemi* ruling, paragraph 42), and, furthermore, the applicability of this provision to pension benefits is in no way subject to the condition that a pension should be a supplementary pension as opposed to a benefit paid by a statutory social security scheme (aforementioned rulings: *Beune*, paragraph 37; of 29 November 2001, *Griesmar*, C-366/99, Compendium p. I-9383, paragraph 37, and *Niemi*, aforementioned, paragraph 42). The Hellenic Republic having claimed that pension benefits are paid directly from the general budget, without their funding being linked to the contributions that pensioners have, where appropriate, paid whilst they were in active employment, the Court recalls that the methods of funding and management of a pension scheme such as that in question here do not constitute a decisive element in the appreciation of whether the said scheme falls within the scope of Article 141 EC (aforementioned rulings: *Beune*, paragraph 38; *Griesmar*, paragraph 37, and *Niemi*, paragraph 43) (paragraphs 41–46).

The Court then recalls the criteria used in the *Beune*, *Griesmar* and *Niemi* rulings, aforementioned, and of 13 November 2008, *Commission/Italy* (C-46/07), namely that the pension only applies to a particular group of workers, that it is directly dependent on length of service and that its amount is calculated on the basis of the last salary earned by the worker. The Court examines whether the

pension paid by means of the pension scheme established by the code fulfils these three criteria (paragraphs 47–51).

Regarding the first criterion, the Court follows a similar reasoning to that of the *Commission/Italy* ruling, aforementioned, in which it concluded that civil servants who benefit from a pension scheme must be considered as constituting a particular category of workers (paragraphs 52–55).

Regarding the second criterion, the Court notes that, whilst underlining the existence of exceptional cases, the Hellenic Republic recognises that, as a general rule, the level of pension paid by virtue of the code is determined by the duration of the worker's professional activity (paragraph 56).

Regarding the third criterion, the Court observes that, as the Hellenic Republic recognises itself, the pension benefits made available by virtue of the code were, at the expiry of the time-period prescribed by the reasoned opinion, being the only date relevant for the ascertainment of the alleged failure, calculated on the basis of the last salary earned. Regarding the exceptional cases mentioned by the Hellenic Republic, such as, for example, that of military servicemen for whom the retirement pension may be calculated not on the basis of the last salary, but on the basis of the salary of the rank above, the Court states that such exceptions, which seem to reflect a sort of end-of-career bonus, do not undermine the fact that, as a general rule, it is the last salary earned which constitutes the basis of calculation of the pension paid under the code (paragraphs 58–59).

Having concluded that the pension paid by virtue of the code is to be classed as payment in the sense of Article 141 EC, the Court notes, on one hand, that the Code sets out different age conditions, according to gender, for the award of pensions, and, on the other hand, that the code sets out that, as a general rule, civil servants and military servicemen are obliged to accomplish a minimum period of service of 25 years with the aim of being able to benefit from a retirement pension, several exceptions being allowed, however, for different categories of female workers according to whether, for example, the interested parties are, for example, widows with dependent children or if they are married. The Court thus rejects the argument drawn by the Hellenic Republic from Article 141 EC(4). The Court feels that the national measures covered by this provision must contribute to helping women conduct their professional lives on an equal footing with men (see the aforementioned rulings *Griesmar*, paragraph 64, and *Commission/Italy*, paragraph 57). However, according to the Court, the disputed provisions of the code are not of such a nature as to compensate for the disadvantages to which the careers of female civil servants and military servicewomen along with those of other female personnel to which the code applies are exposed, by helping these women in their professional lives. On the contrary, they limit themselves to granting beneficiaries of the female gender, and notably those who are mothers, more favourable conditions than those applicable to beneficiaries of the male gender, as regards the age of retirement and the minimum service required at the time of retirement, without remedying the problems that they may encounter during their professional careers (see, to this effect, the *Griesmar* ruling, aforementioned, paragraph 65). In addition, the Court specifies, insofar as the disputed provisions of the code aim, at least in part, to protect employees in their capacity as parents, it would be appropriate to recall, on one hand, that it concerns a capacity that may be had by both male workers and female workers and, on the other hand, that the situations of a male worker and a female worker may be comparable regarding the education of children (see rulings of 25 October 1988, *Commission/France*, 312/86, Compendium p. 6315, paragraph 14, and *Griesmar*, *supra*, paragraph 56) (paragraphs 63–69).

The Commission and the Hellenic Republic having referred to Directive 2006/54, and notably to Article 7(2) of this directive, the Court recalls that the Member States were required to adopt the measures necessary to incorporate the directive by 15

August 2008 at the latest. It considers, assuming that the arguments made by the two parties based on the provisions of Directive 2006/54 are correct, that this has no relevance to the context of proceedings for failure to fulfil an obligation that is before the Court, the time-period prescribed in the reasoned opinion of 25 July 2006 having expired two months after its reception, that is to say, well before the expiry of the time-period for incorporation of this directive (paragraphs 70–72).

The Hellenic Republic having asked that the Court, in the event of its considering that it had failed to fulfil the obligations falling to it by virtue of Article 141 EC, apply a time-limit to the effects of the present ruling, the Court recalls that it is only in exceptional cases that it may, by application of a general principle of legal certainty inherent in the Community judicial order, be led to limit the possibilities for any interested party to invoke a provision that it has interpreted in view of calling into question legal relationships established in good faith (see, in particular, the ruling of 23 May 2000, *Buchner et al*, C-104/98, Compendium p. I-3625, paragraph 39). The court thus concludes, that, even assuming that the judgments delivered with respect to Article 226 EC have the same effects as those delivered with respect to Article 234 EC and assuming, therefore, that considerations of legal certainty may render necessary, in exceptional circumstances, the imposition of a time-limit on the effects (see to this effect, the rulings of 7 June 2007, *Commission/Greece*, C-178/05, Compendium p. I-4185, and of 12 February 2009, *Commission/Poland*, C-475/07, paragraph 61), there does not exist, in this particular case, any element of such a nature as to justify a limitation to the effects of the ruling of the Court. In effect, the Court stresses, it is settled case law that the financial consequences which might ensue for a Member State from a Court ruling do not in themselves justify putting a time-limit on the effects of this ruling (see, to this effect, the judgments of 24 September 1998, *Commission/France*, C-35/97, Compendium p. I-5325, paragraph 52, along with *Buchner et al*, aforementioned, paragraph 41). Limiting the effects of a ruling by relying solely on this type of consideration would end, according to the Court, in substantially reducing the judicial protection of rights that individuals may draw from Community law (see, to this effect, the rulings of 11 August 1995, *Roders et al*, C-367/93 to C-377/93, Compendium p. I-2229, paragraph 48, along with that of 24 September 1998, *Commission/France*, aforementioned, paragraph 52). The Court notes once again that in this particular case, the Hellenic Republic has not, in support of its request, invoked any element of such a nature as to establish that an important and objective uncertainty regarding the scope of the provisions of Article 141 EC and of the case-law of the Court relative to the applicability of this provision to matters concerning pensions, had incited the national authorities to behave in a manner that does not conform to these provisions. It notes furthermore, in response to questions asked at the hearing, in an attempt to clarify the difficulties that any declaration of failure to fulfil obligations could engender, that this Member State was not in a position to specify the concrete consequences that the ruling of the Court could have and limited itself to indicating that numerous female civil servants could hasten to leave the service or that male civil servants could demand the equalisation of the conditions under which their pensions are awarded with those applicable to female civl servants (paragraphs 75–82).

The Court (Third Chamber) declares and rules:

1) By keeping in force provisions under which differences between male workers and female workers in terms of retirement age and minimum service required by virtue of the Greek code of civil and military pensions set up by Presidential Decree No 166/2000, of 3 July 2000, in the version applicable to the present case, the Hellenic Republic has failed to fulfil the obligations that fall to it by virtue of Article 141 EC.

2) The Hellenic Republic is ordered to pay the costs.

Case C-537/07
EVANGELINA GÓMEZ-LIMÓN SÁNCHEZ-CAMACHO/INSTITUTO NACIONAL DE LA SEGURIDAD SOCIAL (INSS), TESORERÍA GENERAL DE LA SEGURIDAD SOCIAL (TGSS), ALCAMPO SA
Date of judgment:
16 July 2009
Reference:
Available at http://curia.europa.eu
Content:
Directive 96/34/EC — Framework agreement on parental leave (clause 2, points 6 and 8) — Rights acquired or in the process of being acquired at the start of leave — Continuity in the receipt of social security benefits over the course of leave — Directive 79/7/EEC (Article 7(1)(b) — Acquisition of the rights to a permanent invalidity pension during parental leave — Indirect gender-based discrimination

1. Facts and procedure

From 17 December 1986, Mrs Gómez-Limón Sánchez-Camacho was employed as an administrative assistant, working full-time, by Alcampo SA, a business whose activites are in the retailing and large-scale distribution industry. It had been agreed with the aforementioned business that, with effect from 6 December 2001, Mrs Gómez-Limón Sánchez-Camacho would benefit from the reduction of working hours scheme applicable to workers having the legal guardianship of a child of less than six years of age, in line with Spanish legislation that was in force at the time, and the daily working hours of the interested party were, consequently, reduced by a third. At the same time, Mrs Gómez-Limón Sánchez-Camacho's pay and, since no special convention had been agreed, the amount of the contributions paid both by the business and the interested party to the general social security scheme were reduced by the same proportion, the aforesaid amount corresponding to a percentage of the payment received.

Suffering from a common illness, Mrs Gómez-Limón Sánchez-Camacho began, due to physical and practical difficulties, an administrative procedure which gave rise to a decision by the Instituto Nacional de la Seguridad Social, of 30 June 2004, by which it was recognised that she was afflicted by total and permanent invalidity preventing her from practising her normal profession and that she had the right to a pension amounting to 55 % of a basis for calculation of EUR 920.33 per month. The calculation of the aforementioned basis had been effected based on the amount of contributions actually paid to the public social security system during the period which had to be taken into account by virtue of the legislation governing benefits, that is to say between 1 November 1998 and the month of November 2004.

The interested party claims that, even if the calculation effected takes into account the contributions actually paid, they were proportionally reduced according to the reduction in her salary following the reduction of her working hours during the period of parental leave which was granted to her in order that she could take care of a minor child, whereas her pension should have been calculated on the basis of the amount of contributions corresponding to full-time work. She maintains that the calculation that was applied to her had the effect of depriving a measure that was intended to promote equality before the law and to eliminate gender-based discrimination, of its effects in practice.

2. Questions referred to the Court

1) Taking account of the fact that the awarding of parental leave, according to the modalities and the terms freely fixed by each Member State within the minimum limits imposed by Directive 96/34 [...] is, by its very nature, a measure for the promotion of equality, is it possible that profiting from this period of parental leave, in the case of reduction of working hours and of the salary from which those caring for minor children benefit, affects the rights being acquired by the worker, male or

female, benefiting from this parental leave, and could the principle of maintaining these rights acquired or in course of being acquired be invoked by the individuals before the public institutions of a State?

2) In particular, does the formulation 'rights acquired or in the course of being acquired' that figures in clause 2, [point] 6, of [the framework agreement on parental leave] include only the rights concerning working conditions, and does it only concern the contractual work relationship with the entrepreneur or does it, on the contrary, affect the maintenance of rights acquired or in the course of being acquired in terms of social security; can the demand for 'continuity of the rights to social security benefits for different contingencies' stated in clause 2, [point] 8, of the [framework agreement on parental leave] be considered to be respected by the scheme examined in this case, which has been applied by the national authorities and, if appropriate, can this right to continuity of rights to social security benefits be invoked before the public authorities of a Member State on the basis that it is sufficiently precise and concrete?

3) Are the Community provisions compatible with national legislation that, during the period of reduction of working hours due to parental leave, reduces the invalidity pension which is to be received compared with what would have been applicable before this leave and also entails the reduction of the right to future benefits and to the consolidation of these in proportion to the reduction of working hours and salary?

4) The national courts being obliged to interpret national law in light of obligations stated in the directive, and to do everything necessary, as far as possible, in order to achieve the objectives established by Community legislation, must this obligation also be applied to the continuity of rights in terms of social security during the period of parental leave, and, in practical terms, in the case where a method of partial leave or reduction of working hours is used, as in this particular case?

5) In the practical circumstances of the dispute, can the reduction of rights recognised and acquired in terms of social security benefits during the period of parental leave be considered as direct or indirect discrimination contrary, on one hand, to the provisions of Directive 79/7 […] and, on the other hand, to the requirement for equality and non-discrimination between men and women, according to the tradition common to Member States, insofar as this principle must be applied not only to working conditions but also to public activity in the domain of social protection of workers?

3. *Court ruling*

The Court notes that, by the second part of its first question, the court that referred the case asks, in essence, if clause 2, point 6, of the framework agreement on parental leave may be invoked by individuals before a national court against public authorities. In this regard, it observes that the aforesaid clause, which aims to avoid any threat to the rights of workers having chosen to benefit from parental leave, obliges, in a general manner and in terms that are devoid of ambiguity, both national authorities and employers to recognise rights already acquired and those in the course of being acquired at the beginning of such leave and to guarantee that, at the end of the leave, the workers may continue to acquire rights as though the leave had never occurred. It concludes, with this in mind, that the contents of clause 2, point 6 of the framework agreement on parental leave appear sufficiently precise for this provision to be invoked by a litigant and applied by the judge (paragraphs 32–36).

The Court notes that, by the first part of its first question, the first part of the second question, the third question and the second part of the fourth question, which it would be appropriate to

examine together, the court that referred the case asks, in essence, whether clause 2, points 6 and 8, of the framework agreement on parental leave is opposed to the taking in to account, at the time of calculation of the permanent invalidity pension of worker, the fact that they have benefited from a period of parental leave on a part-time basis during which they have contributed to and acquired pension rights proportionate to the salary received, which has the consequence of the awarding of a pension of a smaller amount than that which they would have been paid had they continued to work full-time (paragraph 38).

On this point, the Court states that it follows as much from the wording of clause 2, point 6, of the framework agreement on parental leave as it does from the context in which it is inserted that this provision has the object of avoiding the loss of rights derived from the work relationship, acquired or in the course of being acquired, available to the worker already at the time that they begin parental leave, and of guaranteeing that, at the end of the aforesaid leave, they will find themselves, concerning these rights, in the same situation as that in which they were previous to the parental leave. The aforesaid rights derived from the work relationship are those available to the worker at the date that the leave began. The Court notes that clause 2, point 6 of the framework agreement on parental leave does not regulate, however, the rights and obligations derived from the work relationship for the duration of the parental leave, which are defined, by virtue of the aforementioned clause 2, point 7, by the Member States and/or by the Unions. Thus, this clause effects a referral to national legislation and to the collective agreements for the determination of the contract scheme or the work relationship, including the extent to which the worker, over the course of the period of the aforementioned leave, continues to acquire rights with regard to the employer as well as under occupational social security schemes. The Court further observes that continuity of acquisition of future rights under statutory social security schemes over the course of parental leave is not regulated in an explicit manner in the framework agreement on parental leave either, and that, in any case, clause 2, point 8 of this framework agreement refers to national legislation for the examining and determination of all the questions of social security linked to the aforementioned agreement, and that, with this in mind, the extent to which a worker may continue to acquire social security rights while they are benefiting from part-time parental leave must be determined by the Member States (paragraphs 39–41).

It follows, according to the Court, that clause 2, points 6 and 8, of the aforesaid framework agreement does not impose on Member States the obligation to guarantee workers that, during the period over the course of which they benefit from part-time parental leave, they will continue to acquire rights to future social security benefits to the same extent as if they had continued to practise their profession full-time (paragraph 43).

