JUDGMENT OF THE COURT (Sixth Chamber)
2 October 1997 *

In Case C-100/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht Bremen (Germany) for a preliminary ruling in the proceedings pending before that court between

Brigitte Kording

and

Senator für Finanzen

on the interpretation of Article 3(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),

THE COURT (Sixth Chamber),

composed of: J. L. Murray (Rapporteur), President of the Fourth Chamber, acting for the President of the Sixth Chamber, P. J. G. Kapteyn and G. Hirsch, Judges,

* Language of the case: German.

Advocate General: A. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Senator für Finanzen, by Wolfgang Baumgürtel, Senatsrat, acting as Agent,

— the Commission of the European Communities, by Maria Wolfcarius, of its Legal Service, and Horstpeter Kreppel, a national civil servant seconded to that service, acting as Agents, assisted by Klaus Bertelsmann, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of the Senator für Finanzen, represented by Wolfgang Baumgürtel; the United Kingdom Government, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and David Pannick QC; and the Commission, represented by Maria Wolfcarius, assisted by Klaus Bertelsmann, at the hearing on 13 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 22 October 1996,

gives the following

Judgment

1 By order of 7 March 1995, received at the Court on 30 March 1995, the Finanzgericht (Finance Court), Bremen, referred to the Court for a preliminary ruling

under Article 177 of the EC Treaty a question on the interpretation of Article 3(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; hereinafter 'the Directive').

2 That question was raised in proceedings between Mrs Kording and the Senator für Finanzen concerning the refusal by the admissions committee for tax advisers, set up under the auspices of the Senator für Finanzen, to exempt Mrs Kording from the compulsory qualifying examination for entry to that profession (hereinafter 'the qualifying examination').

3 Article 1(1) of the Directive states that its purpose 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. That principle is known as 'the principle of equal treatment'.

4 Article 3(1) provides that 'application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy'.

5 Pursuant to Paragraph 2 of the Steuerberatungsgesetz (Law on Tax Consultancy, hereinafter 'the StBG'), the right to practise as a tax adviser in Germany is restricted to persons or associations with the appropriate professional status. That status is conferred on persons who have passed the qualifying examination or have been exempted therefrom (Paragraph 35(1) of the StBG). Under Paragraph 38(1), No 4a, of the StBG, exemptions are granted *inter alia* to 'former executive-class officers or employees of the revenue administration who have been employed for not less than 15 years in work connected with the taxes administered by the

Federal or *Land* tax authorities, as case officers ("Sachbearbeiter") or at least in an equivalent capacity'.

6 At the material time, Paragraph 38 of the StBG gave no indication whether the requisite 15 years' experience could also be acquired by working on a part-time basis.

7 However, operation of Paragraph 38 was modified by Paragraph 36(3) of the StBG, as amended by the 1994 Sixth Law amending the Law on Tax Consultancy ('the 1994 Law'), which states that the experience required for admission to the qualifying examination may also be acquired through employment on a part-time basis. In the case of part-time employment involving working hours of no less than one-half of normal working hours, the total period required is extended on a *pro rata* basis, but may not exceed double the length of the period specified in subparagraphs (1) and (2). Where the number of hours worked on a part-time basis is any lower, those hours are not taken into account.

8 The new wording of Paragraph 38(2) of the StBG, which was also amended by the 1994 Law, provides that Paragraph 36(3) is also to apply for the purposes of gaining exemption from the qualifying examination.

9 The duties carried out by Mrs Kording at the Bremen Oberfinanzdirektion (Principal Revenue Office) are those of a case officer. By letter of 21 October 1992, she requested the Senator für Finanzen to provide her with a written statement, binding on the administration, to the effect that as of 30 April 1993 she would be exempt, by virtue of the duties she had performed, from the qualifying examination.

10 On 11 February 1993 the admissions committee issued Mrs Kording with a written statement, binding on the administration, to the effect that the duties performed were such as to satisfy the relevant requirements but adding that

Mrs Kording would not have acquired by 30 April 1993 the minimum length of professional experience — 15 years — required under the StBG. According to that statement, in prescribing the length of practical experience required, the legislature had proceeded on the assumption that the work would be performed by way of a main occupation, that is to say, through full-time employment. Consequently, in the case of an applicant employed part-time, the hours worked can be taken into account only on a *pro rata* basis.

11 On 9 March 1993 Mrs Kording brought proceedings before the Finanzgericht, which, uncertain whether the German legislation is compatible with the Directive, accordingly referred the following question to the Court for a preliminary ruling:

'Is there an infringement, in the form of indirect discrimination against women, of Article 3(1) of 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), or of other Community legislation, where, under domestic legislation (Paragraph 38(1), No 4(a), second subparagraph, in conjunction with Paragraph 36(3) of the Steuerberatungsgesetz (Law on Tax Consultancy), the 15-year minimum period of employment as a case officer in the executive grade of the revenue administration, which is required for exemption from the tax consultants' examination, is proportionately extended in the case of part-time employment involving working hours of no less than one-half of the normal working hours, and where, of the 119 part-time executive-grade officers in the Bremen revenue administration, 110 are women (92.4%)?'

