JUDGMENT OF THE COURT (Sixth Chamber)
11 September 2003 *

In Case C-77/02,

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

Erika Steinicke

and

Bundesanstalt für Arbeit,

on the interpretation of Article 141 EC and of Council Directives 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principles of equal pay for men and women (OJ 1975 L 45, p. 19), 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to

* Language of the case: German.

employment, vocational training and promotion and working conditions (OJ 1975 L 39, p. 40) and 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, V. Skouris, F. Macken (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Erika Steinicke, by T. Lenz, Rechtsanwalt,

— the Portuguese Government, by L. Fernandes, A. Seiça Neves and A.J. Simões, acting as Agents,

— the Commission of the European Communities, by N. Yerrell and H. Kreppel, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2003,

gives the following

Judgment

1 By order of 10 December 2001, received at the Court on 7 March 2002, the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 141 EC and of Council Directives 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principles of equal pay for men and women (OJ 1975 L 45, p. 19), 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 1975 L 39, p. 40) and 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

2 That question was raised in proceedings between Ms Steinicke and the Bundesanstalt für Arbeit (Federal Employment Office) concerning her exclusion from a scheme of part-time work for older employees.

The relevant provisions of Community law

3 Article 141 EC provides:

'1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

...'

Directive 75/117

4 Under Article 1 of Directive 75/117, the principle of equal pay for men and women 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.

5 Article 3 of Directive 75/117 provides that the Member States are to abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.

Directive 76/207

6 According to Article 1(1) of Directive 76/207, 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 paragraph 2 of that article, social security.

7 Under Article 2(1) of Directive 76/207:

'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.'

8 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 97/81

9 Clause 1(a) of the Annex to Directive 97/81 provides that the purpose of the Framework Agreement on part-time work is to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work.

10 In accordance with Clause 4(1) of the Annex to Directive 97/81:

'In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.'

The relevant provisions of national law

Provisions of national law in force until 30 June 2000

11 In accordance with the first sentence of Paragraph 72(b)(1) of the Bundesbeamtengesetz (Law on public servants) of 14 July 1953 (BGBl. I, p. 551, 'the BBG') in the version published on 31 March 1999 and in force until 30 June 2000 (BGBl. I, p. 675, 'the provision at issue'):

'Public servants in receipt of a salary may be authorised, at their request, to work part time for half of normal hours, where this request covers the period prior to their retirement, and where:

(1) they have reached the age of 55,

(2) they have worked full-time for at least three of the five years preceding part-time work,

(3) part-time work begins before 1 August 2004 and

(4) there are no overriding work-related reasons why they should not...'

12 Part-time work for older employees under the BBG may take the form of either continuous part-time employment where the actual working hours represent half of normal working hours ('Teilzeitmodell' or part-time model), or a two-stage model ('Blockmodell'), where a period of full-time working (or, at least, more than half-time working) is followed by a period in which no work is done ('Freistellungsphase').

13 In accordance with Article 6(1) of the Bundesbesoldungsgesetz (Law on federal pay) of 23 May 1975 (BGBl. I, p. 1173), in the version published on 3 December 1998 (BGBl. I, p. 3434, 'the BBesG'), in the case of part-time work, pay is reduced in the same proportion as the hours worked.

14 In the case of part-time work for older employees, Paragraph 2(1) of the Verordnung über die Gewährung eines Zuschlags bei Altersteilzeit (regulation concerning the grant of a pay supplement in the case of part-time work for older employees of 21 October 1998 (BGBl. I, p. 3191, 'the ATZV') provided that the amount of the supplement awarded was equal to the difference between net pay under Article 6(1) of the BBesG and 83% of the net amount which would be paid for full-time work.

15 The first sentence of Paragraph 6(1) of the Gesetz über die Versorgung der Beamten und Richter in Bund und Ländern (Law on the pensions of public servants and judges in the Bund and the Länder) of 24 August 1976 (BGBl. I, p. 322, corrected p. 847 and p. 2033, 'the BeamtVG') provided that the length of service completed by a public servant in that status, starting from the date on which he was first established as an official in the public service, confers entitlement to a pension.

16 By virtue of the third sentence of Paragraph 6(1) of the BeamtVG, periods of part-time work conferred pension rights only in respect of the part equivalent to the percentage of reduced employment in relation to normal working hours; the periods of part-time work for older employees referred to in the provision at issue conferred pension rights of only nine-tenths of normal working hours.