The Court notes that, by the first part of the fourth question and the second part of the second question, which it will be appropriate to examine together, the court that referred the case asks, in essence, if clause 2, point 8, of the framework agreement on parental leave must be interpreted in the sense that it imposes on Member States the obligation to lay down the continuity of receipt of social security benefits over the course of parental leave, and if the aforementioned clause may be invoked by individuals before a national court against public authorities (paragraph 45).

In this regard, the Court stresses, on one hand, that clause 2, point 3, of the framework agreement on parental leave refers to the law and/or collective agreements, in Member States, for the definition of conditions of access to parental leave and methods of application of the latter, and that this definition must, however, be effected in such a way as to respect the minimum prescriptions fixed by the framework agreement on parental leave. The Court stresses, on the other hand, that, if clause 2, point 8 of the framework agreement of parental leave also refers to the legislation of Member States for the examination and determination of all the questions of social security linked to the aforesaid agreement, it only recommends

that they take into account the importance of the continuity of rights to social security benefits for different contingencies during parental leave, in particular healthcare. The Court observes that, in addition, both the text of the aforementioned clause 2, point 8, and the fact that the framework agreement on parental leave has been agreed upon by the workers' committees represented by the interprofessional organisations demonstrates that this could not impose obligations on national social security funds, which have not been party to such an agreement. Furthermore, the Court adds, according to point 11 of the general considerations of the framework agreement on parental leave, the Member States should, when it appears appropriate and taking into account national conditions and the budget situation, contemplate the maintenance as before of rights to social security benefits for the minimum duration of parental leave (paragraphs 46–49).

The Court concludes from the above that clause 2, point 8 of the framework agreement on parental leave does not impose any obligation on Member States to establish, for the duration of parental leave, the continuity of receipt, by the worker, of social security benefits and does not define rights in favour of the workers. With this in mind, the Court concludes, and without it being necessary to examine whether it contains unconditional and sufficiently precise provisions, the aforesaid clause 2, point 8, may not be invoked by individuals before a national court against public authorities (paragraph 50).

The Court notes that, by its fifth question, the court that referred the case asks, in essence, whether the principle of equal treatment between men and women, and, in particular, the principle of equal treatment between men and women in terms of social security, in the sense of Directive 79/7, is opposed to the notion that, during the period of part-time parental leave, a worker should acquire rights to a permanent invalidity pension in proportion to the length of time that they have worked and of the salary received and not as though they had worked full-time (paragraph 52).

Having recalled, on this point, that there is indirect discrimination when the application of a national measure, even if it is formulated in a neutral fashion, in fact disadvantages a far greater number of men than women (see, notably, the rulings of 27 October 1998, *Boyle et al*, C-411/96, Compendium p. I-6401, paragraph 76, and of 21 October 1999, *Lewen*, C-333/97, Compendium p. I-7243, paragraph 34), the Court notes that, in order to devote themselves to the education of their children, women opt far more often than men for periods of reduction to the workweek matched by a proportional reduction in pay, which as a consequence leads to a reduction in social security rights derived from the work relationship. It notes that it follows, however, from settled case-law that discrimination consists of the application of different rules to comparable situations or in the application of the same rule to different situations (see in particular the aforementioned rulings *Boyle*, paragraph 39, and *Lewen*, paragraph 36). However, the Court states, the worker, who benefits from the parental leave that they are afforded by Directive 96/34 which enforces the framework agreement on parental leave, according to one of the methods defined by national law or by a collective agreement, by practising, as in the case in question in the main proceedings, a profession on a part-time basis, is in a specific situation, which cannot be likened to that of a man or a woman who works full-time (see, to this effect, the *Lewen* ruling, aforementioned, paragraph 37) (paragraphs 54–57).

Having noted that the national regulations in question in the main proceedings set out that the amount of the permanent invalidity pension is calculated on the basis of contributions actually paid by the employer and by the worker during the period of reference, in this particular case the eight years preceding the appearance of the contingency, which, to the extent that, during the period of part-time parental leave, the worker receives a salary of a lesser amount for the reason of the reduction of their workweek, the contributions, which constitute a percentage of the salary, are also reduced and there is a resulting difference in the acquisition of rights to future social

security benefits between workers in full-time employment and workers benefiting from part-time parental leave, the Court recalls that it has already ruled that Community law is not opposed to the calculation of pensions according to a pro rata temporis rule in the case of part-time work, and in effect, apart from the number of years of service of a civil servant, the taking into account of the duration of the work effectively accomplished by them over the course of their career, compared with that of a civil servant who had effected, during their whole career, a full-time workweek, constitutes an objective criterion that is irrelevant to all gender-based discrimination, and allows a proportional reduction to their pension rights (see, in terms of public service, the ruling of 23 October 2003, *Schönheit and Becker*, C-4/02 and C-5/02, Compendium p. I-12575, paragraphs 90 and 91) (paragraphs 58–59).

The Court adds, concerning Directive 79/7, that, according to the first recital and Article 1 of this last, it only aims at the progressive enforcement of the principle of equal treatment between men and women in terms of social security. Thus, by virtue of Article 7(1)(b) of the aforesaid directive, the Member States have at their disposal the power to exclude from the scope of application of this directive the acquisition of rights to social security benefits under statutory schemes following periods of interruption of employment due to the education of children. It follows, according to the Court, that the regulations concerning the acquisition of rights to social security benefits over the course of periods of interruption to employment due to the education of children falls within the competence of the Member States (see the ruling of 11 July 1991, *Johnson*, C-31/90, Compendium p. I-3723, paragraph 25). It follows, in effect, from the case-law, that Directive 79/7 does not oblige the Member States in any case to award advantages in terms of social security to people who have raised their children or to set out rights to benefits following periods of interruption to employment due to the education of children (see, by analogy, the ruling of 13 December 1994, *Grau-Hupka*, C-297/93, Compendium p. I-5535, paragraph 27) (paragraphs 60–62).

The Court (Third Chamber) hereby rules:

1) *Clause 2, point 6, of the framework agreement on parental leave, concluded on 14 December 1995, which appears in an Annex to Council Directive 96/34/EC of 3 June 1996, concerning the framework agreement on parental leave concluded by UNICE, CEEP and CES, may be invoked by individuals before a national court.*

2) *Clause 2, points 6 and 8, of the framework agreement on parental leave is not opposed to the taking into account, when calculating the permanent invalidity pension of a worker, of the fact that this last has benefited from a period of part-time parental leave during which they have made contributions and acquired pension rights in proportion to the salary received.*

3) *Clause 2, point 8, of the framework agreement on parental leave does not impose obligations on Member States, except that of examining and determining the questions of social security linked to this agreement in conformity with national legislation. In particular, it does not impose that they should ensure, during the period of parental leave, continuity of receipt of social security benefits. The aforesaid clause 2, point 8, may not be invoked by individuals before a national court against public authorities.*

4) *The principle of equal treatment between men and women, and, in particular, the principle of equal treatment between men and women in terms of social security, in the sense of Council Directive 79/7/EEC of 19 December 1978, concerning the progressive enforcement of the principle of equal treatment between men and women in terms of social security, is not opposed to the notion that, during the period of part-time parental leave, a worker should acquire rights to a permanent invalidity pension in proportion to the length of time that they have worked and of the salary received and not as though they had worked full-time.*

Second part

Case law in relation to non-discrimination

Case C-328/04
ATTILA VAJNAI
Date of judgment:
6 October 2005
Reference:
2005 compendium p. I-8577
Content:
Principle of non-discrimination — National measure rendering subject to prosecution the public wearing of the symbol in the form of a five-pointed red star — Evident incompetence of the Court.

1. Facts and procedure

Vajnai, vice-president of the Worker's Party of Hungary, was criminally prosecuted for having worn a cardboard five-pointed red star 5cm in diameter on his clothes before a large number of people during a demonstration organised in Budapest on 21 February 2003. A police officer responsible for maintaining order asked the concerned party to remove this symbol, which the latter agreed to do.

On 11 March 2004, the Pesti Központi Kerületi Bíróság (Central tribunal of the Pest area) found Vajnai guilty of having acted in breach of Article 269/B (1) b) of the Hungarian penal code by using a 'symbol of totalitarianism'. This court decided to place the concerned party on a year's probation and ordered the confiscation of the said symbol.

2. Question referred to the Court

According to Article 269/B (1) of the Hungarian penal code, anyone who uses or displays the symbol in the form of a five-pointed red star before a large public — in the absence of a more serious offence — is guilty of a (minor) crime. Can this be said to be compatible with the fundamental principle of non-discrimination of the European Community? Do Article 6 of the Treaty on European Union, according to which the Union is founded on the principles of freedom, democracy, respect for human rights and fundamental liberties, the clauses of Directive 2000/43/EC, which similarly refer to fundamental liberties, or the clauses of Articles 10, 11 and 12 of the Charter of Fundamental Rights allow a person who wishes to express his political convictions by means of a symbol that reflects them to do so in any Member State?

3. Court ruling

The Court indicates that, in order to verify its competence, the purpose of the question posed should be examined. The Court points out in this respect that, with this question, the national court is essentially asking whether the principle of non-discrimination, under Article 6 of the Treaty of European Union, and the clauses of Council Directive 2000/43/EC of 29 June 2000, regarding the implementation of the principle of equal treatment among all persons regardless of race or ethnic origin (OJ 2000 L 180, p. 22), or Articles 10, 11 and 12 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), stand in opposition to a national clause such as Article 269/B of the Hungarian penal code which sanctions the public use of the symbol in question (paragraphs 10–11).

The Court recalls that it is a matter of established case law that, when a national regulation enters the scope of the law of the European Union, the Court, provisionally referred to, must provide all elements aiding understanding of a regulation deemed necessary for an assessment by the national court of law of the regulation's conformity with fundamental rights, respect for which the Court seeks to maintain (see judgment of 29 May 1997 (Case C-299/95 *Kremzow* [1997], ECR I-2629, paragraph 15)). On the other hand, the Court does not have this jurisdiction with regard to a regulation which does not fall within the framework of the law of the European Union and when the matter at issue is not in any way linked to any of the situations envisaged by the clauses of the treaties (see aforementioned Court ruling *Kremzow*, paragraphs 15 and 16) (paragraphs 12–13).

According to the Court, it has to be said that Vajnai's case is not linked to any of the situations envisaged by the clauses of the treaties and that the Hungarian regulation as applied to the dispute in the main proceedings is not to be found within the framework of the law of the European Union (paragraph 14).

The Court (Fourth Chamber) rules:

It is evidently not within the capacity of The Court of Justice of the European Communities to respond to the question posed by Fővárosi Bíróság (Hungary), as decided on 24 June 2004.

Case C-144/04
WERNER MANGOLD v RÜDIGER HELM
Date of judgment:
22 November 2005
Reference:
2005 compendium p. I-9981
Content:
Directive 1999/70/EC — Clauses 5 and 8 of the framework agreement regarding fixed-term work — Directive 2000/78/EC (Article 6) — Age discrimination — Fixed-term work contract — Lawful objective of general interest — Employment policy — Necessary and appropriate means.

1. Facts and procedure

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement, as concluded by the CES (Conseil economique et social (Economic and Social Council)), the UNICE (Union des industries de la Communauté Européenne (Union of Industrial and Employers' Confederations of Europe, now, Business Europe)) and the CEEP (Centre européen des entreprises à participation publique (European Centre of Employers and Enterprises providing Public services)), regarding fixed-term work (hereafter called the 'framework agreement') was transposed into German law by an act on 21 December 2000 regarding part-time work and fixed-term contracts, which modified and repealed clauses of employment law (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen), (hereafter called 'TzBfg'). Article 14(3) of the TzBfg was modified by an act on 23 December 2002. The revised version of the said clause, which comes into effect as of 1 January 2003, is worded as follows: 'The conclusion of a fixed-term work contract is not dependent upon any objective grounds when the worker has reached the age of 58 years at the time at which the fixed-term business contract commences. The establishment of a fixed term is not lawful when there exists a close link with a preceding open-term contract concluded with the same employer. Such a close link is presumed to exist when the interval between the two work contracts is less than six months. Until 31 December 2006, the first sentence should be implemented by reading 52 years in place of 58 years'.

On 26 June 2003, Mangold, then aged 56 years, concluded a fixed-term work contract with Mr Helm, who is a lawyer by profession, this contract coming into effect on 1 July 2003 (hereafter called 'contract'). According to the terms of Article 5 of the contract:

'1. Employment will commence on 1 July 2003 and will last until 28 February 2004.

2. The duration of the contract is based upon the legal clause that seeks to facilitate the conclusion of fixed-term work contracts with older workers (combined clauses of Article 14(3), fourth and first sentences of the TzBfg [...]), since the worker is aged over 52 years.

3. The parties concerned have agreed that the fixed term of the present contract is based on no reason other than that set out in paragraph 2 above. The other grounds for the limitation of the length of employment allowed in principle by the legislator and case law are expressly excluded from the present agreement'.

According to Mangold, the said Article 5, in that it limits the length of his contract, although such a limitation conforms to Article 14(3) of the TzBfg, is incompatible with the framework agreement and Directive 2000/78/EC.

2. Questions referred to the Court

1) a) Is Clause 8(3) of the framework agreement [...] to be interpreted in the sense that, having been transposed into internal law, it opposes a regression resulting from the lowering of the age from 60 to 58 years?

b) Is Clause 5(1) of the framework agreement [...] to be interpreted in the sense that it opposes a national regulation, such as that in dispute here, which does not make provision for any restrictions corresponding to any of the three assumptions given in that paragraph?

2) Is Article 6 of Directive 2000/78 [...] to be interpreted in the sense that it is opposed to a national regulation, such as that in dispute here, which authorises work contracts of employees aged 52 years to be given a fixed term, even when there are no objective grounds, contrary to the principle which demands such objective grounds?

3) If any of these three questions receive a positive response: Is the state judge required to reject the national regulation that runs contrary to the law of the European Union and to implement the general principle of internal law, according to which it is lawful to establish fixed terms only when supported by objective grounds?

3. Court ruling

Regarding the first question, section b), the Court notes that Clause 5(1) of the framework agreement seeks to 'prevent abuse resulting from the use of successive fixed-term work or business contracts'. Yet, the contract is the first and sole work contract concluded between the parties in the main proceedings. Under these circumstances, the interpretation of Clause 5(1) of the framework agreement is, according to the Court, clearly lacking in relevance for the purpose of solving the current dispute, which is being brought before the court of referral, (paragraphs 40–43).

Regarding the first question, section a), the Court observes that it emerges from the very terms of Clause 8(3) of the framework agreement that the implementation of the latter could not constitute for the Member States valid grounds for bringing about a regression of the general level of protection for workers previously guaranteed in the internal law of the area covered by the said agreement. The Court adds that the expression 'implementation', used without further clarification in Clause 8(3) of the framework agreement, could not be aimed solely at the initial transposition of Directive 1999/70/EC and, in particular of its annexe containing the framework agreement. It must instead cover every national measure aiming to ensure that the desired result of the latter can be reached, including those measures which, subsequent to the transposition proper, complete or modify the national rules already in place. On the other hand, the Court judges that a regression of the protection guaranteed for workers, as regards fixed-term contracts, is not prohibited as such by the framework agreement when it is not linked in any way to the implementation of the latter. Yet, the Court explains that it emerges as much from the referral decision as from the observations set out by the German government at the time of the hearing that the successive lowering of the age after which the conclusion of fixed-term contracts is permitted without restriction is justified not by the need to implement the framework agreement but by the need to promote the employment of elderly people in Germany (paragraphs 44–45).

