JUDGMENT OF THE COURT (Sixth Chamber)
20 March 2003 *

In Case C-187/00,

REFERENCE to the Court under Article 234 EC by the Arbeitsgericht Hamburg (Germany) for a preliminary ruling in the proceedings pending before that court between

Helga Kutz-Bauer

and

Freie und Hansestadt Hamburg,

on the interpretation of 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 (OJ 1976 L 39, p. 40),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann, V. Skouris, F. Macken (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Ms Kutz-Bauer, by K. Bertelsmann, Rechtsanwalt,

— Freie und Hansestadt Hamburg, by T. Scholle, Rechtsanwalt,

— the German Government, by W.-D. Plessing and T. Jürgensen, acting as Agents,

— the Commission of the European Communities, by J. Sack, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Kutz-Bauer, of Freie und Hansestadt Hamburg, of the German Government and of the Commission at the hearing on 23 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 5 February 2002,

gives the following

Judgment

1 By decision of 3 May 2000 and a further decision of 29 June 2000, received at the Court on 19 May and 4 July 2000 respectively, the Arbeitsgericht Hamburg (Labour Court, Hamburg) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of 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 (OJ 1976 L 39, p. 40).

2 Those questions were raised in proceedings between Ms Kutz-Bauer and Freie und Hansestadt Hamburg ('the City of Hamburg') concerning Ms Kutz-Bauer's exclusion from a scheme of part-time work for older employees under a collective agreement applicable to the public service.

Community legislation

Directive 76/207

3 Article 1(1) of Directive 76/207 states that the purpose of that directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in Article 1(2), social security.

4 Article 2(1) of Directive 76/207 provides:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.'

5 Article 5 of Directive 76/207 provides:

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.'

Directive 79/7/EEC

6 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 (OJ 1979 L 6, p. 24) provides:

'This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).'

7 Article 4(1) of Directive 79/7 provides that the principle of equal treatment means that there is to be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status.

8 Article 7(1)(a) of Directive 79/7 provides that that directive is to apply 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.

German legislation

9 In Germany, the retirement pensions scheme and the scheme of part-time work for older employees are regulated at federal and regional level. They are also covered by collective agreements.

German provisions on retirement

10 The conditions for the grant of a statutory old-age pension at the full rate are defined in Book VI of the Sozialgesetzbuch (German Social Code, 'the SGB VI').

11 Paragraph 35 of the SGB VI, on the ordinary old-age pension, provides:

'Insured persons shall be entitled to a retirement pension where

1. they reach the age of 65 years; and

2. they have completed the normal qualifying period.'

12 Paragraph 38 of the SGB VI, in the version in force until 31 December 1999, governed the old-age pension in the case of unemployment or following part-time work for older employees. It provided that insured persons were entitled to an old-age pension where, in particular, they had reached the age of 60, been employed under a scheme of part-time work for older employees for 24 calendar months and completed a qualifying period of 15 years.

13 Paragraph 39 of the SGB VI, in the version in force until 31 December 1999, provided that female insured persons were to be entitled to an old-age pension where, in particular, they had reached the age of 60.

14 Under the Hamburgisches Ruhegeldgesetz (Land of Hamburg Law on retirement pensions), male workers must work up to the age of 65 in order to be eligible for an occupational retirement pension under the statutory scheme, whereas female workers are entitled to such pension at the full rate from the age of 60.

15 The Hamburgisches Ruhegeldgesetz provides that the fact that a woman receives an old-age pension at the full rate as soon as she is entitled to do so does not entail a reduction in or suspension of her supplementary pension.

German provisions on part-time work for older employees

16 The scheme of part-time work for older employees is regulated by the Altersteilzeitgesetz (Law on part-time work for older employees) of 23 July 1996 ('the AltTZG') (BGBl. 1996 I, p. 1078).

17 It is apparent from Paragraph 1(1) of the AltTZG that the purpose of that law is to make it easier for workers who have reached a certain age to make a gradual transition from active life to retirement.