The provisions of national law in force since 1 July 2000

17 The provision at issue was amended, as from 1 July 2000, by the Gesetz über die Anpassung von Dienst- und Versorgungsbezügen in Bund und Ländern (Law on the adjustment of salaries and pensions in the Bund and Länder) of 19 April 2001 (BGBl. I, p. 618).

18 According to the new wording of the provision at issue:

'Public servants in receipt of a salary may be authorised, at their request, to work part time on grounds of age ("Altersteilzeit"), for half the working hours

previously worked, without exceeding half the average working hours worked during the two years immediately preceding part-time work for older employees, where this request covers the period prior to their retirement and where:

(1) they have reached the age of 55,

(2) they have worked part-time for at least three of the five years immediately preceding part-time work for older employees,

(3) part-time employment for older employees begins before 1 January 2010 and

(4) there are no overriding work-related reasons why they should not...'.

19 The new version of Paragraph 2 of the ATZV (BGBl. 2001 I, 2239), provides for the amount of the pay supplement awarded to represent the difference between net pay as it results from the extent of part-time work and 83% of the net pay to which the persons concerned would have been entitled for the hours currently worked taken as a basis for calculating the reduced working hours in part-time employment for older employees.

20 In accordance with the third sentence of Paragraph 6(1) of the new version of the BeamtVG periods of part-time work for older employees confer pension rights in respect of nine-tenths of the normal working hours taken as the basis for the calculation of the reduced working hours in part-time employment for older employees.

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

21 Ms Steinicke, who was born in 1944, has worked for the Bundesanstalt für Arbeit since 1962. She has worked as an employment officer since 1973 with the status of an established official. Until 1976 she worked full-time.

22 After the birth of her baby, her working hours were reduced, at her request, to half normal working hours from 19 November 1976. In the period 1 February 1985 to 13 April 1986 the normal weekly working hours were reduced to 30 hours. Since 14 April 1986, Ms Steinicke has as a general rule worked part-time.

23 She has been able to work full-time, at her own request, only on a monthly basis and because the workload and budgetary provisions have so permitted.

24 Her request of 1 December 1998 for a permanent increase in her normal working hours on account of the growth in the workload and in order subsequently to work part time on grounds of age was rejected for budgetary reasons by the

Arbeitsamt Reutlingen (Reutlingen Employment Office, Germany) by letter of 27 July 1999. Nor was it possible, in the absence of a suitable vacant post, to offer her a temporary full-time post.

25 On 30 June 1999 Ms Steinicke made an application to the Bundesanstalt für Arbeit to work part-time on grounds of age under the provision at issue for the period 1 October 1999 to 30 September 2007, on the basis of the block model, that is to say, a period from 1 October 1999 to 30 September 2003 of work equal to that normally done before then, followed by a period of free time from 1 October 2003 to 30 September 2007. In addition, she declared her intention of retiring on 1 October 2007.

26 By decision of the Arbeitsamt Reutlingen of 12 July 1999 that application was rejected on the ground that Ms Steinicke did not satisfy the condition laid down by the provision at issue, namely, that she should have worked full time for three of the five years immediately preceding the period of part-time work for older employees.

27 On 28 July 1999 Ms Steinicke submitted a complaint against that decision.

28 The Landesarbeitsamt Baden-Württemburg (Regional Employment Office for the Land of Baden-Württemburg, Germany) rejected her complaint by decision of 10 August 1999.

29 Ms Steinicke then brought proceedings on 8 September 1999 before the Verwaltungsgericht Sigmaringen.

30 Following the amendment during those legal proceedings of the provision at issue and the other relevant provisions of German law referred to above, by decision of 24 August 2001 the Arbeitsamt Reutlingen authorised Ms Steinicke to join the scheme of part-time working on grounds of age for the period 1 July 2000 to 30 September 2007, in accordance with the block model.

31 The working hours which had hitherto been hers were reduced from half to one quarter of normal working hours for the period 1 July 2000 to 30 September 2007. The period of working 50% of normal working hours runs from 1 July 2000 to 14 February 2004 and the free-time stage from 15 February 2004 to 30 September 2007.

32 In addition to her salary, reduced in proportion to her working hours, Ms Steinicke receives a supplement which does not carry any pension rights and which may not exceed 83% of the net pay to which she would have been entitled for the 50% hours which she used to work.

33 In those circumstances, the parties declared the dispute settled for the period starting on 1 July 2000 and the file was closed in that respect.