Regarding the second and third questions, examined together, the Court recalls that, in accordance with its first article, Directive 2000/78/EC seeks to establish a general framework for combating discrimination in the area of work and employment based on the motives referred to in this article, of which age features prominently. Yet, the Court observes that Article 14(3) of the TzBfg, providing for the possibility of employers concluding, without restriction, fixed-term contracts with workers that have reached the age of 52 years, establishes a difference in treatment based directly on age. The Court considers that this legislation clearly has the objective of promoting the professional rehabilitation of older unemployed workers insofar as the latter confront considerable difficulties in order to re-enter employment. The Court judges that the legitimacy of such an

objective cannot reasonably be called into question and that, hence, an objective of this nature must in principle be considered as 'objective and reasonable' justification (as provided for by the first subparagraph of Article 6(1) of Directive 2000/78/EC) for a difference in treatment based on age as decreed by the Member States. The Court explains that it remains to be verified, according to the terms of the said clause, as to whether the means put in place to realise this legitimate objective are 'appropriate and necessary'. In this respect, according to the Court, the Member States unarguably command a wide margin of discretion in the choice of measures likely to realise their objectives in terms of social and employment policy. The Court, however, stresses that the implementation of national legislation such as that at issue in the main proceedings leads to a situation in which all workers who have reached the age of 52 years, without distinction, whether or not they have been unemployed before the conclusion of the contract and whatever may have been the duration of any possible employment, can, until the age at which they are able to assert their right to a pension, legitimately be offered fixed-term work contracts which can be extended an indefinite number of times. In this way, this large group of workers, grouped exclusively on the basis of their age, is at risk of being excluded, for a substantial part of their professional careers, from the benefits of job security, which is, however, as emerges from the framework agreement, a major element in the protection of workers. Such legislation, in that it views the age of the worker as the sole criterion for the implementation of a fixed-term contract, without having demonstrated that the establishment of an age threshold, as such, independent of all other considerations linked to the structure of the labour market in question and of the personal situation of the concerned party, is objectively necessary for the realisation of the aim of getting older unemployed workers back to work must, the Court maintains, be considered to be going beyond what is appropriate and necessary for the attainment of the desired objective: respect for the principal of proportionality implies in effect that each derogation of an individual right can be reconciled, in every measure possible, with the demands of the principle of equal treatment and those of the desired goal (to this effect, see judgment of 19 March 2002 (Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 39)). The Court concludes that such national legislation could not be justified on the grounds of Article 6(1) of Directive 2000/78/EC (paragraphs 55–65).

The Court adds that the fact that the time period for the transposition of Directive 2000/78/EC had not yet expired by the date of the conclusion of the contract is not cause to challenge this observation. In fact, in the first place, the Court recalls that it has already juged that, during the period of transposition of a directive, the Member States must abstain from taking any action which could seriously compromise the achievement of the result prescribed by that directive (judgment of 18 December 1997 (Case C-129/96 *Inter-Environnement Wallonie* [1997]ECR I-7411, paragraph 45)). Yet, the Court notes that, in the present case, the lowering from 58 years to 52 years of the age after which it is possible to conclude fixed-term work contracts, as provided for in Article 14(3) of the TzBfg, took place in December 2002 and was to apply until 31 December 2006. Secondly, the Court stresses that Directive 2000/78/EC itself does not establish the principle of equal treatment as regards work and employment. The Court notes that according to the terms of its 1st article, this directive, in effect, has as its sole purpose to 'establish a general framework for combating discrimination based on religion, disability, age or sexual orientation', and that the principle itself of prohibition of these forms of discrimination arose, as it emerges from the first and fourth preambles of the said directive, from various international instruments and the constitutional traditions common to the Member States. The Court considers that the principle of not discriminating because of age based must be considered as a general principle of the law of the European Union and that, once a national regulation comes within the scope of the latter, which is the case for Article 14(3) of the TzBfg, modified by the act of

2002, as a measure for the implementation of Directive 1999/70/EC, the Court, provisionally referred to, must provide all aids to interpretation necessary for the national courts to understand how this regulation conforms to such a principle (to this effect, see judgment of 12 December 2002 (Case C-442/00 *Rodriguez Caballero* [2002] ECR I-11915, paragraphs 30 to 32)). Thereof, the Court judges that respect of the general principle of equal treatment, especially regarding age, cannot, as such, be dependent upon the expiration of the time period granted to Member States for the transposition of a directive which is meant to put in place a general framework to combat age discrimination. The Court therefore concludes that, under these conditions, it is incumbent upon national courts, when referred to regarding a dispute calling the principle of not discriminating because of age into question, within the bounds of its competences, to ensure legal protection deriving from Community law for those accountable and to guarantee the full effect of the latter by leaving unimplemented all clauses in national law that could run contrary to it (to this effect, see judgments of 9 March 1978 (Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21) and of 5 March 1998 (Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30)) (paragraphs 66–77).

The Court (Grand Chamber) hereby rules:

1) *Clause 8(3) of the framework agreement regarding fixed-term work, concluded on 18 March 1999 and implemented by Council Directive 1999/70/EC on 28 June 1999 concerning the framework agreement as concluded by the CES, the UNICE and the CEEP regarding fixed-term work, must be interpreted in the sense that it does not stand in opposition to a regulation such as that at issue in the main proceedings, which, for reasons linked to the necessity to promote employment and, independently of the implementation of the said agreement, has lowered the age after which fixed-term work contracts can be concluded without restriction.*

2) *The law of the European Union and, notably, Article 6(1) of the Council Directive 2000/78/EC of 27 November 2000, supporting the creation of a general framework in favour of equal treatment concerning work and employment, must be interpreted in the sense that they stand in opposition to a national regulation such as that at issue in the main proceedings which, as long as there does not exist a close link with a previous open-term work contract concluded with the same employer, authorises, without restriction, the conclusion of fixed-term work contracts when the worker has reached the age of 52 years.*

It is incumbent upon national law to ensure the full effect of the general principle of non age discrimination by leaving unimplemented all clauses which run contrary to national law, and this even when the time period for the transposition of the said directive has not yet expired.

Case C-13/05
SONIA CHACÓN NAVAS V EUREST COLECTIVIDADES SA
Date of judgment:
11 July 2006
Reference:
2006 compendium p. I-6467
Content:
Directive 2000/78/EC (Articles 2(1) and 3(1)(c) — Dismissal — Disability discrimination — Concept of disability — Reasonable adjustments — Discrimination based on illness — Scope of the directive

1. Facts and procedure

Mrs Chacón Navas worked for Eurest Colectividades SA (hereafter called 'Eurest'), a company specialising in institutional catering. She was granted leave of absence due to illness on 14 October 2003 and, according to the public health service that was treating her, she was unfit to resume her professional activity in the short term. No information was provided by the court of referral as to the nature of the illness suffered by Mrs Chacón Navas. On 28 May 2004, Eurest informed Mrs Chacón Navas of her dismissal without providing a reason, while at the same time recognising the unusual nature of this and offering her compensation. Mrs Chacón Navas maintains that her redundancy is void due the inequality of treatment and the discrimination that she has been subject to, which resulted from the fact of her being on leave of absence for eight months.

2. Questions referred to the Court

1) In establishing in its [first] article a general framework for combating disability discrimination, does Directive 2000/78 protect a worker who has been dismissed from her job solely on the grounds of her illness?

2) In addition, in the case of a negative response to the first question, if the illness is deemed not to fall within the protection framework offered by Directive 2000/78 to combat disability discrimination:

Could illness be another of the outward signs which, according to Directive 2000/78, must not be used as grounds for discrimination?

3. Court ruling

The Court notes that, by its first question, the national court is essentially asking whether the general framework established by Directive 2000/78 to combat disability discrimination ensures protection for a person who has been dismissed by their employer exclusively due to illness. The Court observes that this general framework is applicable as far as dismissal is concerned. The Court judges that, in response to the question posed, it is first of all necessary to interpret the concept of 'disability' as used in Directive 2000/78 and, secondly, to examine the extent to which disabled persons are protected by this Directive as regards dismissal (paragraphs 35–38).

Regarding the concept of 'disability', the Court notes that this concept is not defined by the directive itself and that this directive does not refer either to the laws of the Member States to define this concept. Yet, the Court judges, it follows from the need for uniform application of the law of the European Union and the principle of equality that the terms of a clause of the law of the European Union which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community that must be sought by taking into account the context of the clause and the objective sought by the regulation in question (to this effect, see judgment of 18 January 1984 (Case 327/82 *Ekro* [1984] ECR 107, paragraph 11)). The Court notes, then, that, as emerges from Article 1, Directive 2000/78 has as its objective the establishment of a general framework to combat discrimination as regards employment and occupation based on the grounds

given in this article, including disability. The Court points out that, taking this objective into consideration, the concept of 'disability', in the sense that it is used in Directive 2000/78, must, in conformity with the aforementioned rule, be subject to an independent and uniform interpretation (paragraphs 39–42).

In this respect, the Court stresses that Directive 2000/78 seeks to combat certain types of discrimination regarding employment and occupation. The Court judges that, in this context, the concept of 'disability' must be understood as referring to a limitation, resulting notably from physical, mental or psychological afflictions, hindering the participation of the person in question in professional life. However, the Court notes that, by using the concept of 'disability' as in Article 1 of the said directive, the legislator has deliberately chosen a term different to that of 'illness'. According to the Court, the two concepts cannot, therefore, simply be treated as the same. The Court observes that recital 16 in the preamble to Directive 2000/78 states that the 'implementation of measures intended to accommodate the needs of disabled persons in employment plays a major role in the fight against disability discrimination'. The importance attached by the Community legislator to measures aimed at adjusting workstations to accommodate disability proves, in opinion of the Court, that it envisaged situations in which participation in professional life is hindered for long periods of time. For the limitation to fall under the concept of 'disability', it must, according to the Court, be likely that this limitation is long term. Directive 2000/78, the Court adds, does not contain any indication that would suggest that workers are protected by the prohibition of disability discrimination as soon as any illness arises (paragraphs 43–46).

Regarding the protection of disabled persons as regards dismissal, the Court judges that unfavourable treatment based on disability only runs counter to the protection mentioned in Directive 2000/78 insofar as it constitutes discrimination in the sense of Article 2(1) of this directive. The Court observes that, according to recital 17 of its preamble, Directive 2000/78 does not require that a person who is not competent, capable and available to fulfil their essential roles in the job in question be recruited, promoted or remain employed without prejudice to the obligation to provide for reasonable adjustments to accommodate disabled persons. The Court concludes that the prohibition, as regards dismissal, of disability discrimination, as noted under Article 2(1) and Article 3(1)(c) of Directive 2000/78, stands in opposition to dismissal based on disability which, taking into account the obligation to provide for reasonable adjustments to accommodate disabled persons, is not justified by the fact that the person in question is not competent, capable or available to fulfil the essential roles of their job (paragraphs 48–51).

The Court notes that, with its second question, the national court is asking whether the illness could be considered among those reasons against which Directive 2000/78 prohibits all discrimination (paragraph 53).

In this regard, the Court notes that no clause of the Treaty on European Union prohibits discrimination based on an illness as such. The Court notes that Article 13 of the Treaty on European Union and Article 137 of the same, read in conjunction with Article 136 of the Treaty, only regulate one of the competences of the European Community and also that, beyond disability discrimination, Article 13 of the Treaty does not refer to discrimination based on illness as such and could therefore not constitute lawful grounds for measures to be taken by the Council aiming to combat such discrimination. Indeed, the Court notes that, among the fundamental rights forming an integral part of the general principles of the law of the European Union, the general principle of non-discrimination features prominently. The latter is therefore binding on the Member States when the national situation at issue in the main proceedings falls within the scope of the law of the European Union (to this effect, see judgments of 12 December 2002 (Case C-442/00 *Rodriguez Caballero* [2002] ECR I-11915, paragraphs

30 and 32) and of 12 June 2003 (Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 75) and cited case law). However, according to the Court, it does not follow that the scope of Directive 2000/78 must by analogy be extended beyond discrimination based on the grounds listed exhaustively in Article 1 of this directive (paragraphs 54–56).

The Court (Grand Chamber) hereby rules:

1) *A person who has been dismissed by their employer exclusively due to illness does not fall within the general framework established with the aim of combating disability discrimination by Council Directive 2000/78/EC of 27 November 2000, supporting the creation of a general framework in favour of equal treatment in employment and occupation.*

2) *The prohibition, as regards dismissal, of disability discrimination, as noted under Article 2(1) and Article 3(1)(c) of Directive 2000/78, stands in opposition to a dismissal based on disability which, taking into account the obligation to provide for reasonable adjustments to accommodate disabled persons, is not justified by the fact that the person in question is not competent, capable or available to fulfil the essential roles of their job.*

3) *Illness in itself cannot be considered among the reasons against which Directive 2000/78 prohibits all discrimination.*

Case C-411/05
FÉLIX PALACIOS DE LA VILLA V CORTEFIEL SERVICIOS SA
Date of judgment:
16 October 2007
Reference:
2007 compendium p. I-8531
Content:
Directive 2000/78/EC (Article 6) Collective agreement making provision for the termination, as of right of an employment contract when the worker has reached the age of 65 years and is in receipt of an old age pension — Age discrimination — Principle of proportionality — Employment policies

1. Facts and procedure

In Spain, the single transitional clause of Law 14/2005 concerning the clauses of collective agreements regarding the attainment of normal age of retirement (Ley 14/2005 sobre las cláusulas de los convenios colectivos referidas al cumplimiento de la edad ordinaria de jubilación), of 1 July 2005 (BOE No 157 of 2 July 2005, p. 23634), which came into force on 3 July 2005 (hereafter called 'the single transitional clause'), is worded as follows:

'The clauses of the collective agreements concluded before the present Law came into force, making provision for the termination of work contracts for workers who have reached the normal age of retirement, are considered lawful provided the worker in question has completed the minimum period of contribution and satisfy the other criteria required by the legislation in question [...]'

The relations between the parties concerned are governed by the Textile Trade Collective Agreement for the Autonomous Community of Madrid (hereafter called the 'collective agreement'). The collective agreement was concluded on 10 March 2005. In accordance with Article 3 thereof, the period of its validity was extended until 31 December 2005. Since this agreement preceded the entry into force of Law 14/2005, the single transitional clause is applicable to it. The third paragraph of Article 19 of the collective agreement thus states:

'With a view to promoting employment, it has been agreed that the age of retirement is 65 years, unless the worker concerned has not completed the required period for benefiting from an old age pension; in such a case, he may continue to work until he has completed this period'.

Mr Palacios de la Villa, born 3 February 1940, worked for in accounts for Cortefiel Servicios SA (hereafter called 'Cortefiel') since 17 August 1981 in the capacity of organisational manager. On 18 July 2005 Cortefiel notified him by letter of the automatic termination of his contract on the grounds that the concerned party had reached the age of compulsory retirement from work as provided for in the third paragraph of Article 19 of the collective agreement. It is agreed that on the date on which Mr Palacios was informed by Cortefiel of the termination of his contract that the former had completed the required period of activity for benefiting from a state pension. On 9 August 2005, Mr Palacios de la Villa, deeming that the said notification amounted to a dismissal launched an appeal challenging this on the grounds that it constituted a violation of his basic rights and, more specifically, his right to not be discriminated on the grounds of age, this measure having been taken on the sole grounds of his having reached the age of 65 years.

2. Questions referred to the Court

1) Does the principle of equal treatment, which prohibits all age discrimination as laid down in Article 13 EC and Article 2(1), of Directive 2000/78, stand in the way of a national law (more specifically the first paragraph of the single transitional clause [...]) by virtue of which the clauses regarding compulsory retirement which featured in the collective

agreement are considered lawful and which require, as the only criteria, that the worker has reached the normal age of retirement and has satisfied the other criteria decreed by Spanish legislation regarding social security in order to have the right to a contributory pension?