18 Under Paragraph 1(2) of the AltTZG, the Bundesanstalt für Arbeit (Federal Labour Authority) provides financial support, by means of the benefits provided for in that law, for part-time work for workers who, by no later than 31 July 2004, reduce their working hours once they have reached the age of 55 and thus make it possible to recruit workers who would otherwise be unemployed.

19 In accordance with the provisions of the AltTZG, part-time work for older employees may take the form of either a uniform reduction in working hours throughout the relevant period or 'block' working, where a period of full-time work is followed by a period during which the worker retains his status as an employee even though he ceases work.

20 Under Paragraph 2(1)(1) and (2) of the AltTZG, benefits are granted for workers who have reached the age of 55 and who have concluded an agreement with their employer covering at least the period up to the time when they are entitled to a retirement pension and under which their working hours are reduced.

21 Under Paragraph 3(1)(2) and (3) of the AltTZG, an employer is required to recruit an unemployed person to work either alongside the worker placed on the scheme of part-time work for older employees or, if the worker has taken advantage of the 'block' part-time working scheme, after the worker has retired.

22 Incentives to take up the scheme of part-time work for older employees are provided, first, in the form of enhanced remuneration, equal to at least 70% of the net full-time salary, pursuant to Paragraph 3(1)(1)(a) of the AltTZG.

23 Furthermore, under Paragraph 4 of that law, the Bundesanstalt für Arbeit reimburses the expenditure which the employer has incurred in paying the enhanced remuneration for part-time work and the increased retirement insurance contributions.

24 However, these costs are not reimbursed if the employer does not fulfil the conditions relating to the recruitment of an unemployed person set out at Paragraph 3(1)(2) and (3) of the AltTZG. Furthermore, under Paragraph 8(2) of that law, an employer is not relieved of his obligation to pay the worker the enhanced remuneration provided for at Paragraph 3(1)(1)(a) of the AltTZG where the employer no longer satisfies the conditions for reimbursement by the Bundesanstalt für Arbeit.

25 It follows from Paragraph 5(1) of the AltTZG that the financial support provided by the Bundesanstalt für Arbeit ceases, *inter alia*, where the worker reaches the age of 65 or at the age at which he becomes entitled to an old-age pension at the full rate.

26 The Tarifvertrag zur Regelung der Altersteilzeit (collective agreement on part-time work for older employees) of 5 May 1998 ('the TV ATZ') was the collective agreement on part-time work for older employees applicable to the public service at the material time. It was concluded in consideration of the opportunities provided by the AltTZG.

27 The preamble to the TV ATZ is worded as follows:

'The parties to the agreement intend, by means of that agreement, to allow employees who have reached a certain age to make a smooth transition from active life to retirement and thus to create opportunities for the recruitment of trainee employees (apprentices) and the unemployed.'

28 Paragraph 2(1) and (2) of the TV ATZ provides:

'1. The employer may agree with full-time employees who have reached the age of 55 and completed a period of employment... of five years and who during the last five years have worked the normal weekly working hours on at least 1 080 calendar days to change the employment relationship to a relationship of part-time work for older employees on the basis of [the AltTZG]...

2. Employees who have reached the age of 60 and who satisfy the other conditions laid down in subparagraph 1 shall be entitled to conclude a contract on part-time work for older employees...'

29 Under Paragraphs 4(1) and 5(1) and (2) of the TV ATZ, the remuneration payable is equal to the remuneration for part-time work plus 20% of that amount. In any event, a person taking advantage of the scheme of part-time work for older employees is guaranteed to receive remuneration equal to 83% of the net remuneration which would be payable if he worked full time.

30 Paragraph 9(1) and (2) of the TV ATZ provides:

'1. The employment relationship shall terminate on the date stated in the agreement on part-time work for older employees.

2. Without prejudice to the other conditions of termination provided for in collective agreements..., the employment relationship shall terminate:

(a) at the end of the calendar month preceding that from which the employee can claim a retirement pension on the ground of his age or, where he is exempt from obligatory membership of the general retirement scheme, a comparable payment provided by a retirement or insurance institution or by an insurance company; this rule shall not apply to pensions which can be claimed before the insured person reaches the relevant retirement age; or

(b) at the beginning of the calendar month from which the employee receives a retirement pension, a miner's compensation benefit, a similar benefit governed by public law or, where he is not subject to compulsory insurance under the statutory social security scheme, a comparable benefit provided by a retirement or insurance institution or by an insurance company.'

