JUDGMENT OF THE COURT (Sixth Chamber)
27 June 1990 *

In Case C-33/89

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

Maria Kowalska

and

Freie und Hansestadt Hamburg

on the interpretation of 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 (Official Journal 1975, L 45, p. 19),

THE COURT (Sixth Chamber)

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

Advocate General: M. Darmon
Registrar: D. Louterman, Principal Administrator

after considering the written observations submitted on behalf of

Mrs Kowalska, 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 W. Scheer and Rolf Stahmer, Rechtsanwälte, Hamburg,

the Commission of the European Communities, represented by Bernhard Jansen, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument presented by Maria Kowalska, the Freie und Hansestadt Hamburg and the Commission at the hearing on 7 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 28 March 1990,

gives the following

Judgment

1 By order of 12 December 1988, which was received at the Court on 9 February 1989, the Arbeitsgericht Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions 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 (Official Journal 1975, L 45, p. 19).

2 The questions were raised in proceedings brought by Mrs Kowalska against her former employer, the Freie und Hansestadt Hamburg, concerning her claimed entitlement to a severance grant ('Übergangsgeld') upon her retirement.

3 The documents before the Court show that her employment relationship was governed by the Bundesangestelltentarifvertrag (Federal Civil Service Employees' Collective Agreement). Under Article 62 of that agreement, full-time employees who satisfy the prescribed conditions are entitled to a severance grant on the day on which they retire.

4 Mrs Kowalska's employer refused to pay her the severance grant under that provision on the ground that she had worked part time.

5 Considering herself the victim of unlawful indirect discrimination, Mrs Kowalska brought an action before the Arbeitsgericht (Labour Court), Hamburg. That court decided that her claim raised problems as to the interpretation of Articles 117 and 119 of the EEC Treaty and of Directive 75/117. It therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is there "indirect discrimination against women" and hence an infringement of Article 119 of the EEC Treaty 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), whose historical basis 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 the 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?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant Community provisions, 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 By its first question, the national court wishes to determine, essentially, whether, by virtue of Article 119 of the Treaty, it is unlawful, where the part-time work-force contains a much larger number of women than of men, for a collective agreement applying to the public service to provide that employers are to pay a severance grant on termination of the employment relationship only to full-time workers.

8 To answer that question, it is necessary first to determine whether the severance grant paid to workers on termination of their employment relationship is covered by Article 119 of the Treaty.

9 As the Court has held, the concept of pay, within the meaning of the second paragraph of Article 119 of the EEC Treaty, comprises any other consideration, whether in cash or kind, whether immediate or future, provided that the worker receives it, albeit indirectly, from his employer in respect of his employment (see most recently the judgment of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraph 12). Accordingly, 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.

10 In particular, compensation granted to a worker on termination of the employment relationship is a form of deferred pay to which the worker is entitled by reason of his employment but which is paid to him on termination of the employment relationship with a view to enabling him to adjust to the new circumstances arising from such termination (see to that effect the judgment of 17 May 1990 in Case C-262/88 *Barber, supra*).

11 It follows that, in principle, compensation paid to a worker on termination of the employment relationship falls within the definition of pay contained in Article 119 of the Treaty.

12 The prohibition of discrimination between male and female workers contained in that provision, being mandatory, not only applies to the action of public authorities but extends also to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals (see judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraph 39).

13 It is apparent from the documents before the Court that the collective agreement at issue allows the severance grant to be paid only to full-time workers on termination of the employment relationship. A collective agreement like the one at issue, which allows employers to maintain a difference in total pay as between two categories of workers — those who work a specified minimum number of hours each week and those who, whilst performing the same tasks, do not work that minimum number of hours — leads to discrimination against female workers as compared with male workers in cases where a considerably lower percentage of men than of women work part time. Such an agreement must, in principle, be regarded as infringing Article 119 of the Treaty. The position would be different only 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 judgment of 13 May 1986 in Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607).

14 In the course of the proceedings, the Freie und Hansestadt Hamburg contended essentially that part-time workers do not provide for their needs and those of their

families exclusively out of their income from their employment and therefore that employers are not under a duty to provide temporary assistance for part-time workers.

15 It must be remembered that it is the responsibility of the national court, which alone has jurisdiction to appraise the facts, to decide whether, and if so to what extent, a provision of a collective agreement which applies without distinction to all workers but in fact affects women more than men is explained by objectively justified reasons unrelated to any discrimination on grounds of sex.

16 It must therefore be stated in reply to the first question submitted by the national court that 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.

The second question

17 The second question relates to the consequences of a finding, by the national court, that a provision such as that at issue contained in a collective agreement is incompatible with Article 119 of the EEC Treaty, having regard in particular to the freedom of contract of the parties to such an agreement.

18 In Case 43/75 *Defrenne* v *Sabena*, *supra*, the Court held that Article 119 is sufficiently precise to be relied upon in proceedings brought by individuals before national courts seeking a declaration that a national provision is applicable, including one contained in a collective agreement which is not in conformity with that article.

9 It is apparent from the judgment of 13 December 1989 in Case C-102/88 *Ruzius Wilbrink* v *Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311, that in a case of indirect discrimination the members of the class of persons placed at a disadvantage are entitled to have the same scheme applied to them as that applied to other workers, on a basis proportional to their working time. That ruling applies equally to discriminatory provisions in a collective agreement.

20 It must therefore be stated in reply to the second question 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, 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.

Costs

21 The costs incurred by the Commission of the European Communities, which has 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in reply to the questions submitted to it by the Arbeitsgericht Hamburg, by order of 7 February 1989, hereby rules:

(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 reason 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.

Kakouris Schockweiler

Mancini O'Higgins Diez de Velasco

Delivered in open court in Luxembourg on 27 June 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Sixth Chamber