JUDGMENT OF THE COURT
30 November 1993 *

In Case C-189/91,

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

Petra Kirsammer-Hack

and

Nurhan Sidal

on the interpretation of Article 92(1) of the EEC Treaty and 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 (OJ 1976 L 39, p. 40),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C. N. Kakouris, M. Zuleeg and J. L. Murray, Judges,

Advocate General: M. Darmon,
Registrar: L. Hewlett, Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— the German Government, by Ernst Röder, Ministerialrat in the Ministry of Economic Affairs, and Joachim Karl, Regierungsdirektor in that ministry, acting as Agents,

— the Commission of the European Communities, by Michel Nolin, of its Legal Service, assisted by Claus-Michael Happe, a national civil servant on secondment to the Commission, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Petra Kirsammer-Hack, represented by Wolfgang Däubler, Professor at the University of Bremen, and of the German Government, represented by Claus-Dieter Quassowski, Regierungsdirektor in the Ministry of Economic Affairs, and of the Commission at the hearing on 22 September 1992,

after hearing the Opinion of the Advocate General at the sitting on 25 November 1992,

gives the following

Judgment

1 By an order of 3 May 1991, which was received at the Court on 25 July 1991, the Arbeitsgericht (Labour Court), Reutlingen, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 92 of that Treaty and 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 (OJ 1976 L 39, p. 40, hereinafter 'the Directive').

2 Those questions were raised in the course of proceedings between Mrs Kirsammer-Hack and her employer, Mrs Sidal.

3 It appears from the case-file that 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 ten hours per week and four part-time employees working fewer than ten hours per week or 45 hours per month.

4 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.

5 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 Kündigungschutzgesetz (Law of 25 August 1969 on protection against unfair dismissal, BGBl I, p. 1317, 'the KSchG').

6 Pursuant to Paragraphs 9 and ten 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.

7 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.

8 According to that provision, 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 ten hours per week or 45 hours per month.'

9 The national court shares the view of the employer but wonders 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.

10 The Arbeitsgericht therefore referred the following two questions to the Court for a preliminary ruling:

'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 Kündigungsschutzgesetz (Law on unfair dismissal, as amended by the first Arbeitsrechtsbereinigungsgesetz (Law on the revision of labour law) of 25 August 1969, BGBl I, p. 1317) 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 Beschäftigungsförderungsgesetz (Law on the promotion of employment) of 26 April 1985, BGBl I, p. 710 et seq.) constitute indirect discrimination against women, contrary to Articles 5 and 2 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 (76/207/EEC)?'

11 Reference is made to the Report for the Hearing for a fuller account of the facts and legal background of the case in the main proceedings, 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 advantage granted to small businesses

12 By its first question, the national court seeks to ascertain whether the exclusion of small businesses from the national system of protection of workers against unfair dismissal constitutes aid within the meaning of Article 92(1) of the Treaty.

13 On that question the German Government maintains *in limine* that the implementation of Community rules on State aid is a matter for the Commission, subject to review by the Court, and that, consequently, Mrs Kirsammer-Hack could not rely on the incompatibility of the German legislation with those rules before the national court.

14 On that point, it is sufficient to observe that, according to the case-law of the Court, the Commission's powers in that regard do not preclude individuals from bringing proceedings before a national court in order to determine whether a State measure which has not been notified should have been notified pursuant to Article 93(3) of the EEC Treaty, since that court may refer to the Court of Justice a question on the interpretation of the concept of aid (see Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 12).

15 The national court points out that small businesses, since they are not obliged to pay compensation in the event of socially unjustified dismissals or to bear the legal expenses incurred in proceedings concerning the dismissal of workers, enjoy a significant competitive advantage over other undertakings.

16 In that respect, it should be noted that only advantages granted directly or indirectly through State resources are to be considered as State aid within the meaning of Article 92(1). The distinction made in that provision between aid granted 'by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (*Sloman Neptun*, paragraph 19).

17 In the present case, the exclusion of a category of businesses from the protection system in question does not entail any direct or indirect transfer of State resources to those businesses but derives solely from the legislature's intention to provide a specific legislative framework for working relationships between employers and employees in small businesses and to avoid imposing on those businesses financial constraints which might hinder their development.

18 It follows that a measure such as the one in question in the main proceedings does not constitute a means of granting directly or indirectly an advantage through State resources.

19 Accordingly, the reply to the first question should be that the 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 Treaty.

The question of indirect discrimination against women

20 By its second question the national court seeks to ascertain whether the principle of equal treatment for men and women in so far as concerns conditions for

dismissal as it emerges from Articles 2(1) and 5(1) of the Directive precludes the application of a national provision which, like the third sentence of Paragraph 23(1) of the KSchG, does not take into account employees whose working hours are not more than ten hours per week or 45 hours per month (hereinafter 'part-time employees') when determining whether or not an undertaking must apply the system of protection against unfair dismissal.

21 The national court states that the effect of the abovementioned provision is to deprive employees on part-time working hours from benefitting from the national system of protection against unfair dismissal. Since nearly 90% of all part-time employees in the Federal Republic of Germany are women, such a rule constitutes indirect discrimination which is contrary to the Directive.

22 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 in Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 12).

23 In the present case, the second sentence of Paragraph 23(1) of the KSchG restricts the application of the system of protection against unfair dismissal to businesses which employ more than five workers, while the third sentence states that part-time employees are not taken into account in determining the number of persons employed for the purpose of the second sentence.

24 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.

25 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.

26 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.

27 Exclusion from the national system of protection against unfair dismissal does not therefore affect specifically part-time employees but all employees of undertakings which are not subject to that system, irrespective of whether they work on a full-time, half-time or part-time basis.

28 Thus, workers such as the plaintiff in the main proceedings do not benefit from protection against unfair dismissal although they do not work part-time. Conversely, part-time employees benefit from the system of protection when they are employed in undertakings subject to that system.

29 The proportion of women among part-time employees in Germany to which the national court refers 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.

30 There would be such discrimination only if it were established that small businesses employ a considerably higher percentage of women than men.

31 In the present case, the information provided to the Court does not establish such a disproportion.

32 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.

33 As the German Government and the Commission rightly state, that is true of legislation which, like the provision in question, forms part of a series of measures intended to alleviate the constraints burdening small businesses which play an essential role in economic development and the creation of employment in the Community.

34 In that respect, it should be noted that, by providing that directives adopted in the fields of health and safety of workers are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings, Article 118a of the EEC Treaty, which was introduced by the Single European Act into the chapter concerning social provisions, indicates that such undertakings may be the subject of special economic measures.

35 The reply to the national court's second question should therefore be that 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 the Directive does not preclude the application of a national provision which, like the third sentence of Paragraph 23(1) of the KSchG, does not take into account employees whose working hours are not more than ten 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.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arbeitsgericht Reutlingen by order of 3 May 1991, 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 Kündigungsschutzgesetz (Law of 25 August 1969 on protection against unfair dismissal), does not take into account employees whose working hours are not more than ten 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.

Due Mancini Moitinho de Almeida

Diez de Velasco Kakouris Zuleeg Murray

Delivered in open court in Luxembourg on 30 November 1993.

J.-G. Giraud O. Due

Registrar President