OPINION OF ADVOCATE GENERAL DARMON

delivered on 5 July 1994 *

1. It might have been thought that the judgment of the Court of 4 June 1992 in *Bötel*, [1] had settled the delicate question of the compatibility of the German system for compensating members of works councils in Germany with Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975. [2]

2. The heated debate provoked by that judgment in Germany has prompted two further references to the Court for a preliminary ruling. [3] This case is concerned with the first reference, from the Arbeitsgericht Bremen.

3. It is clear that the Court is being called on to carry out a veritable review, or even, as far as the German Government is concerned, a revision, of its case-law.

4. Pursuant to paragraph 46 of the Bundespersonalvertretungsgesetz (Federal law applicable to staff representation) of 15 March 1974 (the 'BpersVG'): [4]

— 'The members of the staff committee ("Personalrat") shall perform their duties free of charge' (subparagraph 1).

— 'The time which staff committee members devote to their duties shall give rise neither to a reduction of income nor to remuneration. If staff committee members are required to spend longer than their normal working hours in order to fulfil their duties, they are entitled to a corresponding period of leave' (subparagraph 2).

* Original language: French.

1 — Case C-360/90 [1992] ECR I-3589.

2 — Council Directive 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).

3 — In Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation* v *Lewark*, pending, the question submitted by the Bundesarbeitsgericht concerns the same issue.

4 — BGBl., I, p. 693, as at 16 January 1991, BGBl., I, p. 47.

— 'The members of the staff committee who are entirely discharged from their professional obligations shall receive a monthly payment in respect of their duties as representatives ...' (subparagraph 5).

— 'The members of the staff committee shall be discharged from their professional obligations, without loss of remuneration, in order to take part in basic and advanced training courses providing them with the knowledge needed to enable them to perform their duties on the staff committee' (subparagraph 6).

5. The Betriebsverfassungsgesetz (Law on industrial relations) of 15 January 1972 (the 'BetrVG') [5] contains similar provisions applicable to works councils ('Betriebtsrat'). [6]

6. In its judgment in *Bötel*, relating to the BetrVG, the Court held that

(1) the compensation paid to workers' representatives constituted pay within the meaning of Article 119 of the Treaty and Directive 75/117;

(2) works council members employed on a part-time basis are placed at a disadvantage by comparison with those working full-time as regards compensation for attending training courses. In view of the much higher number of women than men among members of staff committees working part-time, there is, as a result, 'indirect discrimination against female workers in relation to male workers in the matter of pay contrary to Article 119 of the Treaty and Directive 75/117'; [7]

(3) that difference of treatment '... cannot be regarded as justified by objective factors unrelated to any discrimination on grounds of sex, unless the Member State concerned proves the contrary before the national court'. [8]

7. The factual background to the questions from the national court is as follows.

8. Mrs Freers and Mrs Speckmann, the plaintiffs in the main proceedings, work for the Deutsche Bundespost and are members of the Bremerhaven Post Office Staff Committee (Personalrat). Whilst the collective

5 — BGBl., 1, p. 13, as at 23 December 1988, BGBl., I, p. 1 and 902.

6 — *Bötel* was concerned with that Law.

7 — Paragraph 20.

8 — Paragraph 26.

agreement applicable to them provides that the working week for a full-time worker is 38.5 hours, they are both employed part-time (18 hours per week). [9]

9. During February 1992, they attended a training seminar entitled 'Introduction to the law applicable to staff representation'.

10. Whilst attending that seminar, they received their usual salary, calculated on the basis of part-time work, without compensation for time in excess of their normal working hours.

11. In pursuit of their claim for paid leave ('bezahlte Freistellung') for that additional time, they do not rely on their national law, which would not be of assistance to them. [10]

12. Apprised of the fact that most of the members of the staff committee who work part-time are women, they claim, relying on the judgment of the Court of Justice in *Bötel*, that the German rules are contrary to Article 119 of the Treaty and Directive 75/117/EEC.

13. The national court is familiar with that judgment. However, it wonders whether it is compatible 'with essential principles of German law' [11] and expresses certain doubts which the judgment does not dispel.