Main proceedings and questions referred to the Court

31 Ms Kutz-Bauer was born on 21 August 1939 and is employed by the City of Hamburg as director of the Landeszentrale für politische Bildung (Public Office for Political Education).

32 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. 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.

33 The City of Hamburg considered her request and rejected it by letter of 21 December 1998. Ms Kutz-Bauer would have fulfilled the personal criteria granting entitlement to part-time work for older employees in accordance with Paragraph 2 of the TV ATZ; however, under Paragraph 9(2) of the TV ATZ, an agreement on part-time work for older employees between the parties to the main proceedings would have had the consequence of immediately terminating their employment relationship.

34 Ms Kutz-Bauer submitted a second request, which was rejected by letter from the City of Hamburg dated 6 July 1999, on the ground that although she would have been entitled to an agreement on part-time work for older employees once she had reached the age of 60, the employment relationship would automatically cease on the same date pursuant to Paragraph 9 of the TV ATZ, since, on the basis of the Hamburgisches Ruhegeldgesetz, her supplementary pension would not be reduced.

35 Before the national court, Ms Kutz-Bauer claimed that the refusal to recognise her entitlement to part-time work for older employees constituted indirect discrimination on grounds of sex, contrary to Directive 76/207.

36 Taking the view that the outcome of the dispute before it requires the interpretation of the provisions of Directive 76/207, the Arbeitsgericht Hamburg decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'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?'

First question

37 By its first question, the national court is asking whether Articles 2(1) and 5(1) of Directive 76/207 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 the 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 at 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.

Observations submitted to the Court

38 Both Ms Kutz-Bauer and the Commission maintain that the unequal treatment of male and female workers introduced by the TV ATZ into the scheme of part-time work for older employees falls within the scope of Directive 76/207, in particular Articles 2(1) and 5(1) of that directive, in so far as the scheme affects the working conditions referred to in Article 5(1).

39 The Commission submits that an agreement defining a scheme of part-time work for older employees does not form part of the statutory schemes which provide protection against the risk of old age and to which Directive 79/7 applies pursuant to Article 3. It therefore maintains that there is no need to consider whether the provisions of Directive 79/7 might restrict the scope of Article 2(1) of Directive 76/207.

40 The Commission further submits that Article 7(1) of Directive 79/7 can naturally apply only to social security benefits and that the arguments put forward by the City of Hamburg cannot prevent the application of Articles 2 and 5 of Directive 76/207. The first question must therefore be answered in the affirmative.

41 On the other hand, the German Government contends that, regard being had to the purpose and structure of the scheme of part-time work for older employees at issue in the main proceedings, the measure applicable to that scheme is Directive 79/7. The scheme is intended, first, to make it easier for older workers to make the gradual transition from work to retirement and, second, to provide young workers with recruitment opportunities by making posts available.

42 Furthermore, in the German Government's submission, the conditions laid down by the Court in Case C-328/91 *Thomas and Others* [1993] ECR I-1247 for the application of the derogation provided for in Article 7(1) of Directive 79/7 are fulfilled in the present case. The German rules on part-time work for older employees tend to ensure coherence between the scheme of financial support for such work and the retirement scheme. In order to avoid any overlap between the unemployment insurance and retirement insurance schemes, it is necessary to ensure that employees who are already entitled to a retirement pension at the full rate do not also benefit from financial support provided by the Bundesanstalt für Arbeit.

Reply of the Court

43 In order to provide an answer of use to the national court, it is necessary to ascertain at the outset whether the scheme of part-time work for older employees at issue in the main proceedings is governed by Directive 76/207 or whether, as the German Government submits, it is governed by Directive 79/7.

44 In that regard, the scheme of part-time work for older employees is intended to reduce the normal working time, either by reducing the working hours at a uniform rate throughout the entire period concerned, or by allowing the person concerned to cease work at an earlier date. In each case the scheme affects the exercise of the occupation of the workers concerned by adjusting their working time.