If the first question is answered in the affirmative, then

2) Does the principle of equal treatment, which prohibits all age discrimination as laid down in Article 13 EC and Article 2(1) of Directive 2000/78, compel the national court, in the case in question, not to apply the said single transitional clause [...]?

3. Court ruling

The Court first addresses the question of the applicability of Directive 2000/78. On this point, the Court notes that it follows from Article 3(1)(c), of the said directive, that, in the framework of the agreements conferred upon the European Community, this directive applies to 'all persons [...] as regards work and employment conditions, including dismissal and payment'. The Court notes that indeed, according to recital 14 of its preamble, Directive 2000/78 does not go against the national clauses laying down the age of retirement. However, the Court stresses, this recital is limited to specifying that the said directive does not affect the power of the Member States to determine the age for admission to retirement and it does not in any way stand in opposition to the application of this directive to national measures governing the conditions for the termination of an employment contract when the age of retirement, so established, is reached. Yet, the Court notes that the regulation at issue in the main proceedings, which considers the automatic termination of employment contracts concluded between an employer and a worker when the latter has reached the age of 65 years to be lawful, affects the duration of the employment contract binding the parties as well as, more generally, the possibility of the worker engaging in professional activity, by preventing the future participation of the latter in active life. Therefore, the Court judges, a regulation of this nature must seen as one which establishes rules relating to 'work and employment conditions, including [...] dismissal and payment', as defined in Article 3(1)(c) of Directive 2000/78 (paragraphs 43–46).

The Court next addresses the question of the interpretation of Articles 2 and 6 of Directive 2000/78. On this point, the Court notes that, according to the terms of Article 2(1) of the directive, for the purpose of the latter, 'principle of equal treatment' is to be understood as the absence of all direct or indirect discrimination based any of the grounds set out in Article 1 of this directive, including age, and that Article 2(2)(a), of the directive specifies that direct discrimination occurs when a person is treated less favourably than another person in a similar position on the basis of any of the grounds set out in Article 1 of the same directive. Yet, the Court judges, a national regulation such as that at issue in the main proceedings, according to which the fact that a worker has reached the retirement age determined by this regulation brings about the automatic termination of a work contract, must be considered to directly impose less favourable treatment upon workers who have reached this age, in comparison with all other employees. According to the Court, such a regulation establishes a difference in treatment directly based on age, such as that given in Article 2(1) and (2)(a) of Directive 2000/78 (paragraphs 49–51).

With particular regard to difference in treatment based on age, the Court notes, however, that it emerges from the first subparagraph of Article 6(1) of the directive, that such inequality does not constitute prohibited discrimination according to Article 2 of the directive 'when it is objectively and reasonably justified within the framework of national law by a legitimate objective, notably by the legitimate objectives of employment policy, of the labour market and of professional training and when the means of achieving this objective

are appropriate and necessary'. In this instance, the Court observes that the single transitional clause authorising the insertion into collective agreements of clauses regarding the compulsory retirement for workers was adopted at the instigation of social partners within the framework of a national policy seeking to promote access to employment through better distribution of the latter between the different generations. Indeed, the Court notes, the national court has stressed that the said disposition does not officially refer to an objective of this nature. The Court judges, however, that it cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision regarding the national regulation in question in relation to the desired objective automatically excludes the possibility that may be justified under the terms of this directive. In the absence of such precision, the Court indicates, it is nevertheless important that other elements gleaned from the general context of the measure in question facilitate the identification of the objective underlying the latter for the purposes of judicial review relating to its legitimacy as well as to the appropriate and necessary nature of the means put in place to achieve this objective. In the light of explanations from the national court, the Court notes in this respect that, set back in context, the single transitional clause seeks to regulate the national employment market, notably with the purpose of hindering unemployment (paragraphs 52–62).

The Court judges that whereas the legitimacy of such an objective of general interest cannot be reasonably called into question, because employment policies as well as the situation in the labour market feature among the objectives expressly stated in the first subparagraph of Article 6(1) of Directive 2000/78 and, in accordance with the first bullet point of the first indent of Article 2 EU and 2 EC, the promotion of a higher level of employment constitutes one of the aims pursued by the European Union and the European Community. In addition, the Court recalls that it has already judged that the promotion of recruitment unarguably constitutes a legitimate objective of social policy or of employment in Member States (to this effect see judgment of 11 January 2007 (Case C-208/05 *ITC* [2007] ECR I-181, paragraph 39)), and that this assessment must clearly apply to the instruments of national labour market policies seeking to improve opportunities for rehabilitation into active life of certain groups of workers. The Court notes that, hence, an objective similar to that desired by the regulation at issue in the main proceedings must, in principle, be seen 'objectively and reasonably' 'within the framework of national law', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78, to justify a difference in treatment based on the age decreed by the Member States (paragraphs 64–66).

The Court explains that it remains to be verified, according to the terms of the said clause, whether the means put in place to realise this legitimate objective are 'appropriate and necessary'. The Court recalls in this context that, as the law of the European Union stands at present, the Member States, as well as, where appropriate, the social partners at national level, command a wide margin of discretion in their choice, not only to pursue one of several objectives relating to social and employment policies but also to define measures likely to help achieve it (to this effect, see judgment of 22 November 2005 (Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 63)). The Court notes that, as it already emerges from the terms: 'specific clauses which may vary according to the situation in Member States', which feature in recital 25 of the preamble to Directive 2000/78, such is notably the case as regards the choice which the national authorities in question could be led to implement, according to political, economic, social, demographic and/or budgetary considerations and in view of the situation such as it presents itself in practical terms on the labour market of a particular Member State, to extend the length of the active life of workers, or on the contrary, to provide for the earlier retirement of the latter. In addition, the Court notes, the authorities competent at national, regional or sectoral level must have the possibility of modifying the means put in place to achieve the legitimate objective of gen-

eral interest, for example, by adapting them to developments in the employment situation in the Member State concerned. The fact that, in this case, the procedure of compulsory retirement was reintroduced in Spain, having been repealed there for several years, is, therefore, according to the Court, lacking in relevance. Thus the Court judges that it is incumbent upon the competent authorities of the Member States to strike an accurate balance between the different interests involved. However, it is important to ensure that the national means planned in this context do not go beyond what is appropriate and necessary for achieving the objective pursued by the Member State concerned (paragraph 67–71).

Yet, the Court stresses that it does not appear unreasonable for the authorities of a Member State to judge that a measure such as that at issue in the main proceedings could be appropriate and necessary for achieving the legitimate objective in the context of national employment policy and consisting in the promotion of full employment by encouraging access to the labour market. In addition, the Court considers that this measure cannot be regarded as going very much against the legitimate claims of workers involuntarily entering retirement due to having reached the age limit provided for, since the relevant regulation is not based solely on a pre-determined age but equally takes into consideration the fact that those concerned could benefit at the end of their professional career from financial compensation by being granted an old age pension such as that provided for by the national system at issue in the main proceedings and whose level cannot be considered unreasonable. The Court notes, incidentally, that the relevant national regulation allows the social partners to opt, by means of collective agreements — and with considerable flexibility — for the implementation of the mechanism of compulsory retirement, so that due account can be taken not only of the overall situation in the labour market in question but also of the specific features of the jobs in question. In view of these factors, the Court concludes, it cannot be validly maintained that a national regulation such as that at issue in the main proceedings is incompatible with the demands of Directive 2000/78 (paragraphs 72–75).

Given the foregoing interpretation of Directive 2000/78, the Court judges that it is no longer necessary for it to provide a ruling regarding Article 13 EC, which is also referred to in the first question asked, and on the basis of which this directive was adopted (paragraph 76).

In view of the negative response given to the first question, the Court considers that there is no cause to give a ruling regarding the second question (paragraph 78).

The Court (Grand Chamber) hereby rules:

The prohibition of all age discrimination, such as that implemented by Council Directive 2000/78/EC of 27 November 2000, creating of a general framework in favour of equal treatment in employment and occupation, must be interpreted as not standing in opposition to a national regulation, such as that at issue in the main proceedings, by virtue of which clauses regarding compulsory retirement featuring in collective agreements are considered lawful when such clauses require, as the only criteria, that the worker has reached the normal age of retirement, set at 65 years by the national regulation, and has satisfied the other criteria required by social security legislation in order to be entitled to a contributory pension, where

- *the said measure, although based on age, is objectively and reasonably justified, within the framework of the national law, by a legitimate objective regarding policies of employment and the labour market, and*

- *the means put in place in order to achieve this objective of general interest do not appear inappropriate and unnecessary to this end.*

Case C-267/06
TADAO MARUKO V VERANSTALTUNGSORT DER DEUTSCHEN BÜHNEN
Date of judgment:
1 April 2008
Reference:
2008 compendium p. I-1757
Content:
Directive 2000/78/EC (Articles 1 and 2) Survivor's pension provided for by a compulsory system of occupational pensions planning — Concept of pay — Refusal to grant in the case of same-sex partnerships — Discrimination based on sexual orientation — Similar case — Limited time period for judgment to take effect

1. Facts and procedure

On 8 November 2001, Mr Maruko began, by virtue of Article 1 of the Law regarding registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 (BGBl. 2001 I, p. 266, hereafter called 'LPartG'), in its initial version, a life partnership with a designer of theatrical costumes. The latter was affiliated to the Veranstaltungsanstalt der deutschen Bühnen (pension fund for German theatres, hereafter called 'VddB') from 1 September 1959 and voluntarily continued to contribute to this fund during the periods of time when he was not obliged to do so. Mr Maruko's life partner passed away on 12 January 2005. Mr Maruko requested from the VddB that he receive a widower's pension. This request was rejected by the VddB on the grounds that its statutes do not provide for such payments to life partners.

2. Questions referred to the Court

1) Is a compulsory system of occupational pension planning — such as that managed in this case by the [VddB] — similar to public systems, in the sense of the third paragraph of Article of Directive 2000/78 [...]?

2) Is a survivor's pension granted in the form of widow's or widower's pension by a compulsory pension planning institution to be considered as payment within the meaning of Article 3(1)(c) of Directive 2000/78?

3) Do the combined clauses of Articles 1 and 2(2)(a) of Directive 2000/78 [...] stand in the way of the provisions of the statutes of a complementary system of pension planning under which, after the death of his/her partner, the registered partner does not receive any survivor's pension equivalent to those granted to spouses, even though, in the manner of a spouse, the registered partners live in a union of mutual support and assistance entered into formally for life?

4) In the case of a positive response to the preceding question, is discrimination based on sexual orientation permitted according to recital 22 of the preamble to Directive 2000/78 [...]?

5) Is the payment of survivor's pension to be limited to the period after 17 May 1990 on the basis of the case law in *Barber,* [judgment of 17 May 1990 (Case C-262/88 *Barber* [1990] ECR I-1889]?

3. Court ruling

The Court notes that by its first, second and fourth questions, which it is appropriate to answer together, the national court is essentially asking whether a survivor's pension granted under a system of occupational pension planning such as that managed by the VddB falls within the scope of Directive 2000/78 (paragraph 34).

The Court notes that it emerges from Article 3(1)(c) and (3) of Directive 2000/78 that the latter applies to all persons, in both the public and private sectors, including public bodies, as regards, in particular, conditions for payment, but that it does not apply to any kind of payment made by public or similar schemes, including state social

security or social protection schemes. The Court observes that the scope of Directive 2000/78 must be understood, in the light of the said clauses read together with recital 13 of the preamble to this directive, as excluding the social security and social protection schemes whose advantages are not similar to a payment in the sense given to this term for the implementation of Article 141 EC nor to payments of any kind made by the State with the objective of access to employment or job retention. The Court notes therefore that it is necessary to determine whether a survivor's pension granted by an occupational pension planning scheme such as that managed by the VddB could be similar to a 'payment' in the sense of Article 141 EC (paragraphs 40–42).

In view of this, the Court recalls the criteria employed in its judgments of 28 September 1994 (Case C-7/93 *Beune* [1994] ECR I-4471, paragraph 45), of 17 April 1997 (Case C-147/95 *Evrenopoulos* [1997] ECR I-2057, paragraph 19), of 29 November 2001 (Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 30), of 12 September 2002 (Case C-351/00 *Niemi* [2002] ECR I-7007, paragraph 47) and of 23 October 2003 (Joined Cases C-4/02 and C-5/02 *Schönheit Becker* [2003] ECR I-12575, paragraph 58), and points out that the pension only applies to a particular group of workers, that it is directly dependent on length of service and that its amount is calculated on the basis of the last salary earned by the worker. The Court notes that these three criteria are satisfied in this case and that it follows that the survivor's pension at issue in the main proceedings results from the work contract of Mr Maruko's life partner and that it must, therefore, be described as 'payment' in the sense of Article 141 EC (paragraph 46–56).

The Court adds that this conclusion is not challenged by the fact that the VddB is a public body (to this effect, see aforementioned judgment *Evrenopoulos*, paragraphs 16 and 23), nor by the compulsory nature of membership to the scheme granting entitlement to the survivor's pension at issue in the main proceedings (to this effect, see judgment of 25 May 2000 (Case C-50/99 *Podesta* [2000] ECR I-4039, paragraph 32)) (paragraph 57).

The Court adds, as regards the scope of recital 22 of the preamble to Directive 2000/78, which states that the said directive is without prejudice to the national laws regarding marital status and the pensions dependent thereon, that, certainly, civil status and pensions which result therefrom are matters which fall within the competence of the Member States and the law of the European Union does not undermine this competence, but that, however, it is important to recall that the Member States must, in the exercise of the said competence, respect the law of the European Union, notably the clauses relating to the principle of non discrimination (to this effect, see judgments of 16 May 2006 (Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92) and of 19 April 2007 (Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 23)). The Court concludes that, once a survivor's pension such as that at issue in the main proceedings has been described as 'payment' in the sense of Article 141 EC and it has entered the scope of Directive 2000/78, recital 22 of the preamble to Directive 2000/78 cannot challenge the implementation of this directive (paragraphs 58–60).

Regarding the third question, the Court notes that the following information and assessments emerge from the decision of the national court. From 2001 — the year when the LPartG, in its initial version, came into force — the Federal Republic of Germany altered its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely for heterosexual couples, the said Member State created a separate scheme for homosexual couples, the life partnership, the conditions of which have gradually been brought closer to those applicable to marriage. The life partnership is similar to marriage as regards widow or widower's pension. Considering the similarities between marriage and life partnerships, a

life partnership, without being identical to marriage, places persons of the same sex in a similar situation to that of a married couple as regards the survivor's pension at issue in the main proceedings. Yet, this survivor's pension is restricted, under the provisions of the statutes of the VddB, to surviving spouses and is denied to surviving life partners. In this case, these life partners are being treated in a less favourable manner than surviving spouses who are in receipt of the said survivor's pension (paragraph 67–71).

The Court therefore judges that, if the national court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's pension, a regulation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on the grounds of sexual orientation, in the sense of Articles 1 and 2(2)(a) of Directive 2000/78 (paragraph 72).

Regarding the fifth question, the Court recalls that it emerges from its case law that it may, exceptionally, taking account of the serious difficulty that its judgment may create as regards events in the past, be moved to restrict the possibility for all concerned to invoke the interpretation that the Court gives to a clause in response to a reference for a preliminary ruling. A restriction of that kind may be permitted only by the Court, in the actual judgment ruling upon the interpretation sought (to this effect, see aforementioned judgment *Barber*, paragraph 41, and judgment of 6 March 2007 (Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 36)). The Court judges in view of this that it does not emerge from the case that the financial balance of a scheme such as that managed by the VddB risks being retroactively disrupted if the effects are not restricted in time (paragraphs 77–78).