14. In the first place, work as a staff committee member is unpaid.

15. The law even provides that staff representatives are, in certain cases, 'discharged from their professional obligations' (paragraph 46(3) and (4) of the BPersVG and paragraph 38 of the BetrVG). As they receive no pay in that connection, they are given, by way of compensation, a sum equal to the remuneration they would have received if they had worked normally. There are thus, inevitably, differences in remuneration which are unconnected with activity as a staff representative and are linked to the number of hours per week that the person concerned is required to work under his contract of employment.

9 — Paragraph 1 of the order for reference.

10 — Order for reference, p. 5 of the French translation.

11 — Ibid., p. 7.

16. Is it not the case that to classify such compensation as pay is tantamount to considering the activity of a staff representative as a *paid activity*? The German legislature has always opposed that view on the ground that unpaid status ensures that the independence of staff representatives is guaranteed.

17. Moreover, a member of a staff committee essentially represents the interests of employees and does not, as his primary task, perform any duty or service in the interests of the employer for which the latter should pay.

18. Secondly, the national court wonders whether those principles of unpaid work and compensation for loss of salary might in fact constitute objective grounds for differentiation which are unconnected with any differentiation against women.

19. Thirdly, the national court observes that, if the employer were to grant a part-time worker the same compensation as that granted to full-time workers, the latter would relate no longer to the normal working hours but to the time spent on courses. That fact, together with the employer's obligation to continue paying for overtime which employees would normally have worked during the week in question, would give rise to an accumulation of financial burdens for which the employer received nothing in return and which exceeded the limit represented by the contractual working hours. Does the objective criterion of compensation for loss of salary not in fact allow such an accumulation to be avoided?

20. That situation prompted the following three questions:

1. Does the economic compensation accorded to a male or female employee in respect of work on a statutorily established employee representation body constitute pay within the meaning of the European provisions on equal pay for men and women (Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975)?

2. If the answer to Question 1 is yes: Does the fact that under national law work on an employee representation body is unpaid, being governed essentially by the loss-of-pay principle (Lohnausfallprinzip), constitute an objective ground for unequal treatment which is in no way connected with discrimination against women?

3. If the answer to Question 2 is no: Is it an objective ground for unequal treatment of this kind that whereas part-time employees continue to receive pay in respect of their attendance at an all-day training course only in accordance with their part-time working hours, employees who normally work overtime are paid for that overtime even if the duration of the training course corresponds to that of the normal working day?

The first question

21. I have already given my views on the concept of pay in my opinion in *Bötel*. [12]

22. In *Bötel*, the Court gave an affirmative answer to the question whether 'compensation, in the form of paid leave or overtime pay for training courses imparting the knowledge necessary for work on staff councils constitutes "pay" for the purposes of Article 119 of the Treaty and Directive 75/117', [13] on the basis of four factors:

(i) The Court's traditional definition of the concept of pay:

'The concept of pay, within the meaning of the second paragraph of Article 119 of the Treaty, comprises any consideration whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer and irrespective of whether the worker receives it under a contract of employment, by virtue of legislative provisions or on a voluntary basis'. [14]

(ii) The existence of a paid employment relationship:

the compensation is paid 'by virtue of legislative provisions' and 'under a contract of

12 — Paragraphs 4 to 7.

13 — Paragraph 11 of that judgment.

14 — Paragraph 12. See also the judgment in Case 12/81 *Garland* v *British Rail* [1982] ECR 359, paragraph 5, and Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 12. The case-law of the Court is consistent regarding the definition of pay. Work *done after* the cessation of the employment relationship may constitute pay within the meaning of Article 119: see the judgment in Case C-173/91 *Commission* v *Belgium* [1993] ECR I-673, paragraph 13.

employment,' even if it does not derive from the employment relationship. [15]

(iii) Performance of the activity in the general interest of the undertaking:

'Staff council members ... are entrusted with the task of safeguarding staff interests, thus promoting harmonious working relationships within the undertaking; which is in its interests'. [16]

(iv) The purpose of the compensation:

'The compensation ... is intended to ensure that Staff council members receive income even where during periods of training they are not performing any work as stipulated in their contracts of employment'. [17]

23. In this case, the debate on the concept of pay is broadened in two respects.

24. In the first place, the Court is not merely asked whether compensation for *training courses* constitutes pay within the meaning of Community law [18] but, more generally, whether 'the economic compensation accorded to a male or female employee in respect of work on a statutorily established employee representation body constitute [s] pay ...'.

