Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

28 February 2013 *

(Article 141 EC — Directive 75/117/EEC — Equal pay for men and women — Indirect discrimination — Objective justification — Conditions)

In Case C-427/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 27 July 2011, received at the Court on 16 August 2011, in the proceedings

Margaret Kenny,

Patricia Quinn,

Nuala Condon,

Eileen Norton,

Ursula Ennis,

Loretta Barrett,

Joan Healy,

Kathleen Coyne,

Sharon Fitzpatrick,

Breda Fitzpatrick,

Sandra Hennelly,

Marian Troy,

Antoinette Fitzpatrick,

Helena Gatley

v

Minister for Justice, Equality and Law Reform,

Minister for Finance,

* Language of the case: English.

Commissioner of An Garda Síochána,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta (Rapporteur), acting as President of the Third Chamber, K. Lenaerts, E. Juhász, T. von Danwitz and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 July 2012,

after considering the observations submitted on behalf of:

— Margaret Kenny and Others, by G. Durkan SC, A. Murphy, Solicitor, and M. Honan, BL,

— Ireland, by D. O'Hagan, acting as Agent, assisted by M. Bolger SC, and by A. Kerr, Barrister,

— the Spanish Government, by A. Rubio González, acting as Agent,

— the European Commission, by J. Enegren and C. Gheorghiu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 141 EC 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 (OJ 1975 L 45, p. 19).

2 The request has been made in proceedings between Margaret Kenny and 13 other civil servants, on the one hand, and the Minister for Justice, Equality and Law Reform (Department of Justice, Equality and Law Reform, 'the Minister'), the Minister for Finance and the Commissioner of An Garda Síochána, on the other, concerning a difference in pay between the appellants in the main proceedings and another group of civil servants.

Legal context

European Union law

3 Article 1 of Directive 75/117 provides:

'The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.'

4 Under Article 3 of Directive 75/117:

'Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.'

5 Article 4 of Directive 75/117 states:

'Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.'

Irish law

6 The Employment Equality Act 1998 repealed and replaced the earlier legislation transposing Directive 75/117 into Irish law.

7 Section 18(1)(a) of the Employment Equality Act 1998, in the version in force at the time of the facts in the main proceedings, states:

'Subject to paragraph (b), for the purpose of this Part "A" and "B" represent 2 persons of opposite sex so that, where A is a woman, B is a man, and vice versa.'

8 Section 19(1), (4) and (5) of the Employment Equality Act 1998, in that same version, provides:

'(1) It shall be a term of the contract under which A is employed that, subject to this Act, A shall at any time be entitled to the same rate of remuneration for the work which A is employed to do as B who, at that or any other relevant time, is employed to do like work by the same or an associated employer.

...

(4)

(a) Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender (being As or Bs) at a particular disadvantage in respect of remuneration compared with other employees of their employer.

(b) Where paragraph (a) applies, the persons referred to in that paragraph shall each be for the purposes of subsection (1) as complying or, as the case may be, not complying with the provision concerned, whichever results in the higher remuneration, unless the provision is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.

(c) In any proceedings statistics are admissible for the purpose of determining whether this subsection applies in relation to A or B.

(5) Subject to subsection (4), nothing in this Part shall prevent an employer from paying, on grounds other than the gender ground, different rates of remuneration to different employees.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 The appellants in the main proceedings are civil servants employed by the Minster and assigned to clerical duties in An Garda Síochána (the national police). According to those appellants, they are engaged in work equivalent to that of other male An Garda Síochána employees also assigned to clerical duties in specific posts reserved for members of the police, called 'designated' or 'clerical' posts.

10 Between 2000 and 2005, the appellants in the main proceedings brought proceedings before the Equality Tribunal through their trade union. By decision of 22 November 2005, that tribunal found in favour of seven of the appellants and rejected the claims of the other seven. All parties to the proceedings appealed against the Equality Tribunal's decision to the Labour Court (Ireland).

11 The Labour Court found that the proportions of men and women in the relevant groups revealed prima facie indirect pay discrimination, given that, when the eight initial claims were filed in July 2000 there were, on the one hand, 353 designated posts occupied by police officers, of whom 279 were male and 74 female, and on the other hand, 761 clerical officers, most of whom were female. The Labour Court also found at the time of the hearing in May 2007 that the number of designated posts was 298 and that it was the defendant's policy to reduce that number to 219.