The Court (Grand Chamber) hereby rules:

1) *A survivor's pension granted within the framework of an occupational pension planning scheme such as that managed by the Versorgungsanstalt der deutschen Bühnen falls within the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework in favour of equal treatment in employment and occupation.*

2) *The combined provisions of Articles 1 and 2 of Directive 2000/78 stand in opposition to regulation such as that at issue in the main proceedings by virtue of which, after the death of his life partner, the surviving partner does not receive a survivor's pension equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns the said survivor's pension. It is incumbent upon the court of referral to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's pension provided for under the occupational pension planning scheme managed by the Versorgungsanstalt der deutschen Bühnen.*

Case C-54/07
CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING V FIRMA FERYN NV
Date of judgment:
10 July 2008
Reference:
Available at http://curia.europa.eu
Content:
Directive 2000/43/EC (Articles 2(2)(a), 8(1) and 15 — Discrimination on the basis of race or ethnic origin — Discrimination when selecting staff — Concept of direct discrimination — Possibility for organisations promoting equality to begin proceedings — Absence of an identifiable plaintiff — Burden of proof — Penalties

1. Facts and procedure

The Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and the fight against racism), which is a Belgian organisation with the role of promoting equal treatment, has, in light of Article 13 of Directive 2000/43, asked the Belgian labour courts to confirm whether the company Firma Feryn NV (hereafter called 'Feryn'), specialising in the sale and installation of up-and-over and sectional doors, applied a discriminatory policy of recruitment. The Centrum voor gelijkheid van kansen en voor racismebestrijding is acting on the basis of public statements made by the director of Feryn, according to which the company sought to recruit fitters but could not hire any 'foreigners' because customers were reluctant to grant them access to their private home for the work to be carried out.

2. Questions referred to the Court

1) Can direct discrimination be said to take place, within the meaning of Article 2(2)(a) of Directive 2000/43 [...], when an employer, after having advertised a vacant position in a way so as to draw attention to it, publically states:

'I must meet the needs of my clients. If you were to say to me "I want such and such a product or I want it done such and such a way" and I say "I can't do that, these people have to do the job" you would say to me "I don't need your door anymore". Then I'm putting myself out of business. We must meet the needs of our clients. This is not about me. It wasn't me who caused the problem in Belgium. I want to do well out of the business and I want to see at the end of the year that the business is turning over, and the only way I can achieve this is ... by securing business through accommodating the wishes of the client!'[?]

2) For a finding of direct discrimination affecting the recruitment process for a paid position, is it sufficient to ascertain the application by the employer of explicitly discriminatory selection criteria?

3) When examining the discriminatory nature of the recruitment policy used by an employer, can the fact that only native fitters have been employed by a company linked to this employer be taken into account in order to determine whether direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/43[...] has taken place?

4) What must be understood by 'facts from which it may be presumed that direct or indirect discrimination has taken place', given in Article 8(1) of Directive 2000/43 [...]? How strict must a national court be when assessing the facts which could lead to a presumption of discrimination?

   a) To what extent do previous acts of discrimination (public statement of directly discriminatory selection criteria in April 2005) constitute 'facts from which it may be presumed that direct or indirect dis-

crimination has taken place', as in Article 8(1) of Directive [2000/43]?

b) Does an act of discrimination that took place in April 2005 (public statement of April 2005) subsequently lead to the presumption that a directly discriminatory recruitment policy is being persued? Taking into account the facts of the dispute in the main proceedings, is it sufficient, in order to give rise to the presumption (that an employer applied and continues to apply a discriminatory recruitment policy), that in April 2005, in response to the question as to whether, as an employer, he treats native and foreign workers unequally and if he is not somewhat racist, he publically replied: 'I must meet the needs of my clients. If you were to say to me "I want such and such a product or I want it done such and such a way" and I say "I can't do that, these people have to do the job" you would say to me "I don't need your door anymore". Then I'm putting myself out of business. We must meet the needs of our clients. This is not about me. It wasn't me who caused the problem in Belgium. I want to do well out of the business and I want to see at the end of the year that the business is turning over, and the only way I can achieve this is ... by accommodating the client's wishes!' [?]

c) Taking into account the facts of the dispute in the main proceedings, can a joint press release issued by the employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly recognised, give rise to such a presumption?

d) Does the fact that an employer does not employ foreign fitters give rise to a presumption of indirect discrimination when this employer has experienced considerable difficulty recruiting fitters in the past and had also stated publically that his clients preferred not to work with foreign fitters?

e) Is one fact enough to give rise to a presumption of discrimination?

f) Taking into account the facts in the main proceedings, can the presumption of an act of discrimination by the employer be deduced from the fact that a company linked to this employer only recruits native fitters?

5) How strict must the national court be when assessing a refutation which could arise in the case of a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 [...]? Can a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 [...] be rebutted by a simple and independent statement from the employer to the press that he does not and will not commit any act of discrimination and that foreign fitters are welcome; and/or by a simple statement from the employer that his company, excluding the sister company, has filled all the posts available to fitters and/or by the statement that a Tunisian cleaning lady has been hired; and/or, taking into account the facts of the dispute in the main proceedings, can the presumption only be rebutted by the genuine recruitment of foreign fitters and/or by respecting commitments made in the joint press release?

6) What must be understood by 'effective, proportionate and dissuasive' penalties within the meaning of Article 15 of Directive 2000/43 [...]? Does the requirement given in Article 15 of Directive 2000/43 [...] allow the national court to simply declare that there has been a case of direct discrimination, taking into account the facts of the dispute questioning the main proceedings? Or does it require that the national court order a prohibitory injunction, as provided for by national law? Taking into account the facts of the dispute in the

main proceedings, to what extent is the national court required to order the publication of the forthcoming decision as an efficient, proportionate and dissuasive penalty?

3. *Court ruling*

The Court notes that the national court is essentially seeking an interpretation by the Court of the clauses of Directive 2000/43 in order to assess the scope of the concept of direct discrimination as regards public statements made by an employer during a recruitment process (see first and second questions), the conditions under which the rule of reversal of the burden of proof, as laid down by the said directive, can be applied (see third to fifth questions), and the nature of the penalties which may be considered appropriate in a situation such as that described in the main proceedings (see sixth question) (paragraph 20).

Regarding the first and second questions, as Ireland and the United Kingdom of Great Britain and Northern Ireland maintain that there cannot be any form of direct discrimination within the meaning of Directive 2000/43, so that it is not applicable when the alleged discrimination results from public statements made by an employer regarding his recruitment policy without there being an identifiable plaintiff maintaining that he has been the victim of this discrimination, the Court observes that it is true that Article 2(2) of Directive 2000/43 defines direct discrimination as a situation in which, for reasons of race or ethnic origin, a person 'is treated' in a less favourable manner than another person is, has been, or would be, in a similar situation. The Court states that Article 7 of this directive likewise requires of the Member States to ensure that judicial procedures are available 'to all persons who consider themselves to be wronged by a violation of the principle of equal treatment' and to public interest bodies taking legal action 'on behalf of or in support of the plaintiff'. The Court judges that it cannot however be deduced from this that the absence of an identifiable plaintiff is reason enough to conclude that no direct discrimination has taken place within the meaning of Directive 2000/43. This directive essentially aims, as stated in recital 8 of its preamble, to 'promote a labour market enabling social integration'. The Court considers that such an aim would be difficult to achieve if the scope of Directive 2000/43 were limited to situations in which an unlucky applicant believed himself to be a victim of direct discrimination and started legal proceedings against the employer. If an employer has stated publically that he will not recruit employees of a certain ethnic or racial origin, he clearly seriously dissuades certain candidates from applying and, hence, hinders their access to the labour market. This constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination does not presume that a plaintiff claiming that he has been a victim of such discrimination is identifiable (paragraphs 21–25).

The Court adds that the question regarding the definition of direct discrimination within the meaning of Directive 2000/43 must be distinguished from that regarding the legal procedures given in Article 7 of this directive in order to ascertain and punish any violation of the principle of equal treatment. These legal procedures must, in accordance with this article, be open to persons who consider themselves to have been the victim of discrimination. The Court indicates that the requirements of Article 7 of Directive 2000/43 are however, as stated in Article 6 of this directive, only minimum requirements and the said directive does not prohibit the adoption or maintenance by the Member States of clauses which are more conducive to the protection of the principle of equal treatment. The Court consequently judges that Article 7 of Directive 2000/43 does not in any way stand in opposition to the Member States making provision, in their national legislation, for the right for associations with a legitimate interest in ensuring compliance with this directive or for designated bodies in accordance with Article 13 of this directive, to bring legal or administrative proceedings with the aim of enforcing the obligations resulting from the said directive without acting in the name of a specific plaintiff or in

the absence of an identifiable plaintiff. The Court specifies, however, that it remains solely the role of the national judge to assess whether the legislation gives rise to such a possibility (paragraphs 26–27).

In light of the third to fifth questions, the Court notes that Article 8 of Directive 2000/43 specifies that it is the obligation of the defendant to prove that there has been no violation of the principle of equal treatment when the facts suggest that direct or indirect discrimination has taken place. The only precondition for the obligation for the presumed perpetrator of the discrimination to bring evidence in rebuttal is a simple finding of a presumption of discrimination based on established facts. The Court considers that the statements by which an employer makes known publically that, under his recruitment policy, he will not hire any employees of a certain ethnic or racial origin, may constitute facts giving rise to the presumption of a discriminatory recruitment policy. The Court indicates that it is therefore incumbent upon this employer to provide evidence to show that he has not violated the principle of equal treatment, which he can most notably do by showing that the company's actual employment practices do not correspond with these statements. The Court also specifies that it is the obligation of the national court to verify whether the accusations makes against the said employer are based on established fact and to assess whether the factors that he brings in support of his assertions that he has not violated the principle of equal treatment are sufficient (paragraphs 30–33).

As regards the sixth question, the Court notes that Article 15 of Directive 2000/43 confers upon the Member States the responsibility of determining the penalties applicable to a violation of national clauses in the implementation of this directive and that this article specifies that these penalties must be effective, proportionate and dissuasive and provides that they may comprise compensation to be paid to the victim. The Court notes that Article 15 of Directive 2000/43 imposes upon the Member States the obligation to introduce into their national legal systems measures which are sufficiently effective for achieving the goal of this directive and to ensure that these measures can be effectively relied upon before the national tribunals in order that judicial protection is effective and efficient. Directive 2000/43 does not, however, impose pre-determined penalties but, the Court notes, grants the Member States the freedom to choose from the different solutions available for achieving the established objective (paragraphs 36–37).

In a case such as that referred by the national court, when there is no direct victim of discrimination but when a body is empowered by law to request that a case of discrimination be ascertained and sanctioned, the Court judges that the penalties, which Article 15 of Directive 2000/43 demands be provided for in national law, must be effective, proportionate and dissuasive. According to the Court, they may, if necessary, and if appropriate to the situation described in the main proceedings, include a finding of discrimination by the court or the competent admininstrative authority, together with an adequate amount of publicity, the cost of this being borne by the defendant. They can also include an injunction brought against the employer according to the rules laid down by national law to stop the discriminatory practice, and, if necessary, daily penalty. Moreover, they can involve the granting of damages to the body bringing the proceedings (paragraphs 38–39).

The Court (Second Chamber) hereby rules:

1) *The fact that an employer states publically that he will not recruit any employees of a certain ethnic or racial origin constitutes direct discrimination relating to recruitment within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 regarding the enforcement of the principle of equal treatment among all persons regardless of race or ethnic origin, such statements being of a nature likely to seriously dissuade candidates from applying*

for vacant positions and, hence, hindering their access to the labour market.

2) *The public statements by which an employer makes known that, under his recruitment policy, he will not hire any employees of a certain ethnic or racial origin, are sufficient to give rise to the presumption, within the meaning of Article 8(1) of Directive 2000/43, of the existence of a directly discriminatory recruitment policy. It is therefore incumbent upon the employer to prove that he has not acted in violation of the principle of equal treatment. This can be achieved by showing that the company's actual recruitment practice does not correspond to these statements. It is the obligation of the national court to verify whether the accusations made are based on established fact and to assess whether the factors brought in support of the assertions of the said employer that he has not violated the principle of equal treatment are sufficient.*

3) *Article 15 of Directive 2000/43 requires that, even when there is no identifiable victim, the rules on penalties applicable to violations of national clauses adopted in order to transpose this directive are effective, proportionate and dissuasive.*

Case C-303/06
S.COLEMAN V ATTRIDGE LAW AND STEVE LAW
Date of judgment:
17 July 2008
Reference:
Available at http://curia.europa.eu
Content:
Directive 2000/78/EC (Article 1 and 2) — Disability discrimination — Harassment and dismissal of an employee who is not himself disabled but who has a disabled child — Burden of proof

1. Facts and procedure

Mrs Coleman worked as a legal secretary for the law firm Attridge Law, along with Mr Law, an associate of the firm (hereafter together known as the 'former employer'), from January 2001. In 2002 she gave birth to a son who suffers from apnoeic attacks and congenital laryngomalacia and bronchomalacia. Her son's condition requires specialised and individual care. The claimant in the main proceedings is his primary care giver. On 4 March 2005 Mrs Coleman accepted voluntary redundancy, which terminated the contract with her former employer. On 30 August 2005 she lodged a claim in which she maintains that she has been a victim of unfair constructive dismissal and of treatment less favourable to that received by other employees due to the fact that she is the primary care giver for a disabled child. She claims that this treatment forced her to stop working for her former employer.

It emerges from the decision of the national court, in accordance with the law of the United Kingdom, in the case in the main proceedings, that the facts of the dispute are to be presumed as follows:

- on returning from maternity leave, the former employer refused to allow Mrs Coleman to return to the job that she occupied previously, in circumstances where the parents of non-disabled children would have been allowed to return to their former position;
- he also refused to grant her the same work flexibility and the same work conditions given to her colleagues who are parents of non-disabled children;
- Mrs Coleman was labelled 'lazy' when she asked for time off to care for her son, even though this was granted to parents of non-disabled children;
- the formal grievance that she lodged against her ill treatment was not properly taken into consideration and she felt forced to withdraw it;
- inappropriate and insulting comments were made about both her and her child. No such comments were made when other employees asked for time off or flexibility in order to look after their non-disabled children; and
- occasionally arriving late to work due to difficulties linked to her child's condition, she was told that she would be dismissed if she arrived late to work again. No such threat was made to other employees with non-disabled children who arrived late to work for the same reasons.

2. Questions referred to the Court

1) Within the framework of the prohibition of discrimination based on disability, does Directive [2000/78] only protect from direct discrimination and harassment persons who themselves are disabled?

2) If the first question receives a negative response, does Directive [2000/78] protect employees who, although not disabled themselves, are less favourably treated or are the victims of harassment due to their relationship with a disabled person?

3) When an employer treats an employee less favourably than he treats or would treat oth-

er employees and it has been proven that the reason for this ill treatment is that the employee has a disabled son to care for, does the said treatment constitute direct discrimination that breaches the principle of equal treatment as laid down in Directive [2000/78]?

4) If an employer harasses an employee and it is proven that the reason for this treatment is that the employee has a disabled son to care for, does this harassment breach the principle of equal treatment as laid down in Directive [2000/78]?

3. *Court ruling*

The Court notes that by the first part of the first question and by the second and third questions, which it is necessary to examine together, the national court is essentially asking whether Directive 2000/78 and, in particular, Articles 1 and 2(1) and (2) a) is to be interpreted as prohibiting direct discrimination based on disability only towards an employee who is disabled themselves or whether the principle of equal treatment and the prohibition of direct discrimination equally applies to an employee who is not disabled themselves but who, as in the case in the main proceedings, is a victim of ill treatment due to the disability from which their child is suffering, and for whom the employee is the primary care giver (paragraph 33).