25. In the second place, new arguments and information are presented to the Court which might prompt it to reconsider the classification of such compensation as pay.

26. Let us examine those two aspects.

27. The Court is thus invited to consider not only the conditions applicable to compensation for training courses but also those applicable to normal work as staff representatives, such as participation in meetings of the committee.

28. In principle, the work of staff representatives must be performed during working hours.

15 — Paragraph 14.
16 — Ibid.
17 — Paragraph 15.
18 — See paragraph 11 of the *Bötel* judgment.

29. During the performance of his duties, the representative receives the income that he would have received if he had worked, including overtime if arrangements had been made for him to work overtime: there is thus no wage gain or loss.

30. However, by virtue of paragraph 46(2), second sentence, of the BPersVG (and paragraph 37(3) of the BetrVG), where activities as a representative are carried on outside a person's working hours, staff representatives are granted paid leave for the relevant number of additional hours.

31. The BetrVG provides that such time devoted to the works council outside working hours is paid for only if it is justified 'by reasons connected with the undertaking'. [19] Under the BPersVG, they must be used for 'the performance of tasks required of them' [20] in that capacity.

32. Thus, whilst the function of staff committee member may have been classified as 'unpaid', it nevertheless gives rise to compensation of several kinds:

— within the normal working week: by continued payment of wages;

— outside the working week: by means of paid leave, provided that the tasks performed are required of the person concerned. The compensation in this case depends not only on the contractual working week but also on the time spent by the staff representative in performing his duties.

33. Attendance at basic and advanced training courses is governed by separate conditions.

34. The German legislation provides that, in order to take part in such training, 'staff committee members are discharged from their professional obligations, and continue to receive their pay' (paragraph 46(6), BPersVG, and paragraph 37(6) BetrVG).

35. Those provisions have been interpreted by the Bundesarbeitsgericht and the Bundes-

19 — Paragraph 37(3) BetrVG.
20 — Paragraph 46(2), BPersVG.

verwaltungsgericht [21] as not conferring on staff committee or works council members the right to compensation in excess of the pay that they would normally have received if they had worked, whatever the duration of the course in question.

36. The difference must be clearly identified; outside a person's working hours:

(1) time spent at staff committee meetings or in activities relating thereto qualifies for compensation in addition to that received for loss of the wages that the person concerned would have received if he had worked (paragraph 46(2), BPersVG);

(2) time spent on *training courses* in order to acquire the knowledge necessary to perform duties on the staff committee does not qualify for *any compensation other* than that for loss of wages in respect of the working week (paragraph 46(6) BPersVG).

21 — Cases cited on page 5 of the final translation of the order for reference.

37. Thus, the same training course of a duration of 38.5 hours per week gives rise to compensation which is always equal to the wages which the staff representative would have received if he had worked — the amount received therefore differs according to whether the person concerned works full-time or part-time.

38. In support of its contention that there is no room for the concept of pay in this case, the German Government argues mainly that '... by virtue of the principle of compensation for loss of wages, the activity of staff committee members is not compensated for as such ... but compensation is provided only for the income which each staff representative loses in respect of work not performed'. [22]

39. Each representative receives only a 'pecuniary guarantee', [23] which is determined merely by reference to his normal working time but is unconnected with his activity as a staff representative, which is not *paid* as such: the loss-of-pay principle (Lohnausfallprinzip).