12 With the agreement of the parties to the main proceedings, the Labour Court decided to examine the question of objective justification of the prima facie case of indirect pay discrimination as a preliminary matter and therefore assumed that the appellants in the main proceedings and the chosen comparators were engaged in 'like work' within the meaning of Section 7(1) of the Employment Equality Act 1998. That court therefore required the Minister to prove objective justification.

13 According to the Minister, the deployment of An Garda Síochána officers in reserved clerical posts, that is to say, designated posts, was justified with a view to meeting the operational needs of the force, and it was appropriate and necessary in order to meet that need to pay police officers assigned to that work the rate applicable to their rank as members of An Garda Síochána.

14 Moreover, the number of designated posts had been determined by an agreement concluded between the management and the representative bodies of An Garda Síochána in the context of a process of reduction known as 'civilianisation'. While the Minister admitted that there was a small number of designated posts for which there was no operational need, he asserted none the less that those posts were not representative of the generality of designated posts for which knowledge and experience of policing is a requirement.

15 By decision of 27 July 2007, the Labour Court upheld the Minister's appeal and dismissed that of the other parties. According to that decision, the deployment in clerical posts of officers of An Garda Síochána meets either the latter's operational needs, or the need to continue the process of 'civilianisation' in a manner and at a pace which attract the agreement of the representative bodies of An Garda Síochána. Moreover, by that decision, the Labour Court found that the payment to the holders of those posts of rates corresponding to the rates of pay for members of An Garda Síochána meets the objective pursued, since it would be manifestly unfair and impractical to reduce the pay of the An Garda Síochána officers assigned to those posts. It is also clear from that decision that, having regard to the small number of designated posts, the maintenance of the current agreements pending the completion of the 'civilianisation' process is proportionate to the operational needs.

16 An appeal against the decision of the Labour Court was brought before the High Court (Ireland) by the appellants in the main proceedings.

17 It was on that basis that the High Court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) In circumstances where there is prima facie indirect gender discrimination in pay, in breach of Article 141 EC … and Council Directive [75/117], in order to establish objective justification, does the employer have to provide:

(a) Justification in respect of the deployment of the comparators in the posts occupied by them;

(b) Justification of the payment of a higher rate of pay to the comparators; or

(c) Justification of the payment of a lower rate of pay to the [appellants in the main proceedings]?

(2) In circumstances where there is prima facie indirect gender discrimination in pay, in order to establish objective justification, does the employer have to provide justification in respect of:

(a) The specific comparators cited by the [appellants in the main proceedings] and/or

(b) The generality of comparator posts?

(3) If the answer to Question 2(b) is in the affirmative, is objective justification established notwithstanding that such justification does not apply to the chosen comparators?

(4) Did the Labour Court, as a matter of Community Law, err in accepting that the “interests of good industrial relations” could be taken into account in the determination of whether the employer could objectively justify the difference in pay?

(5) In circumstances where there is prima facie indirect gender discrimination in pay, can objective justification be established by reliance on the industrial relations concerns of the [respondent]? Should such concerns have any relevance to an analysis of objective justification?’

Consideration of the questions referred

Preliminary observations concerning the burden of proof and the concept of same work or work to which equal value is attributed

18 It should be borne in mind at the outset that, in accordance with the normal rules of evidence, it is, in principle, for the worker who believes himself to be the victim of sex discrimination in pay to establish before the national court that the conditions giving rise to a presumption that there is unequal pay prohibited by Article 141 EC and Directive 75/117 are fulfilled (see, to that effect, Case C-381/99 *Brunnhofer* [2001] ECR I-4961, paragraphs 52, 53 and 57).

19 It is accordingly for that worker to prove by any form of allowable evidence that the pay he receives from his employer is less than that of his chosen comparators, and that he does the same work or work of equal value, comparable to that performed by his comparators, so that prima facie he is the victim of discrimination which can be explained only by the difference in sex (see *Brunnhofer*, paragraph 58).

20 If the worker adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied, a prima facie case of discrimination would exist. It would then be for the employer to prove that there was no breach of

the principle of equal pay by establishing by any legal means, inter alia, that the activities actually performed by the two employees were not in fact comparable or by justifying the difference in pay by objective factors unrelated to any discrimination based on sex (see, to that effect, *Brunnhofer*, paragraphs 59 to 62).

21 In the present case, the questions referred are based on the premiss that, in the main proceedings, there is prima facie indirect gender discrimination in pay.