45 The Court therefore finds that the scheme at issue in the main proceedings established rules relating to working conditions for the purposes of Article 5(1) of Directive 76/207.

46 Contrary to the German Government's contention, that conclusion cannot be disturbed by the fact that the collective agreement at issue in the main proceedings was intended to allow employees who have reached a certain age to make a smooth transition from work to retirement and thus to create opportunities for the recruitment of trainee workers and the unemployed. The fact that the agreement pursued those two aims does not suffice to bring the scheme at issue in the main proceedings within the scope of Directive 79/7.

47 The first question therefore correctly refers to the interpretation of Articles 2(1) and 5(1) of Directive 76/207.

48 It is clear from the first question that the class of persons entitled to receive a full retirement pension at the age of 60 under the statutory old-age insurance scheme consists almost exclusively of women while the class of persons eligible for such a pension only from the age of 65 consists almost exclusively of men.

49 It follows from the documents in the file that while both female and male workers may benefit from the scheme of part-time working from the age of 55 with the employer's consent, the great majority of workers entitled to benefit from the scheme for a period of five years from the age of 60 are male.

50 In those circumstances, provisions of the kind at issue in the main proceedings result in discrimination against female workers by comparison with male workers and must in principle be treated as contrary to Articles 2(1) and 5(1) of Directive 76/207. 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, in that regard, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 12; Case C-457/93 *Lewark* [1996] ECR I-243, paragraph 31; Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, paragraph 34; and Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29).

51 It is for the national court, which alone has jurisdiction to assess the facts and to interpret the national legislation, to determine whether that is so. It is necessary in

that regard to ascertain, in the light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, whether such aims appear to be unrelated to any discrimination based on sex and whether those provisions, as a means to the achievement of certain aims, are capable of advancing those aims (see, in that regard, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 72).

52 However, although in preliminary ruling proceedings it is for the national court to establish whether such objective reasons exist in the particular case before it, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see *Hill and Stapleton*, cited above, paragraph 36, and *Seymour-Smith and Perez*, cited above, paragraph 68).

53 In that regard, the Court observes that, as pointed out at paragraphs 9 and 26 of this judgment, part-time work for older employees is governed in Germany at federal and regional level and also by collective agreements and that the TV ATZ was concluded in consideration of the opportunities offered by the AltTZG.

54 The German Government submits that one of the aims pursued by a scheme such as the one at issue in the main proceedings is to combat unemployment by offering the maximum incentives for workers who are not yet eligible to retire to do so and thus making posts available. To allow a worker who has already acquired entitlement to a retirement pension at the full rate to benefit from the scheme of part-time work for older employees implies, first, that a post which the scheme intends to allocate to an unemployed person would continue to be occupied and, second, that the social security scheme would bear the additional costs, which would divert certain resources from other objectives.

55 As regards the argument which the German Government derives from the encouragement of recruitment, it is for the Member States to choose the measures capable of achieving the aims which they pursue in employment matters. The Court has recognised that the Member States have a broad margin of discretion in exercising that power (see *Seymour-Smith and Perez*, paragraph 74).

56 Furthermore, as the Court stated at paragraph 71 of its judgment in *Seymour-Smith and Perez*, it cannot be disputed that the encouragement of recruitment constitutes a legitimate aim of social policy.

57 However, the fact remains that the broad margin of discretion which the Member States enjoy in matters of social policy cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal treatment for men and women (see *Seymour-Smith and Perez*, paragraph 75).

58 It follows from the rule referred to at paragraph 51 of this judgment that mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed provisions is unrelated to any discrimination based on sex or to provide evidence on the basis of which it could reasonably be considered that the means chosen are or could be suitable for achieving that aim.

59 As regards the German Government's argument concerning the additional burden associated with allowing female workers to take advantage of the scheme at issue in the main proceedings even where they have acquired entitlement to a

retirement pension at the full rate, the Court observes 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 which 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 (Case C-343/92 *De Weerd and Others* [1994] ECR I-571, paragraph 35).

60 Moreover, 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 equal treatment between men and women might vary in time and place according to the state of the public finances of Member States (*De Weerd and Others*, cited above, paragraph 36, and *Jørgensen*, cited above, paragraph 39).