34 Ms Steinicke nevertheless claims that the Arbeitsamt Reutlingen's decision of 12 July 1999 and the Landesarbeitsamt Baden-Württemburg's decision of 10 August 1999 concerning her complaint should be annulled, and that the Bundesanstalt für Arbeit should be ordered to authorise her access to the scheme of part-time work for older employees for the period 1 October 1999 to 30 July 2000, in accordance with the block model, thus extending the Arbeitsamt Reutlingen's decision of 24 August 2001.

35 The Bundesanstalt für Arbeit claims that that application should be dismissed on the ground that Ms Steinicke did not satisfy the requirements of the provision at issue during the period concerned. Nor, in its view, is that provision contrary to Article 141 EC, since its exclusion of officials working part-time is objectively justified by the purpose of the scheme.

36 According to the Bundesanstalt für Arbeit, the scheme is intended to implement a specific aspect of staff management, allowing the public service to make a contribution both to employment policy and to freeing posts in the employment market. The objective pursued by the system of part-time work for older employees is to encourage full-time workers to be willing to accept reduced working hours. The Bundesanstalt further submits that the exclusion of part-time workers is justified by considerations of cost-neutrality and the burden of planning for and allocating posts.

37 Those were the circumstances in which the Verwaltungsgericht Sigmaringen decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do Article 141 EC, Directives 75/117/EEC, 76/207/EEC and/or Directive 97/81/EC preclude the rule in point 2 of the first sentence of Paragraph 72(b)(1)

of the Bundesbeamtengesetz (German Law on federal public servants), in the version of 31 March 1999 which was in force until 30 June 2000, that part-time work for older employees may be authorised only for public servants who have worked full-time for a total of at least three of the five years preceding that part-time work, where significantly more women than men work part-time and are consequently excluded by that provision from part-time work for older employees?'

Consideration of the question referred

Observations submitted to the Court

38 Ms Steinicke maintains that the exclusion of part-time workers from part-time work for older employees is contrary to Community law.

39 She submits that the argument that opening the scheme of part-time work for older employees to persons already working part-time would not make it possible, in the field of employment policy, to achieve a result comparable to that produced by opening it only to persons working full-time cannot justify the provision at issue. Having regard to the fact that it is always women who must struggle to reconcile their family and professional lives, the need for part-time posts has to be regarded as equally important. Furthermore, it is precisely part-time workers who make it possible to make savings on costs and to relieve the employment market.

40 Equally unpersuasive, in her view, is the argument that the costs of planning and allocating posts are significant. If a part-time worker starts part-time work on grounds of old age, the subsequent search for a new part-time worker entails the same expense. That expense would be doubled where full-time workers were given access to part-time work for older employees because they would each have to be replaced by two part-time workers. In any case, the fact that, the provision at issue having been amended, part-time workers may also have access to that scheme shows that a solution could have been found to the questions of planning and allocating posts.

41 The Portuguese Government maintains that, in light of the Court's case-law on indirect discrimination between men and women, neither the issue of cost-neutrality nor that of employment policy constitutes an objective reason sufficient to warrant the discriminatory treatment which would seem to prevail in the circumstances of this case. Referring to the judgment in Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, it submits that abolition of discrimination must take priority over economic considerations, otherwise it will be impossible to attain the objective of equal treatment of, and equal opportunities for, men and women.

42 The Commission submits, in the first place, that a rule such as the provision at issue amounts to a rule concerning 'working conditions' within the meaning of Article 5 of Directive 76/207 and does not concern 'pay' within the meaning of Articles 141 EC and 1 of Directive 75/117. The introduction of the scheme of part-time work for older employees is intended to create new jobs and thus to ease the employment market by encouraging more public servants to apply to join the scheme of part-time work for older employees in order to make it possible to recruit new staff in the public sector. The financial benefits granted by the legislature to public servants under that scheme are simply incentives enabling those employment-policy objectives to be attained.

43 Next, the Commission argues that, according to statements made by the national court, the contested decision is more disadvantageous to female workers than to male, since the proportion of women holding a part-time post is far higher than the proportion of men doing so. It is therefore much more likely that female workers would be unable to satisfy the condition laid down by the provision at issue requiring three years of full-time working in the five years preceding part-time working. There would therefore appear, *prima facie*, to be discrimination on grounds of sex.