Having brought attention to the clauses of the first article of Directive 2000/78, of Article 2(1) and (2)(a) and of Article 3(1)(c), the Court judges that it does not emerge from these clauses that the principle of equal treatment that the said directive aims to safeguard is limited to persons who are themselves disabled within the meaning of this directive. On the contrary, the Court indicates that this directive aims to combat all forms of disability discrimination as regards employment and occupation. The principle of equal treatment in this area, as laid down in the said directive, applies, not to a particular group of people, but by reference to the grounds given in Article 1. The Court adds that this interpretation is supported by the wording of Article 13 EC, a clause constituting the legal basis of Directive 2000/78, which confers on the Community the competence to take necessary measures in order to combat all disability discrimination (paragraphs 34–38).

It is true, the Court notes, that Directive 2000/78 contains a certain number of clauses which, as emerges from their very wording, are applicable only to disabled persons Thus its fifth article specifies that, in order to ensure that the principle of equal treatment towards disabled persons is respected, reasonable adjustments are to be made. The Court notes that Article 7(2) of the said directive also provides that, with regard to disabled persons, the principle of equal treatment does not go against the right of the Member States to maintain or adopted clauses relating to the protection of health and safety in the work place nor against measures aiming to create or maintain the provision of facilities seeking to safeguard or promote the integration of these persons into the work environment. However, the Court notes in this respect that these clauses specifically apply to persons with a disability either because they are clauses regarding measures of positive discrimination in favour of disabled persons themselves, or because they are specific measures which would be devoid of meaning or would prove to be disproportionate if they were not limited to disabled persons only (paragraphs 39–42).

The governments of the United Kingdom, Italy and the Netherlands contend that the need for a strict interpretation of the scope ratione personae of Directive 2000/78 emerges from the court ruling of 11 July 2006 (Case C-13/05 *Chacón Navas* [2006] ECR I-6467). The Court specifies that this court ruling does not suggest that the principle of equal treatment as defined in Article 2(1) of the said directive and the prohibition of direct discrimination as provided for in Article 1(2)(a) cannot be applied to a situation such as that described in the main proceedings when the

unfavourable treatment that an employee claims to have suffered is based on the disability suffered by a child for whom the employee is the primary care giver. In fact, although in paragraph 56 of the aforementioned court ruling, *Chacón Navas,* the Court specified that the scope of Directive 2000/78 could not, in light of the wording of Article 13 EC, be extended beyond discrimination based on the grounds listed exhaustively in the first article of that directive, so that a person who has been dismissed by their employer exclusively on the grounds of illness does not fall within the general framework established by Directive 2000/78, nevertheless the Court did not judge that the principle of equal treatment and the scope ratione personae of this directive must be subject to strict interpretation with regard to those grounds (paragraphs 44–46).

The Court returns to the matter of the objectives sought by Directive 2000/78. The Court judges that the said objectives, and the effectiveness of Directive 2000/78, would be compromised if an employee in a situation such as that of the claimant in the main proceedings could not rely on the prohibition of direct discrimination provided by in Article 2(2)(a) of this directive when it has been proven that they have been treated in a less favourable way than another employer, was, is, or would be, treated in a similar situation due to the disability of their child, even if not suffering from a disability himself (paragraphs 47–48).

As regards the burden of proof applicable in a situation such as that described in the main proceedings, the Court recalls that, in accordance with Article 10(1) of Directive 2000/78, the Member States must take the necessary measures, in accordance with their judiciary system, to ensure that, when a person believes that they have been wronged by a violation of the principle of equal treatment, and brings before a court, or other competent body, facts which give rise to the presumption that direct or indirect discrimination has taken place, it is incumbent upon the defendant to prove that there has been no violation of the said principle. In the case in the main proceedings, the Court indicates that it is incumbent upon Mrs Coleman to bring before the national court facts which give rise to the presumption that direct discrimination based on disability, as prohibited by this directive, has taken place. In accordance with Article 10(1) of Directive 2000/78 and recital 31 of the preamble to this directive, the Court specifies that the rules regarding the burden of proof must be adapted when there is a presumption of discrimination. In the event that Mrs Coleman establishes facts which give rise to the presumption that direct discrimination has taken place, the effective implementation of the principle of equal treatment then requires that the burden of proof should fall on the defendant in the main proceedings, who would have to prove that there has been no violation of the said principle. In this context, the Court concludes, the said defendant could contest the existence of such a violation by establishing by any lawful means that the treatment the employee was subject to was justified by objective factors which are not in any way linked to disability discrimination or to any relationship that this employee has with a disabled person (pargraphs 52–55).

The Court notes that by the second part of the first question and by the fourth question, which it is necessary to examine together, the national court is essentially asking whether Directive 2000/78 and, in particular, Articles 1 and 2(1) and (3) is to be interpreted as prohibiting harassment linked to disability only towards an employee who is disabled himself or whether the prohibition of harassment equally applies to an employee who is not disabled himself but who, as in the case in the main proceedings, is the victim of undesirable behaviour amounting to harassment linked to the disability from which their child is suffering, and for whom the employee is the primary care giver (paragraph 57).

The Court notes, as regards this point, that since, according to Article 2(3) of Directive 2000/78, harassment is considered a form of discrimination within the meaning of Article 2(1), it must be held that, on the same grounds as those previously

discussed, that directive, in particular Articles 1 and 2(1) and (3) thereof, must be interpreted as not being limited to the prohibition of harassment of people who are themselves disabled. The Court judges that if it is proven that the undesirable behaviour amounting to harassment suffered by an employee who is himself not disabled is linked to their child's disability, for whom the employee is the primary care giver, such behaviour runs contrary to the principle of equal treatment given in Directive 2000/78 and, in particular, to the prohibition of harassment laid down in Article 2(3) of this directive. In this respect, the Court recalls however that, according to the very terms of Article 2(3) of the said directive, the concept of harassment can be defined in accordance with the national laws and practices of the Member States (paragraphs 58–60).

As regards the burden of proof applicable in a situation such as that described in the main proceedings, the Court notes that, since harassment is considered a form of discrimination within the meaning of Article 2(1) of Directive 2000/78, the same rules as those previously discussed apply to harassment. The Court indicates that, in accordance with Article 10(1) of Directive 2000/78 and recital 31 of the preamble to this directive, the rules regarding the burden of proof must be adapted when there is a presumption of discrimination. In the event that Mrs Coleman establishes facts which give rise to the presumption that harassment has taken place, the effective implementation of the principle of equal treatment then requires that the burden of proof should fall on the defendant in the main proceedings, who must prove that no harassment has taken place in the circumstances of the present case (paragraphs 61–62).

The Court (Grand Chamber) hereby rules:

1) *Council Directive 2000/78/EC of 27 November 2000, establishing the creation of a general framework for equal treatment in employment and occupation, and, in particular, Articles 1 and 2(1) and (2)(a), must be interpreted in the sense that the prohibition of direct discrimination that they provide for is not limited only to persons who are themselves disabled. When an employer treats an employee who is not himself disabled in a less favourable manner than another employee has been, is, or would be, treated in a similar situation, and it can be proven that the unfavourable treatment of which this employee has been a victim is based on the disability of their child, for whom the employee is the primary care giver, such treatment runs contrary to the prohibition of direct discrimination laid down in said Article 2 (2)(a).*

2) *Directive 2000/78 and, in particular Articles 1 and 2(1) and (3) must be interpreted in the sense that the prohibition of harassment that they provide for is not limited only to persons who are themselves disabled. If it is proven that the undesirable behaviour amounting to harassment of which an employee who is himself not disabled is a victim is linked to their child's disability, for whom the employee is the primary care giver, such behaviour runs contrary to the prohibition of harassment laid down in said Article 2(3).*

Case C-427/06
BIRGIT BARTSCH/BOSCH AND SIEMENS HAUSGERÄTE (BSH) ALTERSFÜRSORGE GMBH
Date of judgment:
23 September 2008
Reference:
Available at http://curia.europa.eu
Content:
Article 13 EC — Directive 2000/78/EC — Occupational pension scheme excluding the right to a pension of a spouse more than 15 years younger than the deceased former employee — Age discrimination — Link with Community law — Legal effects of directives before the end of their transposition period

1. Facts and procedure

Article 6(4)of the Bosch und Siemens Hausgeräte (BSH) Alterfürsorge GmbH (hereafter 'BSH Altersfürsorge') guidelines, a business contingency fund, in the version coming into force on 1 April 1992 (hereafter 'guidelines'), provides:

'Conditions for the retirement pension

[…]

4. The pension (Article 5(1)(b) is paid to the widow or widower of an employee who has died during his or her employment relationship [...] who had fulfilled the qualifying period (Article 2) provided that and for as long as a claim for a survivor's pension (widow or widower's pension) exists under the German statutory pension insurance scheme. The corresponding rule applies to the widower or widow of the recipient of a retirement pension.

Payments cannot be made

a) When the widower or widow is more than 15 years younger than the former employee, and

[…]'

Mrs Bartsch, who was born in 1965, married Mr Bartsch in 1986, who was born in 1944 and died on 5 May 2004. On 23 February 1988 Mr Bartsch had concluded an employment contract with Bosch-Siemens Hausgeräte GmbH (hereafter 'BSH'). He started work with them on 1 March 1988 and was employed as a salesman until his death. BSH Altersfürsorge, which has been established by BSH, undertook to perform any obligations with respect to Mrs Bartsch that this company had contracted concerning a company pension for the benefit of the late Mr Bartsch.

The employment relationship between Mr Bartsch and BSH was governed by the guidelines and, in particular, Paragraph 6 thereof. The situation in the main proceedings falls within the terms of Article 6(4)2.a) of the guidelines, in so far as Mrs Bartsch is more than 15 years younger than her deceased husband. After the death of her husband, Mrs Bartsch requested BSH Altersfürsorge to pay her a survivor's pension on the basis of the guidelines. BSH Altersfürsorge rejected this request.

2. Questions referred to the Court

1) a) Does the primary law of the European Community contain a prohibition of discrimination on grounds of age, protection under which must be guaranteed by the Member States, even if the allegedly discriminatory treatment is unconnected to Community law?

   b) If the first question under a) is answered in the negative:

   Does the connection to Community law arise from Article 13 EC or — even before the time-limit for transposition has expired — from Directive 2000/78?

2) Is any prohibition of discrimination on grounds of age under Community law arising from the answer to the first question also applicable to the relationship between private

employers on the one hand and their employees or pensioners and their survivors on the other hand?

3) If the second question is answered in the affirmative:

   a) Does provision of an occupational pension scheme, which provides that a survivor's pension will not be granted to a surviving spouse in the event that the survivor is more than 15 years younger than the deceased former employee, also fall within the scope of any such prohibition of discrimination on grounds of age?

   b) If the third question under a) is answered in the affirmative:

      Can such a provision be justified by the fact that the employer has an interest in limiting the risks arising from the occupational pension scheme?

   c) If the third question under b) is answered in the negative:

      Does any prohibition of discrimination on grounds of age which may apply to rules governing company pensions have unlimited retroactive effect as regards the law relating to occupational pension schemes or is its application limited as regards the past, and if so in what way?

3. Court ruling

In the two parts of its first question, which can be examined together, the referring court asks whether the application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the grounds of age is mandatory even where the allegedly discriminatory treatment contains no link with Community law. If the answer is negative, said court wishes to ascertain whether, in circumstances such as those at issue in the main proceedings, such a link to Community law arises from Article 13 EC or from Directive 2000/78, even before the time-limit allowed to the Member State concerned for transposition has expired (paragraph 14).

The Court observes that neither the Directive 2000/78 nor Article 13 EC enable a situation such as that in issue in the main proceedings to be brought within the scope of Community law. On the one hand, the guidelines do not constitute a measure for implementing Directive 2000/78 and, on the other hand, the death of Mr Bartsch occurred before the time limit allowed to the Member State concerned for transposing the directive had expired (paragraph 16–17).

The Court judges that Article 13 EC, which permits the Council of the European Union, within the limits of the powers conferred upon it by the EC Treaty, to take appropriate action to combat discrimination based on age, cannot, as such, bring within the scope of Community law, for the purpose of prohibiting discrimination based on age, situations which, like that in the main proceedings, do not fall within the framework of measures adopted on the basis of said article, specifically Directive 2000/78 before the expiry of the time limit provided therein for its transposition. The Court states that, contrary to the argument put forward by the Commission, the case which gave rise to the judgment of 2 October 1997, *Saldanha and MTS* (Case C-122/96 [1997] ECR I-5325), cannot support a conclusion contrary to that set out in the previous paragraph. The court recalls the said judgment concerned the application of Article 6 of the EC Treaty (now, after amendment, Article 12 EC), which confers directly, within the scope of application of the Treaty, the right to non-discrimination on grounds of nationality (see, in particular, judgment of 20 October 1993, *Phil Collins and others*, Case C-92/92 and C-326/92 [1993] ECR I-5145, paragraph 34).

The Court also recalls that in that regard it had noted that, in Paragraph 22 of *Saldana and MTS* above, that the dispute in the main proceedings

concerned the protection of interests relied on by a shareholder who was a national of one Member State against a company established in another Member State. In Paragraph 23 of the same judgment, the Court pointed out that Article 54(3)(g) of the EC Treaty (now, after amendment, Article 44(2)(g) of EC) empowered the Council and the Commission, for the purpose of giving effect to freedom of establishment, to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of Article 58(2) of the EC Treaty (now Article 48(2) of EC) with a view to making such safeguards equivalent throughout the Community and that it had concluded, in Paragraph 23, that rules which in the area of company law seek to protect the interests of shareholders come within the 'scope of application of the Treaty', within the meaning of Article 6(1) of the latter, and are accordingly subject to the prohibition of discrimination based on nationality. The applicability of Community law in the case which gave rise to the aforementioned *Saldanha and MTS* judgment did not, therefore, result solely from the fact that there was discrimination based on nationality, but depended on the finding that the national rules at issue fell within the scope of application of the Treaty (paragraph 18–23).

The Court adds that the latter aspect, moreover, distinguishes this case from the one that gave rise to the judgment of 22 November 2005, *Mangold* (Case C-144/04 [2005] ECR I-9981). Indeed, in this last case, the national rules in question were a measure for implementing a Community directive, namely Council Directive 1999/70/EC on 28 June 1999, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L175,p. 43), by means of which those rules were thus brought within the scope of Community law (see aforementioned *Mangold* judgment, paragraph 75). By contrast, the Court notes that the guidelines at issue in the main proceedings do not correspond to measures transposing Community provisions (paragraph 24).

The Court considers that, in view of the answer given to the first question, it is unnecessary to answer the second and third questions (paragraph 26).

The Court (Grand Chamber) hereby rules:

The application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the grounds of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law. No such link arises either from Article 13 EC or, in circumstances such as those at issue in the main proceedings, from Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, before expiry of the time limit allowed to the Member State concerned for its transposition.

Case C-388/07
THE INCORPORATED TRUSTEES OF THE NATIONAL COUNCIL ON AGEING (AGE CONCERN ENGLAND)/SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM
Date of judgment:
5 March 2009
Reference:
Available at http://curia.europa.eu
Content:
Directive 2000/78/EC Article 6(1) — Dismissal by reason of retirement — Age discrimination — Principle of proportionality

1. Facts and procedure

On 3 April 2006, the United Kingdom transposed Directive 2000/78 by adopting the Employment Equality (Age) Regulations 2006, SI 1031/2006 (hereafter 'Regulations'), which were made effective on 1 October 2006.