61 Nor can the City of Hamburg, whether as a public authority or as an employer, justify discrimination arising from a scheme of part-time work for older employees solely because avoidance of such discrimination would involve increased costs (see, to that effect, *Hill and Stapleton*, paragraph 40).

62 It is therefore for the City of Hamburg to prove to the national court that the difference in treatment arising from the scheme of part-time work for older employees at issue in the main proceedings is justified by objective reasons unrelated to any discrimination on grounds of sex. Should it succeed in doing so, the mere fact that the provisions of that scheme which preclude access by workers who have acquired entitlement to a retirement pension at the full rate affect a considerably higher percentage of female workers than of male workers could not be regarded as infringing Articles 2(1) and 5(1) of Directive 76/207.

63 In the light of the foregoing considerations, the answer to the first question must be that Articles 2(1) and 5(1) of Directive 76/207 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 at 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.

Second question

64 By its second question, the national court is essentially asking whether, in the case of a breach of Directive 76/207 by legislative provisions or by provisions of a collective agreement which introduce discrimination contrary to that directive, the national courts are required to set aside that discrimination by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the prior setting aside of those provisions by the legislature, by collective negotiation or otherwise.

Observations submitted to the Court

65 Ms Kutz-Bauer submits that a national court must apply the legislative provisions and the provisions arising under corresponding collective agreements by setting aside the restrictions contrary to Community law and unfavourable to female workers.

66 The Commission maintains that, under Article 5(2) of Directive 76/207, it is for the national legislature to draw the legal inferences from a breach of the principle of equal treatment with regard to working conditions and, in particular, to provide effective measures in order to enable any person affected to rely on his rights in proceedings before a court. In the Commission's submission, this rule may mean that, in certain circumstances, it is necessary to confer retroactive effect on the abolition or amendment of discriminatory rules and even, should that not prove possible, to provide suitable compensation for workers who have suffered discrimination. Should the national legislature fail to take the appropriate steps, workers who have suffered discrimination could rely, as against the State in its capacity as employer, on Article 5 of Directive 76/207 in order to preclude the application of any national provision contrary to that article.

67 As regards the answer to the second question, the City of Hamburg merely refers to the judgment in Case C-184/89 *Nimz* [1991] ECR I-297, which also concerned the consequences of a finding by a national court that a collective agreement was incompatible with Community law, namely, in that case, Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

Reply of the Court

68 The Court recalls, first of all, that under Article 5(2)(a) and (b) of Directive 76/207, Member States are to take the measures necessary to ensure that:

'(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements,... shall be, or may be declared, null and void or may be amended'.

69 Furthermore, 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, those provisions may be relied upon by individuals as against the Member State before the national court (see, in particular, Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 16).

70 With regard to Article 5(1) of Directive 76/207, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, the Court has already held it to be sufficiently precise to be relied upon by an individual as against the State and applied by a national court in order to prevent the application of any national provision which is inconsistent with Article 5(1) (see Case 152/84 *Marshall* [1986] ECR 723, paragraphs 52 and 56 ('*Marshall I*'), and *Seymour-Smith and Perez*, paragraph 40).

71 Furthermore, a person such as Ms Kutz-Bauer would be able to rely on Article 5(1) of Directive 76/207 as against a public authority such as the City of Hamburg (see, in that regard, *Marshall I*, paragraph 49, and Case C-188/89 *Foster and Others* [1990] ECR I-3133, paragraphs 19 and 21).

72 The Court has also held that, in a case of indirect discrimination in a provision of a collective agreement, the members of the class of persons placed at a

disadvantage must be treated in the same way as other workers (see, to that effect, Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 19, and *Nimz*, paragraph 18).

73 According to the Court's case-law (see, in particular, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24), 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 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.

74 It is equally necessary to apply such considerations to the case where the provision at variance with Community law is derived from a collective 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 (see *Nimz*, paragraph 20).

75 In the light of those considerations, the answer to the second question must be that, 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.

Costs

76 The costs incurred by the German Government and by the Commission, 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 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 decision of 3 May and 29 June 2000, 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 at 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.

Schintgen Gulmann Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 20 March 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber