JUDGMENT OF THE COURT (Sixth Chamber)
13 July 1989 [1]

In Case 171/88

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

Ingrid Rinner-Kühn

and

FWW Spezial-Gebäudereinigung GmbH & Co. KG

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 (Official Journal 1975, L 45, p. 19),

THE COURT (Sixth Chamber)

composed of: T. Koopmans, President of Chamber, T. F. O'Higgins, G. F. Mancini, C. N. Kakouris and F. A. Schockweiler, Judges,

Advocate General: M. Darmon
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

Mrs Ingrid Rinner-Kühn, the plaintiff in the main proceedings, by U. Heiser-Jesky, Legal Clerk to the German Federation of Trade Unions,

1 — Language of the case: German.

the Danish Government, in the only written procedure, by K. Wermuth, Legal Adviser, acting as Agent,

the Commission of the European Communities, by its Legal Adviser, J. Grunwald, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 2 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 19 April 1989,

gives the following

Judgment

1 By an order dated 5 May 1988, which was received at the Court on 22 June 1988, the Arbeitsgericht (Labour Court) Oldenburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 119 of that 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 (Official Journal 1975, L 45, p. 19).

2 That question was raised in the course of proceedings between Mrs Rinner-Kühn and her employer, FWW Spezial-Gebäudereinigung GmbH, an office-cleaning undertaking, on the ground that it had refused to continue to pay wages to Mrs Rinner-Kühn during her absence for reasons of illness.

3 The German Law on the continued payment of wages (Lohnfortzahlungsgesetz) of 27 July 1969 provides that an employer must continue to pay wages for a period of up to six weeks to any employee who, after the commencement of his employment and through no fault of his own, is incapable of working. However, employees

whose contract of employment provides for a normal period of work of not more than 10 hours a week or 45 hours a month are excluded from the benefit of that provision.

4 On the basis of that provision 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.

5 Mrs Rinner-Kühn appealed against that decision to the Arbeitsgericht (Labour Court) Oldenburg seeking the continued payment of her wages during the absence caused by her illness. The national court considered that her application raised issues concerning the interpretation of Article 119 of the EEC Treaty and of Directive 75/117. It therefore stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'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?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, 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.

7 As the national court correctly observes, the continued payment of wages to an employee in the event of illness falls within the concept of 'pay' within the meaning of Article 119 of the Treaty.

8 It is apparent from the question submitted to the Court and from the grounds of the order making the reference that the national court essentially wishes to ascertain whether Article 119 of the Treaty and Council Directive 75/117 preclude national legislation which permits employers to exclude from the continued payment of wages in the event of illness employees whose normal period of work does not exceed 10 hours a week or 45 hours a month if that category of workers consists predominantly of women.

9 ld be borne in mind that the first paragraph of Article 119 required the Member States, during the first stage, to ensure the application of the principle that men and women should receive equal pay for equal work. It follows that Article 119 imposed on Member States an obligation to achieve a specific result which had to be complied with within a specified period of time (see the judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455).

10 It appears from the documents before the Court that under the German legislative provision in question only those employees whose contract of employment provides for a normal period of work of more than 10 hours a week or 45 hours a month are entitled to the continued payment of wages by their employer in the event of illness. Since such payment falls within the concept of 'pay' within the meaning of the second paragraph of Article 119, the German legislative provision in question accordingly allows employers to maintain a distinction relating to total pay between two categories of employees: those who work the minimum number of weekly or monthly hours and those who, although performing the same type of work, do not work the minimum number of hours.

11 It is also clear from the order requesting a preliminary ruling that in percentage terms considerably less women than men work 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.

12 In such a situation, it must be concluded that a provision such as that in question results in discrimination against female workers in relation to male workers and must, 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 of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus GmbH* v *Karin Weber von Hartz* [1986] ECR 1607).

13 In the course of the procedure, the German Government stated, in response to a question put by the Court, 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.

14 It should, however, be stated that those considerations, in so far as they are only generalizations about certain categories of workers, do not enable criteria which are both objective and unrelated to any discrimination on grounds of sex to be identified. However, if the Member State can show that the means chosen meet a necessary aim of its social policy and that they are suitable and requisite for attaining that aim, the mere fact that the provision affects a much greater number of female workers than male workers cannot be regarded as constituting an infringement of Article 119.

15 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 greater number of women than men, is justified by reasons which are objective and unrelated to any discrimination on grounds of sex.

16 The reply to the question referred by the national court must therefore be 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.

Costs

17 The costs incurred by the Danish Government 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 proceedings 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 question referred to it by the Arbeitsgericht Oldenburg, by order of 5 May 1988, hereby rules:

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.

Koopmans O'Higgins

Mancini Kakouris Schockweiler

Delivered in open court in Luxembourg on 13 July 1989.

J.-G. Giraud
Registrar

T. Koopmans
President of the Sixth Chamber