Regulation 3 of the regulations defines the circumstances in which a discriminatory practice may be considered to be unlawful, as follows:

'(1) For the purpose of the present regulations, a person ('A') discriminates against another person ('B') if —

(a) on grounds of B's age, A treats B less favourably than he treats other persons, or

(b) if A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but —

1. which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

2. which puts B at that disadvantage,

and if A cannot show the treatment or, as the case may be, the provision, criterion or practice to be a proportionate means of achieving a legitimate aim.'

By way of exception, Regulation 30 of the regulations provides:

'(1) The present article applies to employees within the meaning of Section 230(1) of the 1996 Act, a person in Crown employment, a relevant member of the House of Commons staff, and a relevant member of the House of Lords staff.

(2) No provision in parts 2 and 3 can render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the redundancy is retirement.

(3) For the purpose of the present regulation, whether or not the reason for a dismissal is retirement shall be determined in accordance with sections 98 ZA to 98 ZF of the 1996 Act.'

Regulation 7(4) supplements Regulation 30 by permitting employers, in terms of recruitment, to discriminate on grounds of age against persons at or over the age of 65. Regulation 7 provides:

'(1) It is unlawful for an employer, for an employment offered at an establishment located in Great Britain, to discriminate against a person

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;

[...]

(c) by refusing to offer, or deliberately not offering him employment.

[...]

(4) Without prejudice to Article 5(1)(a) and (c) does not apply to a person

(a) whose age is greater than the employer's fixed normal retirement age or, when the employer does not have a normal retirement age, and whose age is over 65, or

(b) who, within a period of six months from the date of his application to the employer, would reach the employer's normal retirement age or, if the employer does not have a normal retirement age, would reach the age of 65.

(5) Paragraph 4 only applies to persons to whom Regulation 30 (except for retirement) could apply if they were recruited by the employer.

[...]

(8) The normal retirement age in Article 4 is of 65 years or more, which meets the requirements of section 98 ZH of the 1996 Act.'

The National Council on Ageing (hereafter 'Age Concern England') is a charity whose aim is to promote the welfare of older people. By its action before the national court, Age Concern England challenges the legality of Articles 3(1) and (7)4) and Regulation 30 of the Regulations, on the grounds that they do not properly transpose Directive 2000/78. It essentially submits that, by providing in Regulation 30 for an exception to the principle of non-discrimination where the reason for the dismissal of an employee aged 65 or over is retirement, the Regulations infringe Article 6(1) of Directive 2000/78 as well as the principle of proportionality.

2. Questions referred to the Court

In relation to Directive 2000/78 [...]:

[As regards] national retirement ages and the scope of the Directive [:]

1) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement?

2) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement when these rules were introduced after the Directive was made?

3) In light of the answers to be given to the questions [that precede,]

- were Articles 109 and 156 of the 1996 Act, and
- are regulations 30 and 7, when read with Annexes 8 and 6 of the Regulations,

national provisions laying down retirement ages within the meaning of recital 14?

[As regards] the definition of direct age discrimination [, particularly] the justification defence[:]

4) Does Article 6(1) of the Directive allow Member States to introduce legislation providing that a difference of treatment on grounds of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim, or does [the said] Article 6(1) require Member States to define the kinds of differences of treatment which may be so justifies, by a list or other measure which is similar in form and content to [the said] Article 6(1)?

[As regards] the criteria for justification of direct and indirect discrimination [:]

5) Is there any significant practical difference, and if so what difference, between the criteria for justification set out in Article 2(2) of the Directive in relation to indirect discrimination, and the criteria for justification set out in Article 6(1) of the Directive in relation to direct age discrimination?

3. Court ruling

The Court points out that by the first three questions, which need to be examined together, the national court asks essentially whether rules such as those at issue in the main proceedings fall within the scope of Directive 2000/78 (paragraph 21).

In view of this, the Court recalls that, in its judgment of 16 October 2007, *Palacios de la Villa* (Case C-411/05 [2007] ECR 1-8531, point 44), it ruled that although according to the 14th point the Directive does not affect the national provisions laying down retirement ages, it nevertheless merely states that the Directive does not affect the competence of Member States to determine retirement age and it does not in any way preclude the application of the Directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached (paragraph 25).

The Court therefore observes that Regulation 30 has the effect of authorising the dismissal of a worker aged 65 or over if the reason is retirement, and that furthermore, Article 7(4) of said Regulations provides that an employer may discriminate in recruitment on grounds of age with respect to persons who, if they were employed, would be liable to be covered by Regulation 30, and that finally, with respect to workers under 65, it follows from Regulation 3 in conjunction with Regulation 30 that any dismissal by reason of retirement must be regarded as discriminatory unless the employer shows that it is 'a proportionate means of achieving a legitimate aim'. It follows, according to the Court, that regulations such as those at issue in the main proceedings do not establish a mandatory scheme of automatic retirement. It provides the conditions under which an employer may derogate from the principle prohibiting discrimination on grounds of age and dismiss a worker because he has reached retirement age. Consequently, such regulations may directly affect the length of the employment relationship between the parties and, more generally, the concerned worker's pursuit of his professional activity. Furthermore, a provision such as Article 7(5) of the Regulations deprives workers who have reached or are about to reach 65 and who are covered by Regulation 30 of any protection against discrimination in recruitment on grounds of age, thereby limiting the future participation of that category of workers in professional life. The Court concludes that national legislation of this kind must be regarded as establishing rules relating to 'employment and working conditions, including dismissals and pay', within the meaning of Article 3(1)(c) of Directive 2000/78 and, hence falls within the scope of this Directive. The Court specifies that this conclusion cannot be called into question by the fact that such national legislation was introduced after the directive was adopted, a circumstance highlighted by the second question from the referring court (paragraphs 26–29).

The Court notes that by its fourth question, the referring Court asks essentially whether Article 6(1) of Directive 2000/78 must be interpreted as requiring Member States to specify the kinds of differences of treatment on grounds of age which are not covered by the principle of non-discrimination. It is apparent from the file that the question seeks to determine whether Article 6(1) precludes a provision such as Article 3 of the Regulations, pursuant to which a difference in treatment on grounds of ages does not constitute discrimination if it is shown to be 'a proportionate means of achieving a legitimate aim.' Since the referring Court has limited its question to the interpretation of Article 6(1) of the Directive, it is unnecessary for the Court to give a ruling on the interpretation of other provisions, in particular Article 4 (paragraph 31).

The Court observes that Article 3 of the Regulations allows an employer to dismiss workers under the age of 65 — who do not fall within the scope of Regulation 30 — when they reach the retirement age fixed by the employer if such a measure constitutes 'a proportionate means of achieving a legitimate aim'. It concludes that such legislation must be regarded as imposing less favourable treatment on workers who have reached

the retirement age compared to all other working persons. Such legislation is therefore liable to give rise to a difference of treatment directly based on grounds of age, as referred to in Article 2(1) and (2)(a) of Directive 2000/78 (paragraph 34).

The Court notes, however, on this point, that it is clear from Article 6(1) of Directive 2000/78 that such differences of treatment on grounds of age do not constitute discrimination prohibited under Article 2 thereof 'if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary' (paragraph 35).

On this matter, having recalled the principles governing the transposition of directives under Article 249 EC, the Court judged that Article 6(1) of Directive 2000/78 could not be interpreted as imposing on Member States the obligation to draw up, in their measures of transposition, a specific list of the differences of treatment which may be justified by reference to a legitimate aim. Moreover, it is clear from the wording of this provision that the legitimate aims and the differences in treatment referred to therein are purely illustrative, as evidenced by the Community legislature's use of the word 'notably'. Consequently, the Court judges that it cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision in the national legislation as regards the aims which may be considered legitimate under that provision automatically excludes the possibility that the legislation may be justified under that provision (see, to that effect, *Palacios de la Villa*, paragraph 56). In the absence of such precision, the Court indicates, it is nevertheless important that other elements gleaned from the general context of the measure in question facilitate the identification of the objective underlying the latter for the purposes of judicial review relating to its legitimacy as well as to the appropriate and necessary nature of the means put in place to achieve this objective (*Palacios de la Villa*, paragraph 57) (paragraph 41–45).

The Court emphasises, with respect to this point, that it is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered 'legitimate' within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their characteristics of public interest, the Court explains that these legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers. The Court therefore judges that it is for the national court to ascertain whether the aims contemplated by Regulation 3 of the Regulations are legitimate within the meaning of Article 6(1) of Directive 2000/78, in that they relate to a social policy objective such as those related to employment policy, the labour market or vocational training (paragraph 46–49).

The court adds that it is also for the national court to ascertain, in the light of all the relevant evidence and taking account of the possibility of achieving by other means such legitimate social policy objective as may be identified, whether Regulation 3 of the Regulations, as a means intended to achieve that aim, is, according to the actual wording of Paragraph 6(1) of Directive 2000/78, 'appropriate and necessary'. In that respect, it must be observed that, in choosing the means capable of achieving their social policy objectives, the Member States enjoy broad discretion (see, to that effect, judgment of 22 November 2005, *Mangold* Case C-144/04 [2005] ECR 1-9981, paragraph 63). However, according to the Court, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are

not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim (see, by way of analogy, judgment of 9 February 1999, *Seymour-Smith and Perez* Case C-167/97 [1999] ECR I-2623, paragraph 75–76) (paragraphs 50–51).

The Court states that the fifth question referred for a preliminary ruling seeks to determine whether the conditions to which, under Article 6(1) of Directive 2000/78, any derogation from the principle prohibiting discrimination on grounds of age is subject, differ significantly from those laid down in Article 2(2)(b) of that directive as regards indirect discrimination (paragraph 53).

On this point, according to the Court, it must be held that the scope of Article 2(2)(b) and that of Article 6(1) of Directive 2000/78 are not identical. Indeed, the Court observes first of all that Article 2 defines the concept of discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. It draws a distinction, in Paragraph 2, between, on the one hand, discrimination directly based on those grounds and, on the other hand, 'indirect' discrimination which, although based on an apparently neutral provision, criterion or practice, would put persons on account of their religion, their belief, their disability, their age or their sexual orientation at a particular disadvantage compared with other persons. Only provisions, criteria or practices liable to constitute indirect discrimination may, by virtue of Article 2(2)(b) of Directive 2000/78, escape classification as discrimination, that being the case, under Article 2(2)(b)(i), if it is a 'provision, criterion or practice … objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. For differences in treatment constituting direct discrimination, Article 2(1) of the Directive does not provide for any derogation. For its part, the Court recalls that Article 6 of Directive 2000/78 establishes a scheme of derogation specific to differences of treatment on grounds of age, on account of the recognised specificity of age among the grounds of discrimination prohibited by the directive. recital 25 of this Directive makes clear that it is 'essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited' (paragraph 58–60).

The Court recalls that Article 6(1) of Directive 2000/78 authorises Member States to provide, notwithstanding Article 2(2) thereof, that certain differences of treatment on grounds of age do not constitute discrimination if, 'within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. However, the Court notes that Article 6(1) of Directive 2000/78 allows Member States to introduce into their national law measures providing for differences in treatment on grounds of age which fall in particular within the category of direct discrimination as defined in Article 2(2)(a) of that directive. It is indeed to that extent, in particular, that Article 6(1) must be interpreted as applying, in accordance with the first subparagraph thereof, '[n]otwithstanding Article 2(2)' of said directive. This option, in that it constitutes an exception to the principle prohibiting discrimination, is however strictly limited by the conditions laid down in Article 6(1) itself (paragraphs 61–62).

The Court then states that it is clear from the order for reference that the dispute in the main proceedings concerns the legality of national provisions governing the conditions for dismissal by reason of retirement age. It considers that, in so far as they introduce conditions governing dismissal which are less favourable with respect to workers who have reached retirement age, those provisions provide for a form of direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78. By contrast, the interpretation of

Article 2(2)(b) of Directive 2000/78, which concerns exclusively indirect discrimination, does not appear necessary for the resolution of the dispute in the main proceedings. Since the referring court is uncertain as to the existence of a difference in the application of the criteria set out in Article 2(2)(b) of Directive 2000/78 as compared with the application of the criteria in Article 6(1), the Court states that the latter provision gives Member States the option to provide, within the context of national law, that certain forms of differences in treatment on grounds of age do not constitute discrimination within the meaning of that directive if they are 'objectively and reasonably' justified. Whilst nothing that the word 'reasonably' does not appear in Article 2(2)(b) of said Directive, the Court observe that it is inconceivable that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, without the justification being reasonable. Hence, in the Court ruling, no particular significance should be attached to the fact that that word was used only in Article 6(1) of the directive. However, the Court notes that the latter provision is addressed to the Member States and imposes on them, notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued. Although there is no need in this case to give a ruling on whether that standard of proof is higher than that applicable in the context of Article 2(2)(b) of Directive 2000/78, the Court states that if a provision, a criterion or a practice does not constitute discrimination within the meaning of the directive, by reason of an objective justification within the meaning of Article 2(2)(b) thereof, it is as a consequence not necessary to have recourse to Article 6(1) of said directive, which is intended in particular to permit the justification of certain differences in treatment which, but for that provision, would constitute such discrimination (paragraph 63–66).

The Court (Third Chamber) hereby rules:

1) *National rules such as those set out in Regulations 3, 7(4) and (5) and 30 of the Employment Equality (Age) Regulations 2006 fall within the scope of Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.*

2) *Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which, like Article 3 of the Regulations at issue in the main proceedings, does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. However, the said Article 6(1) offers the option to derogate from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim.*

3) *Article 6(1) of Directive 2000/78 gives Member States the option to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are 'objectively and reasonably' justified by a legitimate aim, such as employment policy, or labour market or vocational training, and if the means of achieving that aim are appropriate and necessary. It imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification. No particular significance should be attached to the fact that the word 'reasonably' used in Article 6(1) of the directive does not appear in Paragraph 2(2)(b) thereof.*

Case C-217/08
RITA MARIANO/ISTITUTO NAZIONALE PER L'ASSICURAZIONE V GLI INFORTUNI SUL LAVORO (INAIL)
Date of judgment:
17 March 2009
Reference:
Available at http://curia.europa.eu
Content:
Articles 12 and 13 EC — Grant of survivor's benefit — Difference in treatment between surviving spouses and surviving partners — Article 104(3)(1) of the rules of procedure —Differences with Maruko ruling — Charter of fundamental rights

1. Facts and procedure

In Italy, Article 85 of the Decree of the President of the Republic No 1124/1965 (hereafter 'the Decree') provides:

'In the event of death as a result of an accident, the survivors enumerated below are entitled to an annuity of an amount which is determined by the following points, on the basis of the entire remuneration calculated according to the provisions in Articles 116 and 120:

1) 50 % to the surviving spouse until his or her death or remarriage; in the case of remarriage, an amount equal to three annual instalments will be paid;
2) 20 % to each child who is legitimate, natural, recognised or likely to be so, or adopted, until the age of 18, and 40 % if both parents are deceased, in the case of adopted children, if both adoptive parents are deceased.'

Ms Mariano, of Italian nationality, lived for more than 10 years in cohabitation with Mr E. Quartirolo, also of Italian nationality. They had a son together, Mr J.P. Quartirolo, still a minor at the time of the main proceedings. Mr E. Quartirolo died in Italy on 15 December 2004 as result of an accident at work, and on account of his decease Mrs Mariano requested from the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (National workers' compensation insurance, hereafter 'INAIL') an annuity for herself and her son, on the basis of Article 85 of the decree. INAIL granted the son an annuity equal to 20 % of Mr E. Quartirolo's stated remuneration before his death, but rejected the allocation of an annuity to Mrs Mariano. The latter objected to that rejection and asked, in the main, to benefit from an annuity equal to 50 % of her partner's wages received before his death, and in the alternative, for their underage son to benefit from an annuity equal to 40 % of said remuneration.