44 Finally, concerning the question whether such discrimination may be justified, the Commission observes that the Member States may choose the measures calculated to achieve their social-policy objectives and that budgetary considerations may underlie a Member State's choices of social policy and influence the nature or scope of the social protection measures it wishes to adopt. Nevertheless, such considerations cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes (see Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 35).

45 In the circumstances of the present case, the Commission submits that the considerations of cost-neutrality and the burden of planning and allocating posts relied on by the Bundesanstalt für Arbeit are purely financial reasons and cannot therefore constitute sufficient justification for unequal treatment on grounds of sex (see also *Hill and Stapleton*, cited above, paragraph 40).

46 Moreover, according to the Commission, the administrative and budgetary problems put forward by the Bundesanstalt für Arbeit are not sufficient to amount to convincing arguments. First, because under the provision at issue it is just as possible to imagine a case in which public servants, who had worked

full-time for at least three of the five years immediately preceding their application to join the scheme of part-time work for older employees, held a part-time post just before joining the scheme with the result that, in such case also, the budgetary expense and problems of staff policy pleaded by the Bundesanstalt für Arbeit would be inevitable. Second, because the amendment in 2000 of the provision at issue to enable part-time workers to join the scheme proves that the feared negative consequences could not have been as serious as that body claims.

47 As regards the policy of unblocking the employment market relied on by the Bundesanstalt für Arbeit in order to justify the provision at issue, the Commission maintains that a Member State must furnish satisfactory proof that the means selected were appropriate to the objective pursued and necessary for that purpose. In the Commission's opinion, the provision at issue is in this respect inconsistent, in that it poses the risk that precisely those workers who help to unblock the employment market will be dissuaded from accepting part-time work because they might no longer be able to join the scheme of part-time work for older employees.

The Court's answer

48 In order to give an answer that may be of use to the national court, it is necessary first of all to establish whether the scheme of part-time work for older employees falls within the scope of Directive 76/207 or whether, instead, it falls within the scope of Article 141 EC and Directive 75/117.

49 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 (part-time model), or by

allowing the person concerned to cease work at an earlier date (two-stage model). In each case the scheme affects the exercise of the occupation of the workers concerned by adjusting their working time (see, to that effect, Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 44).

50 It must therefore be held that the scheme in question in the main proceedings lays down rules concerning working conditions within the meaning of Article 5(1) of Directive 76/207.

51 The fact that joining that scheme may have pecuniary consequences for the worker concerned is not sufficient to bring such conditions within the scope of Article 141 EC or of Directive 75/117, those provisions being based on the close connection which exists between the nature of the work done and the amount of the worker's pay (see, to that effect, the judgments in Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 59, and Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 28).

52 Having regard to the fact that the scheme at issue in the main proceedings lays down rules concerning working conditions within the meaning of Article 5(1) of Directive 76/207, there is, in the circumstances, no need to consider whether Directive 97/81 is applicable to the case in the main proceedings.

53 In those circumstances, the question referred for a preliminary ruling must be understood as seeking to ascertain whether Articles 2(1) and 5(1) of Directive 76/207 must be interpreted as precluding a provision, such as the provision at issue, by virtue of which part-time work for older employees may be authorised

for public servants only if they have worked full-time for a total of at least three of the five years preceding such part-time working, when significantly more women than men work part-time and are consequently excluded by that provision from the scheme of part-time work for older employees.

54 It is apparent from the documents before the Court that only persons who have worked full time for at least three of the five years preceding part-time working on grounds of age are authorised to join the scheme of part-time work for older employees provided for by the provision at issue.

55 The order for reference states that it is not disputed that in Germany more women work part-time than men and that about 90% of part-time workers in the German public sector are women.

56 It follows that the group of persons who have chiefly worked part-time during the period referred to by the provision at issue and who are thereby excluded from that scheme consists mainly of women.

57 In those circumstances, a provision such as that at issue results as a matter of fact 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; *Hill and Stapleton*, paragraph 34; Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29, and *Kutz-Bauer*, cited above, paragraph 50).

58 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 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, to that effect, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 72, and *Kutz-Bauer*, paragraph 51).

59 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*, paragraph 36, *Seymour-Smith and Perez*, paragraph 68, and *Kutz-Bauer*, paragraph 52).

60 The Bundesanstalt für Arbeit claims, as may be seen in the order for reference, that considerations relating to employment policy and to cost-neutrality and the burden of planning and allocating posts in the public sector must be treated as objective considerations capable of justifying the unequal treatment brought about by the provision at issue.