12 By its question the Finanzgericht is essentially asking whether Article 3(1) of the Directive precludes national legislation which provides that, in the case of part-time employment involving working hours of no less than one-half of normal working hours, the total length of professional experience required for exemption from the qualifying examination is to be extended on a *pro rata* basis.

13 It should be recalled that Article 3(1) of the Directive prohibits any discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

14 As the Court stated in Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, paragraph 30, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.

15 As the Finanzgericht has stated, the legislation applicable in the main proceedings does not involve any direct discrimination since, where the same work is performed on a part-time basis, the total length of service required of persons working as case officers in the revenue administration who wish to work as tax advisers without taking the examination is extended in exactly the same way for men as for women. It should therefore be determined whether a measure of that kind may amount to indirect discrimination.

16 The Court has consistently held that indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, to that effect, Case C-444/93 *Megner and Scheffel* v *Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741, paragraph 24, and Case C-343/92 *De Weerd (née Roks) and Others* [1994] ECR I-571, paragraph 33).

17 In that regard, it cannot be denied that measures such as those at issue in the main proceedings have an impact on part-time employees and place them at a disadvantage by comparison with those who work full-time. To gain exemption from the qualifying examination, part-time employees must work several years longer than full-time employees.

18 Moreover, the order for reference discloses that 92.4% of executive-grade employees working on a part-time basis in the Bremen revenue administration are women.

19 In those circumstances, measures such as those at issue in the main proceedings give rise in practice to discrimination against women as compared with men and must in principle be regarded as contrary to the Directive. The position would be different only if the distinction between those two categories of employee were justified by factors unrelated to any discrimination on grounds of sex (see *inter alia* Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607, paragraph 29; Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2743, paragraph 12; and Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation* v *Lewark* [1996] ECR I-243, paragraph 31).

20 It is for the national court, which alone has jurisdiction to assess the facts and interpret the national legislation, to determine in the light of all the circumstances whether, and to what extent, a legislative provision which, although applying irrespective of gender, actually affects a greater number of women than men, is justified by objective reasons unrelated to any discrimination on grounds of sex (see Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911, paragraph 14; *Bilka*, paragraph 36; and *Rinner-Kühn*, paragraph 15).

21 The Senator für Finanzen takes the view that qualification as a tax adviser following exemption from the professional examination must be regarded as a possibility available by way of exception solely to persons who, through the performance of certain work over a specified length of time, are certain at least to have gained sufficient experience. The Senator für Finanzen thus maintains that the expertise necessary to enter that profession without taking the examination can only be acquired through employment, the length of which has been prescribed independently of individual cases and with the same implications for all applicants.

22 Mrs Kording, on the other hand, maintains that the variety of tasks and the quality of the work carried out by part-time employees are comparable to those of full-time employees. The only difference lies in the volume of work handled.

23 In Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 14, the Court took the view that it is impossible to identify objective criteria unrelated to any discrimination on grounds of sex on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalization concerning certain categories of worker. Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours.

24 Furthermore, the Finanzgericht has already found that the StBG, as originally worded, made the exemption of revenue administration officials from the qualifying examination conditional on their having aquired, over the ten years preceding departure from the revenue service, five years' experience in tax matters. Mrs Kording stated in the proceedings before the Finanzgericht, without being contradicted by the Senator für Finanzen, that in 1972 the length of experience required had been extended from five to fifteen years in order to discourage the tendency among officials to enter private practice. Thus the legislative amendment was not based on considerations relating to qualifications.

25 In situations of this kind, where a part-time employee is treated less favourably than a full-time employee, measures such as those applicable in the main proceedings give rise to indirect discrimination against women employees if substantially fewer men than women work part-time; the measures in question are therefore

contrary to Article 3(1) of the Directive. However, such inequality of treatment would be compatible with that provision if it were justified by objective factors unrelated to any discrimination on grounds of sex.

26 If the Finanzgericht finds that the competent authorities were in a position to establish that the requirement that, in order to gain exemption from the qualifying examination, candidates employed part-time must work for a longer period than those employed full-time is justified by objective factors unrelated to any discrimination on grounds of sex, the mere fact that the national legislation affects far more women than men cannot be regarded as an infringement of Article 3(1) of the Directive.

27 The answer to the question referred to the Court must therefore be that Article 3(1) of the Directive precludes, in cases where far more women will be affected than men, national legislation which provides that, in the case of part-time employment involving working hours of no less than one-half of normal working hours, the total length of professional experience required for exemption from the qualifying examination for tax advisers is to be extended on a *pro rata* basis, save where such legislation is justified by objective factors unrelated to any discrimination on grounds of sex.

Costs

28 The costs incurred by the United Kingdom 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Finanzgericht Bremen by order of 7 March 1995, hereby rules:

Article 3(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 precludes, in cases where far more women will be affected than men, national legislation which provides that, in the case of part-time employment involving working hours of no less than one-half of normal working hours, the total length of professional experience required for exemption from the qualifying examination for tax advisers is to be extended on a *pro rata* basis, save where such legislation is justified by objective factors unrelated to any discrimination on grounds of sex.

Murray Kapteyn Hirsch

Delivered in open court in Luxembourg on 2 October 1997.

R. Grass J. L. Murray

Registrar For the President of the Sixth Chamber