22 — Observations of the German Government, paragraph 7. See also to that effect, Schiefer DB 1993, p. 1823: 'Gegenstand der im Falle der Schulungsteilnahme gezahlten Vergütung ist also nicht die Schulungsteilnahme sondern die versäumte Arbeitsleistung.' in 'Gegenstand der im Falle der Schulungsteilnahme gezahlten Vergütung ist also nicht die Schulungsteilnahme sondern die versäumte Arbeitsleistung.'

23 — Order for reference, II, 1.

40. Two observations are called for.

41. First, I have already observed that that compensation is not unconnected with the performance of the duties of the staff representative because it may also depend upon their duration. [24]

42. Secondly, that compensation may not be given in return for *work undertaken directly on behalf of the employer*. But Community law does not require such work to be done in order to make income classifiable as pay within the meaning of Article 119. As we have seen, the concept of pay includes, more generally, *every advantage obtained in connection with the employment relationship.*

43. The Court stated in *Bötel*:

'... the legal concepts and definitions established or laid down by national law do not affect the interpretation or binding force of Community law, or, consequently, the scope of the principle of equal pay for men and women ...'. [25]

44. The Court has thus acknowledged that wages which continue to be paid in the event of sickness must be classified as pay. [26] Money is then paid without any direct benefit being received by the employer in return since, of course, the employee is not working. The compensation for loss of wages under paragraph 46(2) of the BPersVG displays a much closer link with employment since the basis for it is the employee's contribution to the functioning of an *institution within the undertaking*. Participation in training courses, if they are needed to enable staff representatives to perform their duties, also displays an — albeit indirect — link with employment. As I stressed in my opinion in *Bötel*, concerning compensation for time spent on training, 'the sums paid are indeed paid by the employer in respect of the employment ...'. [27]

45. *A fortiori*, compensation for an employee who is *directly* engaged in his duties as staff representative must also be classified as pay.

46. I would add that compensation for loss of wages, in respect either of participation in a training course or of the performance by a staff representative of his duties as such, displays certain common characteristics.

24 — See paragraph 46(2), second sentence, BPersVG, and paragraphs 30, and more particularly 32, above.

25 — Paragraph 23.

26 — Judgment in Case 171/88 *Rinner-Kuhn* [1989] ECR 2743, paragraph 7.

27 — Paragraph 6.

47. It is paid by the employer and is exactly equal to the amount of wages that the representative would have received if he had worked normally. [28] Moreover, from both the fiscal and the social points of view, it is treated in the same way as wages. [29]

The second question

48. As we have seen, a part-time worker is not discriminated against with regard to the performance of his tasks as a staff representative properly so called: compensation is paid for the time spent in excess of the weekly hours laid down in his contract of employment. [30]

49. On the other hand, where he takes part in training courses whose duration exceeds his contractual working time, he is the subject of discrimination in so far as he will receive, by way of compensation, only the amount of wages lost, whereas, for a course of the same duration, a full-time worker will qualify for a higher level of compensation because the latter may be equal to his pay.

50. The Court held in *Bötel*:

'It appears that both categories of staff council members devote the same number of hours to attending the training courses. However, once the duration of training courses held during the full-time working hours applicable in the undertaking exceeds the individual working hours of staff council members employed on a part-time basis, the latter receive from their employer compensation which is less than that received by staff council members employed on a full-time basis and they are therefore treated differently.' [31]

51. Is that difference objectively justified?

52. As a general rule, the Court considers that it is for the national court to consider whether a provision which applies regardless of the sex of the worker but, in practice, affects women more than men is justified for reasons unconnected with any discrimination based on sex. [32] That was the approach taken by the Court in *Bötel*. [33] In other decisions, the Court has held that the explanations given by the parties to the preliminary-ruling

28 — Subject to the application of paragraph 46(2), second phrase, BPersVG.

29 — German Government's written reply to the questions put to it by the Court on 13 April 1994, p. 1.

30 — Paragraph 46(2), second sentence, BPersVG.

31 — Paragraph 17.

32 — See my opinion in *Bötel*, paragraph 18.

33 — Paragraph 26.

proceedings could not constitute 'objective reasons unconnected with the discrimination based on sex'. [34]

53. Here, the following question is expressly put to the Court: does application of the principle of compensation for loss of wages constitute an objective reason for discrimination?