22 However, it is apparent from the file submitted to the Court that, of the conditions giving rise to a presumption that there is indirect gender discrimination in pay, only the difference in pay seems to have been established in the case in the main proceedings. With regard to the requirement that the work be comparable, as stated in paragraph 12 above, the Labour Court decided, with the agreement of the parties to the main proceedings, to examine the question of objective justification of that difference in pay as a preliminary matter, assuming that the appellants in the main proceedings and the chosen comparators were engaged in like work.

23 In that regard, it is true that the Court has already decided that, in such a case, it can rule on the questions referred concerning the justification of a difference in pay without first establishing whether the jobs in question are equivalent (see, to that effect, concerning UK law, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 11).

24 However, given that the principle of equal pay for the purpose of Article 141 EC and Article 1 of Directive 75/117 presupposes that the men and women to whom it applies are in identical or comparable situations, it must be ascertained whether the employees concerned perform the same work or work to which equal value may be attributed (see *Brunnhofer*, paragraph 39).

25 As was observed at the hearing, such verification would be necessary in the case in the main proceedings if the referring court were to find that the Labour Court had erred in law in finding that the difference in pay was objectively justified.

26 In such circumstances, it is for the national court, which alone has jurisdiction to find and assess the facts, to make the necessary determination whether, in the light of the actual nature of the activities carried out by those concerned, the workers in question perform the same work or work to which equal value can be attributed (see, to that effect, Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 48, and *Brunnhofer*, paragraph 49). However, in preliminary ruling proceedings, the Court, which is called on to provide answers of use to the national court, may nevertheless 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 Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 67 and 68).

27 In that regard, the Court has repeatedly held that, in order to determine whether employees perform the same work or work to which equal value can be attributed, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation (see Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* [1999] ECR I-2865, paragraph 17, and *Brunnhofer*, paragraph 43).

28 Thus, where seemingly identical tasks are performed by different groups of persons who do not have the same training or professional qualifications for the practice of their profession, it is necessary to ascertain whether, taking into account the nature of the tasks that may be assigned to each group respectively, the training requirements for performance of those tasks and the working conditions under which they are performed, the different groups in fact do the same work within the meaning of Article 141 EC (*Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, paragraph 18).

29 Professional training is not merely one of the factors that may be an objective justification for giving different pay for doing the same work; it is also one of the possible criteria for determining whether or not the same work is being performed (*Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, paragraph 19).

30 In the case in the main proceedings, it is apparent from the file submitted to the Court that the training or professional qualifications of the clerical officers, on the one hand, and of the An Garda Síochána officers assigned to designated posts, on the other, are different.

31 In those circumstances, if the referring court were to find that the difference in pay in question was not objectively justified, that court or the Labour Court would have to ascertain whether, taking into account the nature of the tasks that may be assigned to each group respectively, the training requirements for performance of those tasks and the working conditions under which they are performed, the different groups in fact do the same work within the meaning of Article 141 EC and Directive 75/117.

32 In that regard, it is apparent from the file submitted to the Court and the observations of the parties to the main proceedings that the parties do not agree so far as concerns the number of An Garda Síochána officers assigned to designated posts who perform only clerical duties and the number of those who, in addition, have to perform tasks to meet operational needs, such as communicating with the European Police Office (Europol) or Interpol, those tasks being different from the tasks performed by the clerical officers.

33 However, it must be noted that, in its written observations and at the hearing, Ireland maintained that all An Garda Síochána officers assigned to designated posts can, in exceptional circumstances, be called upon to work in the field in order to meet operational needs.

34 It is therefore for the referring court, if necessary, to ascertain whether, taking into account the factors relating to the tasks that may be allocated to the An Garda Síochána officers assigned to designated posts and to their working conditions, and also the training requirements for the different groups of workers in question, the seemingly identical duties performed by the An Garda Síochána officers assigned to designated posts and by the clerical officers may be regarded as being the 'same work' within the meaning of Article 141 EC.

The questions referred

35 By its questions, which it is appropriate to examine together, the referring court seeks essentially to determine, in the light of Article 141 EC and Directive 75/117, what the employer's justification of the prima facie case of indirect gender discrimination in pay consists of, the workers in relation to whom such justification must be provided and whether the interests of good industrial relations can be taken into account when examining that justification.

36 With regard, first, to what that justification consists of, it must be noted that a difference in the remuneration paid to women in relation to that paid to men for the same work or work of equal value must, in principle, be considered contrary to Article 141 EC and, consequently, to Directive 75/117. It would be otherwise only if the difference in treatment were justified by objective factors unrelated to any discrimination based on sex (see *Brunnhofer*, paragraph 66 and the case-law cited).

