JUDGMENT OF THE COURT (Sixth Chamber)
7 February 1991 *

In Case C-184/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arbeitsgericht (Labour Court) Hamburg for a preliminary ruling in the proceedings pending before that court between

Helga Nimz

and

Freie und Hansestadt Hamburg,

on the interpretation 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 (OJ 1975 L 45, p. 19),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of Chamber, T. F. O'Higgins, M. Díez de Velasco, C. N. Kakouris and P. J. G. Kapteyn, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

after considering the written observations submitted on behalf of:

Mrs Helga Nimz, the plaintiff in the main proceedings, by Klaus Bertelsmann, Rechtsanwalt, Hamburg, and by Professor Heide Pfarr;

* Language of the case: German.

the Freie und Hansestadt Hamburg, the defendant in the main proceedings, by Wolfgang Scheer and Rolf Stahmer, Rechtsanwälte, Hamburg;

the German Government, by Ernst Röder, Regierungsdirektor in the Federal Ministry of Economic Affairs, acting as Agent;

the United Kingdom, initially by Susan J. Hay, and subsequently by Hussein A. Kaya, of the Treasury Solicitor's Department, acting as Agents;

the Commission of the European Communities, by Karen Banks, a member of its Legal Department, acting as Agent, assisted by Elisabeth Hoffmann, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Helga Nimz, of the Freie und Hansestadt Hamburg, represented by Mr Schnebbe, Rechtsanwalt, of the German Government, represented by Dr Joachim Karl, and of the Commission, represented by Bernhard Jansen, at the hearing on 3 October 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 13 November 1990,

gives the following

Judgment

1 By order of 13 April 1989, which was received at the Court on 29 May 1989, the Arbeitsgericht Hamburg referred two questions to the Court pursuant to Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 119 of the 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 (OJ 1975 L 45, p. 19).

2 Those questions were raised in the course of proceedings between Mrs Nimz and her employer, the Freie und Hansestadt Hamburg, relating to her classification in a higher salary grade.

3 It appears from the documents before the Court that Mrs Nimz's employment is governed by the provisions of the Collective Wage Agreement for Federal Employees (Bundesangestelltentarifvertrag, hereinafter referred to as 'the BAT'). Point 6 of Paragraph 23 a of the BAT, in the version in force until 31 December 1987, provided that, for the purposes of classification in a higher salary grade on completion of a probationary period, full account should be taken of the period of service of workers employed for at least three-quarters of normal working time, but that only one-half of such period of service should be taken into account in the case of workers whose working hours are between one-half and three-quarters of normal working time.

4 On the basis of that provision and in view of the fact that Mrs Nimz was employed for less than three-quarters of normal working time, her employer refused to classify her in the next higher salary grade, namely grade IV b, case 2, of the BAT, on her completion of six years in grade V b, case 1 a.

5 In view of the fact that employees who work for at least three-quarters of normal working time are entitled automatically, on completion of six years' service, to be reclassified in the next higher salary grade, Mrs Nimz believed that she was the victim of unlawful indirect discrimination. She therefore brought a case before the Arbeitsgericht Hamburg. That court took the view that her application raised problems relating to the interpretation of Articles 117 and 119 of the EEC Treaty and of Directive 75/117, cited above. It therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 119 of the EEC Treaty infringed, by way of "indirect discrimination against women", where a collective wage agreement for the public service provides, in connection with promotion to the next higher salary grade in the case of a skilled administrative employee at a university:

that account is to be taken of the full duration of a qualifying period during which the employee was regularly employed for at least three-quarters of the normal working hours of an equivalent full-time employee, whereas account is to be taken of half of such a period during which he was so employed for at least half of such normal working hours, where more than 90% of all part-time employees employed for less than three-quarters of the normal working hours of an equivalent full-time employee are women and just over 55% of all part-time employees employed for at least three-quarters of the normal working hours of an equivalent full-time employee are women?

(2) If the reply to Question 1 is in the affirmative:

Does Article 119 of the EEC Treaty in conjunction with Article 117 thereof or with the provisions of Council Directive 75/117/EEC, or in conjunction with both, require that an identical qualifying period should apply to part-time employees employed for less than three-quarters of the normal working hours of an equivalent full-time employee and to part-time employees employed for at least three-quarters of the normal working hours of a full-time employee,

or

is the court precluded from so deciding in view of the autonomy in bargaining enjoyed by the parties to the collective wage agreement so that it must instead leave the question to those parties?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the relevant provisions of Community law, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 In its first question, the national court seeks in substance to ascertain whether Article 119 of the Treaty precludes a collective agreement entered into within the national public service from providing that the period of service of workers employed for at least three-quarters of normal working time be taken fully into account for reclassification in a higher salary grade, but that only one-half of such period of service be taken into account in the case of employees whose working hours are between one-half and three-quarters of such normal working time, where the latter group of employees comprises an appreciably larger percentage of women than men.

8 In order to provide a satisfactory answer to that question, it is first necessary to determine whether classification in a higher salary grade falls within the scope of Article 119 of the Treaty.

9 It appears from the documents before the Court that the present case concerns a system of practically automatic salary classification based on rules relating to length of service contained in a collective agreement. Those rules govern changes in the salary due as such to an employee who continues in the same type of work.

10 It follows that in such circumstances the rules governing what is practically an automatic reclassification in a higher salary grade come in principle within the concept of pay as defined in Article 119 of the Treaty.

11 Since Article 119 is mandatory in nature, the prohibition of discrimination between male and female workers not only applies to the action of public authorities, but also extends to all collective agreements designed to regulate employment relationships and to contracts between individuals (see most recently the judgment of 27 June 1990 in Case C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591).

12 It appears from the documents before the Court that the provision of the collective agreement here at issue requires workers who are employed for between one-half and three-quarters of the working time of a full-time employee to have completed double the length of service of full-time workers in order to qualify for the next highest salary grade. A collective agreement such as that here at issue, which allows employers to maintain a distinction as regards overall pay between two categories of workers, that is to say, those who work for a minimum number of hours per week or per month and those who perform the same type of work but do not work such a minimum number of hours, does constitute discrimination against female workers *vis-à-vis* male workers, if in fact a much lower percentage of men work on a part-time basis than women. Such an agreement must therefore in principle be regarded as contrary to Article 119 of the Treaty. The outcome would be different only if the difference in treatment between the two categories of workers could be shown to be based on objectively justified factors unrelated to any discrimination on grounds of sex (see the judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus* v *Karin Weber von Hartz* [1986] ECR 1607).

13 In this regard, the City of Hamburg claimed during the procedure that full-time employees or those who work for three-quarters of normal working time acquire more quickly than others the abilities and skills relating to their particular job. The German Government also relied on their more extensive experience.

14 It should, however, be stated that such considerations, in so far as they are no more than generalizations about certain categories of workers, do not make it possible to identify criteria which are both objective and unrelated to any discrimination on grounds of sex (see the judgment of 13 July 1989 in Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2743). 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 a particular 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. However, it is a matter for the national court, which alone is competent to evaluate the facts, to determine in the light of all the circumstances whether and to what extent a provision in a collective agreement such as that here at issue is based on objectively justified factors unrelated to any discrimination on grounds of sex.

15 The answer to the first question referred by the national court must therefore be that Article 119 of the EEC Treaty has to be interpreted as precluding a collective agreement, entered into within the national public service, from providing for the period of service of employees working for at least three-quarters of normal working time to be taken fully into account for reclassification in a higher salary grade, where only one-half of such period of service is taken into account in the case of employees whose working hours are between one-half and three-quarters of such normal working time and 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 whose objectivity depends 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 completed.

The second question

16 The second question concerns the consequences which might flow from the finding by the national court that a provision in a collective agreement is at variance with Article 119 of the EEC Treaty, having regard in particular to the autonomy in bargaining enjoyed by the parties to such an agreement.

17 As the Court held in its judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, Article 119 of the EEC Treaty is sufficiently precise for it to be relied on by an individual before a national court for the purpose of having that court set aside any provision of national law, including if necessary a provision derived from a collective agreement which is at variance with that article.

18 It follows from the judgment of 27 June 1990 in Case C-33/89, cited above, that, where there is indirect discrimination in a clause in a collective wage agreement, the class of persons placed at a disadvantage by reason of that discrimination must be treated in the same way and made subject to the same scheme as other workers, such scheme remaining, for want of correct application of Article 119 of the EEC Treaty in national law, the only valid system of reference.

19 It should also be pointed out that the Court has consistently held (see in particular the judgment of 9 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629) that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary by refusing of its own motion to apply any conflicting provision of national legislation, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

20 It is equally necessary to apply such considerations to the case where the provision at variance with Community law is derived from a collective labour agreement. It would be incompatible with the very nature of Community law if the court having jurisdiction to apply that law were to be precluded at the time of such application from being able to take all necessary steps to set aside the provisions of a collective agreement which might constitute an obstacle to the full effectiveness of Community rules.

21 The answer to the second question must therefore be that, where there is indirect discrimination in a provision of a collective agreement, the national court is required to set aside that provision, without requesting or awaiting its prior removal by collective bargaining or any other procedure, and to apply to members of the group 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, remain the only valid system of reference.

Costs

22 The costs incurred by the German Government, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Arbeitsgericht Hamburg, by order of 13 April 1989, hereby rules:

(1) Article 119 of the EEC Treaty must be interpreted as precluding a collective agreement, entered into within the national public service, from providing for the period of service of employees working 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 period of service is taken into account in the case of employees whose working hours are between one-half and three-quarters of those normal working hours and 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 whose objectivity depends 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 completed.

(2) Where there is indirect discrimination in a provision of a collective agreement, the national court is required to set aside that provision, without requesting or awaiting its prior removal by collective bargaining or any other procedure, and to apply to members of the group 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, remain the only valid system of reference.

Mancini O'Higgins

Díez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 7 February 1991.

J.-G. Giraud
Registrar

G. F. Mancini
President of the Sixth Chamber