54. The Commission stressed in its observations [35] that the principle of unpaid work enables the independence of workers' representatives as such to be guaranteed, in that they should neither obtain an advantage from their duties nor be penalized for them. In its order for reference of 20 October 1993, giving rise to Case C-457/93, the Bundesarbeitsgericht stresses that,

'In the interests of objective work on the part of the staff committee, the German legislature attached more importance to the independence of the staff committee than to financial incentives to hold such posts'. [36]

55. The principle of compensation for loss of wages is deemed to guarantee that independence.

56. With respect to training courses, German law applies that principle strictly, whatever the actual duration of the course.

57. One result of this is that the plaintiffs in the main proceedings attend a course of 38.5 hours duration without — or at least with only partial-compensation, since they receive, by way of compensation, only their normal wages calculated on the basis of part-time work. Can the same be said of a full-time worker who, as such, receive compensation corresponding to 38.5 hours?

58. At no stage does attendance at the course, for a period of that length, fail to give rise to compensation for a full-time worker. On the other hand, a part-time worker receives no compensation for that part of the course which exceeds his working week. In a judgment of 30 January 1990, the Landesarbeitsgericht Berlin [37] stated: [38]

34 — See my opinion in *Botel*, paragraph 19. See most recently the judgment of 24 February 1994 in Case C-343/92 *Roks* [1994] ECR I-571.

35 — Paragraph 36.

36 — Page 15 of the French translation.

37 — DB 1991, p. 50.

38 — Free translation: 'the members of the works council working part-time who are engaged in training sacrifice their leisure time to the extent to which the training exceeds their individual working time'.'Um ein Freizeitopfer außerhalb der individuellen Arbeitszeit geht es auch bei der Schulung teilzeitbeschäftigter Betriebsratmitglieder'.

59. At the hearing, the German Government's representative contended that the function of staff committee member calls for a personal commitment and a sacrifice of leisure time. To be convincing, that argument would need to imply that the sacrifice should be borne to the same extent by all the employees. [39]

60. That is not the case and the system at issue here clearly has a *dissuasive* effect on part-time workers — and therefore, for the most part, on women — since they receive wages corresponding to the working week laid down in their contract of employment, which comprises fewer hours than those actually spent in training.

61. Thus, a part-time worker is prompted not to take part in the training necessary for the performance of duties as a representative, and therefore to leave that post — and the shorter the working week, the greater is the incentive to leave.

62. The application of the principle of compensation for loss of wages gives rise to differing treatment regarding compensation for employees, which is arrived at by direct reference to their respective contractual working hours.

63. Is it lawful, in respect of one and the same training course, to provide a lower level of compensation for a staff representative working part-time than for one who works full-time? Is his commitment to defend the interests of employees any the less? Should he not be given in-depth and effective training in the same way as a full-time worker? [40] Moreover, should he not be in a position to pass on to others his experience of the specific problems involved in part-time working?

64. I have already drawn attention to the perverse effects of such a system, which might prompt part-time workers to refuse such posts and reduce the number of part-time workers seeking such posts.

65. The Court stated emphatically in *Bötel*:

'such a situation is likely to deter employees in the part-time category, in which the proportion of women is undeniably preponderant, from serving on staff councils or from acquiring the knowledge needed in order to serve on them, thus making it more difficult for that category of worker to be represented by qualified staff council members'. [41]

39 — It is relevant, in that connection, that, according to the national court, 'none of the male members of the staff committees in the Bremen area works on a part-time basis' (grounds of the order for reference, I 1, third paragraph).

40 — See my opinion in *Bötel*, paragraph 24.

41 — Paragraph 25.

66. Although it is regarded as ensuring the independence of staff representatives, the principle of compensation for loss of wages nevertheless has the effect of penalizing part-time workers wishing to train properly to perform those duties, and it should also be noted that the duration of the training bears no relation to the status of full-time or part-time worker.

67. The Court has consistently held that a legislative provision which affects a much higher number of female workers than male workers does not constitute an infringement of Article 119.