37 The justification given must be based on a legitimate objective. The means chosen to achieve that objective must be appropriate and necessary for that purpose (Case C-17/05 *Cadman* [2006] ECR I-9583, paragraph 32 and the case-law cited).

38 Contrary to what the referring court appears to accept, it is therefore not a question of justifying the rate of remuneration paid to the different groups of comparators or the deployment of workers to one group or the other, but rather of justifying the difference in pay in itself.

39 In accordance with settled case-law, it is the difference in pay which must be justified by objective factors unrelated to any discrimination linked to the difference in sex (see, in particular, *Brunnhofer*, paragraph 30 and the case-law cited).

40 However, it must be noted that in relation to indirect discrimination, there may be diverse reasons for the difference in pay and the justification for such difference may be equally diverse and may relate to national legislation, agreements intended to regulate collectively paid labour or even to a practice or unilateral action of the employer with regard to his employees.

41 It follows that, in relation to indirect pay discrimination, it is for the employer to provide objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators.

42 So far as concerns, second, the group of workers in relation to whom such justification must be provided, it must be noted that if the pay of one group of workers is significantly lower than that of another group and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two groups in question perform duties of equal value and the statistics describing that situation are valid (see, to that effect, *Enderby*, paragraph 16).

43 In this context, it is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant (see, to that effect, *Enderby*, paragraph 17, and *Seymour-Smith and Perez*, paragraph 62).

44 In that regard, it must be noted that a comparison is not relevant where it involves groups formed in an arbitrary manner so that one comprises predominantly women and the other predominantly men with a view to carrying out successive comparisons and thereby bringing the pay of the group consisting predominantly of women to the level of that of another group also formed in an arbitrary manner so that it consists predominantly of men (see Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraph 36).

45 It follows that the employer's justification for the difference in pay, which discloses a prima facie case of gender discrimination, must relate to the comparators who, because of the fact that their situation is described by valid statistics which cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and which, in general, appear to be significant, have been taken into account by the referring court in establishing that difference.

46 So far as concerns, third, the question whether the interests of good industrial relations may be taken into account to justify objectively a prima facie case of indirect gender discrimination in pay, it must be noted that possible objective justifications must correspond to a real need of the employer, in this instance, the Minister (see, to that effect, Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, paragraphs 36 and 37, and *Brunnhofer*, paragraph 67).

47 In addition, it must be recalled that, as is clear from Article 4 of Directive 75/117, collective agreements, like laws, regulations or administrative provisions, must observe the principle laid down in Article 141 EC (see *Enderby*, paragraph 21).

48 Therefore, as the Advocate General has noted in points 59 to 68 of his Opinion, it is not disputed that, in line with collective agreements, the interests of good industrial relations are subject to the observance of the principle of non-discrimination between male and female workers in terms of pay. That concern cannot therefore, of itself, constitute the only basis justifying such discrimination.

49 Nevertheless, the Court has previously held that the fact that the rates of pay have been determined by collective bargaining or by negotiation at local level may be taken into account by the national court as a factor in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex (see *Royal Copenhagen*, paragraph 46).

50 It follows that the interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.

51 In any event, and in line with what has been stated in paragraphs 41 and 45 above with regard to the other parts of the questions referred by the national court, it is for the national court, which alone has jurisdiction to find and assess the facts, to determine to what extent that concern may be taken into consideration in the case in the main proceedings to justify a prima facie case of indirect gender discrimination in pay.

52 In the light of the foregoing, the answer to the questions referred is that Article 141 EC and Directive 75/117 must be interpreted as follows:

— employees perform the same work or work to which equal value can be attributed if, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation, which it is a matter for the national court to ascertain;

— in relation to indirect pay discrimination, it is for the employer to establish objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators;

— the employer's justification for the difference in pay, which is evidence of a prima facie case of gender discrimination, must relate to the comparators who, on account of the fact that their situation is described by valid statistics which cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and which, in general, appear to be significant, have been taken into account by the referring court in establishing that difference, and

— the interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.

Costs

53 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 141 EC 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 must be interpreted as follows:

— **employees perform the same work or work to which equal value can be attributed if, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation, which it is a matter for the national court to ascertain;**

— **in relation to indirect pay discrimination, it is for the employer to establish objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators;**

— **the employer's justification for the difference in pay, which is evidence of a prima facie case of gender discrimination, must relate to the comparators who, on account of the fact that their situation is described by valid statistics which cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and which, in general, appear to be significant, have been taken into account by the referring court in establishing that difference, and**

— **the interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.**

[Signatures]