2. Question referred to the Court

Whether Articles 12 and 13 of the EC Treaty preclude the application of Article 85, in so far as it provides that, in the event of death as a result of an accident, only a spouse is entitled to an INAIL annuity at the rate of 50 % and a child of a non-spouse is entitled only to an annuity at the rate of 20 %.

3. Court ruling

The Court applies Article 104(3)(1) of the rules of procedure, under the terms of which, where the answer to a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, at any time, after hearing the Advocate General, give its decision by reasoned order (paragraphs 15–16).

Indeed, in regards to Article 12 EC, the Court recalls that, to appreciate the application of the Treaty within the meaning of said article, one must read the latter in combination with the provisions made by the EU citizenship Treaty (judgments of 20 September 2001, *Grzelczyk* Case C-184/99 [2001] ECR I-6193, paragraphs 30 and 31; of 2 October 2003, *Garcia Avello* Case C-148/02 [2003] ECR I-69, points 22 and 23; and of 15 March 2005, *Bidar* Case C-209/03 [2005] ECR I-2119, point 31; and of 12 July 2005, *Schempp,* Case C-203/03 [2005] ECRI-6421, point 15), that the Article 17(2) EC attaches to EU

citizens the duties and rights provided by the Treaty, including the right to apply Article 12 EC in all situations that fall within the relevant scope ratione materiae of Community law (aforementioned Schempp, judgment, paragraph 17 and jurisprudence cited), that these situations include, notably, those related to the fulfilment of fundamental rights guaranteed by the Treaty (aforementioned Schempp, judgment, paragraph 18 and aforementioned jurisprudence), and that, however, EU citizenship, provided for in Article 17 EC, does not aim to extend the scope of implementation of the Treaty to internal situations that have no attachment to Community law (judgments of 5 June 1997, *Uecker and Jacquet* C-64/96 and C-65/96 [1997] ECR I-3171, paragraph 23; *Garcia Avello*, aforementioned, paragraph 26, as well as *Schempp*, aforementioned, paragraph 20). Yet, the Court observes that this is the case in the main proceedings, which refers to a purely internal situation (paragraphs 17–23).

In regards to Article 13 EC, the Court recalls that in the aim to prohibit all age discrimination, it is not possible, for that article, such as it is, to include within the scope of Community law situations that are not comprised within the framework of measures taken on the basis of said article and, in particular, Directive 2000/78 (Judgment of 23 September 2008, *Bartsch* Case C-427/06 [2008], paragraph 18). Moreover, the Court recalls that it specified that the application of that directive could not, after considering the wording in Article 13 EC, be extended beyond discriminations based on motives enumerated exhaustively in Article 1 of that Directive, in view of implementing the principle of equality of treatment in Member States (Judgment of 17 July 2008, *Coleman* Case C-303/06 [2008], paragraph 46). However, the Court notes that a situation such as the one at cause in the main proceedings does not fall within the framework of measures taken on the basis of Article 13 EC and, in particular, Directive 2000/78, which targets specifically enumerated categories of discrimination which do not regard Mrs Mariano (paragraphs 25–27).

The Court adds that the case in the main proceedings is different from the one that gave rise to the Judgment of 1 April 2008, *Maruko* Case C-267/06 [2008], which aimed to interpret the clauses of said directive and concerned discrimination based on sexual orientation. The Court observes that the circumstances of the *Maruko* judgment are completely different to the ones in the main proceedings, in that it involved a person residing in Germany who formed, in accordance with German law, a life partnership with a person of the same gender, and who was not able to obtain after the death of said person a survival allowance equivalent to the one allocated to a surviving spouse (paragraph 28).

Finally, the Court specifies that invoking the Charter of Fundamental Rights could not provide more support to a conclusion aiming to include the case in the main proceedings within the scope of Community law. In this regard, the Court recalls that, in accordance with Article 51(2) of said Charter, the latter does not create any new competence or task for the European Community or for the Union and does not modify the competencies and tasks defined by the treaties. The Court also points out that in accordance with Article 52(2) of the same Charter, those rights recognised by the latter which are based on Community treaties or the European Union Treaty are applied within their defined conditions and limitations (paragraph 29).

The Court (Seventh Chamber) hereby rules:

The application, which the courts of Member States must ensure, of the prohibition under Community law of all discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law. In circumstances such as those at issue in the main proceedings, no such link arises from Article 12 EC and 13 EC in themselves.

Those articles do not preclude, in those circumstances, national rules under which, in the event of the death of a person as a result of an accident, a pension amounting to 50 % of the remuneration received by that person before his death is paid solely to his surviving spouse and the minor child of the deceased receives only a pension amounting to 20 % of that remuneration.

Case C-88/08
DAVID HÜTTER V TECHNISCHE UNIVERSITÄT GRAZ
Date of judgment:
18 June 2009
Reference:
Available at http://curia.europa.eu
Content:
Directive 2000/78/EC (Article 6(1) — Age discrimination — Determining the pay of contractual employees of the State — Exclusion of work experience acquired before the age of 18 — Legitimate objective of public interest — Appropriate and necessary measures

1. Facts and procedure

Mr Hütter was born in 1986. Together with a female colleague, he completed a period of apprenticeship, from 3 September 2001 to 2 March 2005, as a laboratory technician with the Technische Universität Graz (hereafter 'TUG'), a public body coming under the Federal Law of 2002 on the organisation of universities and university studies (Universitätsgesetz 2002, BGBl. I-120/2002). Mr Hütter and his colleague were then recruited by TUG, from 3 March 2005 to 2 June 2005, that is to say, for three months. As Mr Hütter's colleague was 22 months older than him, she was recruited at a higher incremental step, which translated into a difference in monthly salary of EUR 23.20. That difference stems from the fact that the period of apprenticeship completed by Mr Hütter after attaining his majority was only approximately 6.5 months, as contrasted with 28.5 months in the case of his colleague.

Mr Hütter sought payment of compensation equivalent to the difference in treatment he received due to his age and which he considers to be unjustified and in breach of Directive 2000/78.

2. Question referred to the Court

Are Articles 1, 2 and 6 of Directive [2000/78] to be understood as precluding national legislation [...] which excludes accreditable previous service completed before the person concerned reached the age of 18 years from being taken into account in the determination of the reference date for salary increments?

3. Court ruling

The Court begins by verifying whether national legislation such as that at issue in the main proceedings falls within the scope of Directive 2000/78. It observes on this matter that Article 26 of Austrian law of 1948 on the status of contractual employees (Vertragsbedienstetengesetz 1948, BGBl., 86/1948), as modified by the 2004 Law (BGBl. I, 176/2004), excludes, generally, accreditation of any work experience acquired before the age of 18 for the purposes of grading for the Austrian public service contractual staff. The Court remarks that this provision thus affects the determination of the incremental step at which such persons are graded, and it also has a consequential effect on their remuneration. Therefore, the Court judges, a regulation of this nature must be regarded as establishing rules relating to the condition for access to employment, recruitment and pay, within the meaning of Article 3(1)(a) and (c) of Directive 2000/78. In those circumstances, the Court concludes that Directive 2000/78 is applicable to a situation such as that giving rise to the dispute before the national court (paragraph 32–36).

The Court then notes that national legislation such as that at issue in the main proceedings imposes less favourable treatment for persons whose working experience has, albeit only in part, been acquired before the age of 18 as compared with those who have acquired experience of the same nature and of comparable length after attaining that age. It notes that such legislation establishes a difference in treatment between persons based on the age at which they acquired their working experience. As is demonstrated by the facts at issue in the main proceedings, the Court specifies that this criterion may even lead to a difference in treatment between

two persons who have pursued the same studies and acquired the same working experience, exclusively on the basis of their respective ages. According to the Court, such a regulation establishes a difference in treatment directly based on the criterion of age, within the meaning of Article 2(1) and (2)(a) of Directive 2000/78 (paragraph 38).

The Court observes, however, that it is apparent from Article 6(1) of Directive 2000/78 that such differences of treatment on grounds of age do not 'constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary' (paragraph 39).

The Court notes that, as regards the legitimacy of the aim pursued by the legislation at issue in the main proceedings, it is apparent from the explanations given by the national court that the Austrian legislature intended to exclude accreditation of working experience acquired before full legal capacity has been attained, at the age of 18, in order not to place persons who have pursued a general secondary education at a disadvantage as compared with persons with a vocational education. Besides this incentive to pursue secondary studies, the national court also mentions the desire of the legislature to avoid making apprenticeship more costly for the public sector and thereby promote the integration of young people who have pursued that type of training into the labour market. The Court therefore examines whether those aims may be considered legitimate within the meaning of Article 6(1) of Directive 2000/78 (paragraph 40).

In that regard, the Court recalls that the aims that may be considered 'legitimate' within the meaning of Article 6(1) of Directive 2000/78 and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age are social policy objectives, such as those related to employment policy, the labour market or vocational training (Judgment of 5 March 2009, *Age Concern England* Case C-388/07 [2009] ECR I-0000, paragraph 46). The Court judges that the aims mentioned by the national court come within that category of legitimate aims and may justify differences in treatment associated with 'the setting of special conditions on access to employment […] including […] remuneration conditions, for young people […] in order to promote their vocational integration' and 'the fixing of minimum conditions of age, working experience or seniority in service for access to employment or to certain advantages linked to employment' referred to in Article 6(1)(a) and (b), respectively, of Directive 2000/78. Consequently, the Court considers that aims of the kind mentioned by the national court must, in principle, be considered to justify 'objectively and reasonably', 'within the context of national law', as provided in the first subparagraph of Article 6(1) of Directive 2000/78, a difference in treatment on the ground of age prescribed by Member States (paragraph 41–43).

The Court adds that it is also necessary to ascertain, according to the actual wording of that provision, whether the means used to achieve that aim are 'appropriate and necessary'. Having recalled that the Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy (Judgment of 22 November 2005 *Mangold* Case C-144/04 [2005] ECR I-9981, paragraph 63), the Court points at that notwithstanding the broad discretion allowed to the Member States, the aims mentioned by the national court may, at first sight, appear contradictory. Indeed, one of these aims is to encourage pupils to pursue a general secondary education rather than vocational education. Another aim is to promote the recruitment of persons who have had a vocational education rather than of persons with a general education. Therefore, the Court points out that in the first case, it is a matter of not placing persons with a general secondary education at a disadvantage as compared with those who have had vocational training and, in the sec-

ond case, the reverse. The Court concludes that it is therefore difficult, at first sight, to accept that national legislation such as that at issue in the main proceedings can, simultaneously, be of advantage to each of those two groups at the expense of the other. Besides that lack of internal consistency, the Court also emphasises that the national legislation at issue in the main proceedings relies on the criterion of previous professional experience for the purposes of determining grading within the scale and, consequently, the pay of contractual public servants. However, the Court notes that rewarding the experience acquired that enables the worker to perform his duties better is, as a general rule, acknowledge as a legitimate aim. That is why the employer is free to reward such experience (see judgment of 3 October 2006, *Cadman* Case C-17/05 [2006], ECR I-9583, paragraphs 35 and 36). The Court nevertheless notes that national legislation such as that at issue in the main proceedings does not merely reward experience but also establishes, where experience is equal, a difference in treatment on the basis of the age at which that experience was acquired. In those circumstances, such an age-related criterion has no direct relationship with the aim, so far as the employer is concerned, of rewarding working experience (paragraphs 44–47).

The Court then points out that, as regards the aim of not treating a general secondary education less favourably than a vocational education, the criterion of the age at which previous experience was acquired applies irrespective of the type of education pursued. It observes that this criterion excludes accreditation both of experience acquired before the age of 18 by a person who has pursued a general education and of that acquired by a person with a vocational education. That criterion may therefore lead to a difference in treatment between two persons with a vocational education or between two persons with a general education based solely on the criterion of the age at which they acquired their working experience. In those circumstances, the Court judges that the criterion of the age at which the vocational experience was acquired does not appear appropriate for achieving the aim of not treating general education less favourably than vocational education. In that regard, the Court notes that a criterion based directly on the type of studies pursued without reference to the age of the persons concerned would, so far Directive 2000/78 is concerned, be better suited to achieving the aim of not treating general education less favourably (paragraph 48).

The Court then stresses that as regards the aim of promoting integration into the labour market of young people who have pursued a vocational education, that non-accreditation of experience acquired before the age of 18 applies without distinction to all contractual public servants, whatever the age at which they are recruited. Thus, the Court notes that the criterion of the age at which working experience was acquired does not single out a group of persons defined by their youth in order to give them special conditions of recruitment intended to promote their integration into the labour market. The Court adds that a rule such as that at issue in the main proceedings can be distinguished from measures such as those mentioned by the Danish Government that are designed to promote the integration of young people below the age of 18 into the labour market, in so far as those measures provide minimum conditions of pay for such young people that are below those for older workers. Since it does not take into account people's age at the time of their recruitment, a rule such as that at issue in the main proceedings is not therefore appropriate for the purposes of promoting the entry into the labour market of a category of workers defined by their youth (paragraph 49).

Consequently, the Court concludes that legislation with the characteristics at issue in the main proceedings cannot be regarded as appropriate within the meaning of Article 6(1) of Directive 2000/78 (paragraph 50).

The Court (Third Chamber) hereby rules:

Articles 1, 2 and 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general frame-

work for equal treatment in employment and occupation must be interpreted as precluding national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded.

European Commission

Compilation of case law on the equality of treatment between women and men and on non-discrimination in the European Union
Third edition

Luxembourg: Publications Office of the European Union

2010 — 622 pp. — 17.6 × 25 cm

ISBN 978-92-79-14247-5
doi:10.2767/88042

This publication presents all relevant European Court of Justice case law pertaining to equal treatment between women and men as well as non-discrimination dating back to 1971. The basic facts of each case are presented as well as the questions asked to the ECJ and its final judgment. The first section of the publication addresses equal treatment between men and women and the second part focuses on non-discrimination cases.

This publication is available in printed format in English, French and German.

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- via EU Bookshop (http://bookshop.europa.eu);
- at the European Union's representations or delegations. You can obtain their contact details on the Internet (http://ec.europa.eu) or by sending a fax to +352 2929-42758.

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

Priced subscriptions (e.g. annual series of the *Official Journal of the European Union* and reports of cases before the Court of Justice of the European Union):

- via one of the sales agents of the Publications Office of the European Union (http://publications.europa.eu/others/agents/index_en.htm).

European Commission

Compilation of case law on the equality of treatment between women and men and on non-discrimination in the European Union
Third edition

Luxembourg: Publications Office of the European Union

2010 — 622 pp. — 17.6 × 25 cm

ISBN 978-92-79-14247-5
doi:10.2767/88042

This publication presents all relevant European Court of Justice case law pertaining to equal treatment between women and men as well as non-discrimination dating back to 1971. The basic facts of each case are presented as well as the questions asked to the ECJ and its final judgment. The first section of the publication addresses equal treatment between men and women and the second part focuses on non-discrimination cases.

This publication is available in printed format in English, French and German.

KE-32-09-187-EN-C

2010 European Year for Combating Poverty and Social Exclusion

www.2010againstpoverty.eu

Are you interested in the **publications** of the Directorate-General for Employment, Social Affairs and Equal Opportunities?

If so, you can download them or take out a free subscription at
http://ec.europa.eu/social/publications

You are also welcome to sign up to receive the European Commission's free Social Europe e-newsletter at
http://ec.europa.eu/social/e-newsletter

http://ec.europa.eu/social

www.facebook.com/socialeurope

Publications Office

ISBN 978-92-79-14247-5