61 As regards the Bundesanstalt für Arbeit's argument based on employment policy and, in particular, encouraging of recruitment, it must be observed that the Member States are required to choose measures likely to attain the objectives

pursued in the field of employment. 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).

62 Furthermore, as the Court has already observed, encouragement of recruitment constitutes a legitimate aim of social policy (*Seymour-Smith and Perez*, paragraph 71, and *Kutz-Bauer*, paragraph 56).

63 However, the broad margin of discretion which the Member States enjoy in matters of social policy may not 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, and *Kutz-Bauer*, paragraph 57).

64 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 on grounds of 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 (*Kutz-Bauer*, paragraph 58).

65 Moreover, as the Commission and the national court have remarked, the provision at issue excludes from access to the part-time working scheme the very group of people, namely, public servants working part-time, who in fact make a considerable contribution to the unblocking of the employment market. As a result, a provision of national law which poses the risk that workers may be discouraged from accepting part-time work for the reason that they will

subsequently be unable to join the scheme of part-time work for older employees cannot *a priori* be considered to be an apt or suitable means of attaining the objective of unblocking the employment market.

66 With regard to the arguments put forward by the Bundesanstalt für Arbeit concerning cost-neutrality and the burden associated with planning and allocating posts in the German public sector, 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 (*Roks and Others*, paragraph 35, and *Kutz-Bauer*, paragraph 59).

67 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 (*Roks and Others*, paragraph 36, and *Kutz-Bauer*, paragraph 60).

68 Nor can the Bundesanstalt für Arbeit, whether as a public authority or as an employer, justify discrimination arising from a scheme of part-time work for older employees solely because elimination of such discrimination would involve increased costs (*Kutz-Bauer*, paragraph 61).

69 In any case, as Ms Steinicke and the Commission have observed, the fact that following the amendment in 2000 of the provision at issue part-time workers also

may join the scheme of part-time working for older employees would seem to demonstrate that the negative financial consequences which the Bundesanstalt für Arbeit claimed would follow if such workers were authorised to join the scheme are not as serious as it alleges.

70 It is therefore for the Bundesanstalt für Arbeit to establish before the national court that the unequal treatment arising out of the scheme of part-time work for older employees is justified by objective factors unrelated to any discrimination on grounds of sex. If such evidence is adduced, the mere circumstance that the provisions of that scheme restrict access to it to those workers who have worked full time for three of the five years preceding such part-time working cannot be regarded as an infringement of Articles 2(1) or 5(1) of Directive 76/207.

71 The order for reference also makes it clear that the national court seeks in addition to ascertain whether, if the national court were to find that the provision at issue was contrary to Articles 2(1) and 5(1) of Directive 76/207, that provision not being justified by objective factors unrelated to any discrimination on grounds of sex, Ms Steinicke is entitled for the period in question to the ancillary benefits provided for by the rules in force until 30 June 2000 or to those provided for by the rules in force as from 1 July 2000.

72 In the case of a breach of Directive 76/207 by legislative provisions 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 or otherwise (*Kutz-Bauer*, paragraph 75).

73 It is, however, not for the Court but for the national court to determine, in light of the facts available to it, which provisions of national law are applicable in the specific case in order to guarantee observance of the principle of non-discrimination enshrined in Directive 76/207.

74 Having regard to the preceding considerations, the reply to the question referred must be that Articles 2(1) and 5(1) of Directive 76/207 must be interpreted as precluding a provision, such as the provision at issue, by virtue of which part-time work for older employees may be authorised for public servants only if they have worked full-time for a total of at least three of the five years preceding such part-time working, when significantly more women than men work part-time and are consequently excluded by that provision from the scheme of part-time work for older employees, unless such provision is justified by objective factors unrelated to any discrimination on grounds of sex.

Costs

75 The costs incurred by the Portuguese 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 action 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 Verwaltungsgericht Sigmaringen by order of 10 December 2001, hereby rules:

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 must be interpreted as precluding a provision, such as point 2 of the first sentence of Paragraph 72(b)(1) of the Bundesbeamtengesetz (German Law on federal public servants), in the version of 31 March 1999 in force until 30 June 2000, by virtue of which part-time work for older employees may be authorised for public servants only if they have worked full-time for a total of at least three of the five years preceding such part-time work, when significantly more women than men work part-time and are consequently excluded by that provision from the scheme of part-time work for older employees, unless such provision is justified by objective factors unrelated to any discrimination on grounds of sex.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass J.-P. Puissochet

Registrar President of the Sixth Chamber