'... if the Member State can show that the means chosen meet a necessary aim of its social policy and that they are suitable and requisite for attaining that aim ...'. [42]

68. The principle of compensation for loss of salary is intended to reflect compliance with a *basic principle* of social law in the Federal Republic of Germany: the independence of staff representatives vis-à-vis their employers.

42 — Judgment in *Rinner-Kuhn*, cited above. See also the judgments in Case C-226/91 *Molenbroek* [1992] ECR I-5943, paragraph 13, and *Roks and Others*, cited above in footnote 34, paragraph 34.

69. The latter share the same circumstances, as regards income, as the employees whom they represent. There is no financial incentive to perform the duties of staff representative.

70. The employer has no financial obligations other than the payment of normal wages.

71. As we have seen, in the case of part-time workers, the strict application of that principle in relation to training is liable to jeopardize their *standing* as staff representatives (since some would refuse outright to undertake training which required them to sacrifice their leisure time without compensation) and to compromise their *representation* (part-time workers might be encouraged to decline to undertake training, and therefore to decline to be candidates for such posts). However, the representative status and the competence of staff representatives are no less important than their independence. Those are indivisible conditions for the exercise of such functions.

72. The justification for the strict application of the principle of compensation, as provided for by paragraph 46 of the BPersVG, appears to be undermined by the fact that the German rules already contain — in the second sentence of paragraph 46(2) of the same law — modifications to that principle.

73. Finally, it does *not appear necessary* in order to ensure that the principle of independence is observed: an approach more in conformity with the principle of equal treatment for men and women could be envisaged. I have in mind, in particular, the spreading of training courses over a period of time so as to adjust them to the timetables of part-time workers.

74. The foregoing review of proportionality proves the point: the principle of compensation for loss of salary cannot be regarded as an objective ground unconnected with any discrimination based on sex.

The third question

75. As victims of discrimination prohibited by Article 119 of the Treaty, part-time workers are entitled to receive compensation for attending training courses of an amount at least equal to that received by full-time workers.

76. Under German law, an employer will also have to pay a full-time worker for overtime if it has been agreed that that worker should work overtime during the week in question.

77. Is the excessive financial burden which would thereby be imposed on the employer such as to constitute an objective reason for discrimination? [43]

78. Do the combined requirements of Community law and national law not lead to an accumulation of charges? Would it not be preferable to adopt a simple and objective principle: avoid loss of wages?

79. With respect to the Member States, the Court has held that

'... to concede that *budgetary considerations* may justify a difference in treatment as between men and women that would otherwise constitute indirect discrimination on grounds of sex, which is prohibited by Article 4(1) of Directive 79/7, would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.' [44]

43 — See the order for reference, p. 12 of the French translation.
44 — *Roks and Others*, cited in footnote 34, paragraph 36.

80. In the same way, it seems to me that, if indeed it is significant, the risk of excessive financial burdens being imposed on employers cannot justify the maintenance of a discriminatory system of compensation. [45]

81. Consequently, I propose that the Court rule as follows:

(1) The compensation paid by an employer to staff committee members, whether in connection with the performance of their duties properly so-called or their participation in training courses, constitutes 'pay' within the meaning of the second paragraph of Article 119 of the EEC 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.

(2) The same provisions preclude national legislation applicable to a much larger number of women than men which limits, by reference to their individual working hours, the compensation to be paid by their employer to staff committee members working part-time, in respect of their participation in training courses providing them with the knowledge needed for the work of such committees, whilst the members of such committees who work full-time are compensated, in respect of their participation in the same courses, by reference to their working timetable.

Neither the principle of compensation for loss of wages nor the risk of additional financial burdens for the employer can constitute objective grounds unconnected with any discrimination on grounds of sex.

45 — As regards the impact, in terms of the total wage bill, of strict application of the principle of equal treatment for men and women, it is apparent from the order for reference that, in the Bremen Region, the number of persons affected totalled less than 30 out of a total workforce of more than 14 000 employees, namely a proportion barely exceeding 0.2% of the workforce.