OPINION OF ADVOCATE GENERAL LÉGER

delivered on 14 January 1997 *

1. By the questions submitted to the Court the Arbeitsgericht (Labour Court), Hamburg asks it once again to consider the application 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 [1] (hereinafter 'the Directive' or 'Directive 76/207').

In substance the Court is asked to rule whether Directive 76/207 precludes reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment from being made subject to the existence of fault. The Court is also asked whether, in the same situation, Directive 76/207 precludes a provision of national law from setting a ceiling for compensation.

2. As the Arbeitsgericht points out, [2] the Court has already been asked to rule on similar questions. However, the Arbeitsgericht wishes to obtain confirmation that the facts before it and the relevant provisions of German law dictate the same replies.

3. I shall move on to consider the questions submitted after briefly describing the background to this case.

Legislative background

The relevant Community provisions: Directive 76/207

4. The purpose of Directive 76/207 is to implement in the Member States the principle of equal treatment for men and women while ensuring, in particular, that workers of both sexes have real equality of opportunity in access to employment.

5. For this purpose, Article 2 of the Directive defines the principle of equal treatment

* Original language: French.

1 — OJ 1976 L 39, p. 40.

2 — Page 7 of the English translation of the order for reference.

and its limits. Thus, Article 2(1) provides that the principle shall mean that there is to be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. Article 2(2) provides, however, that the Directive is to be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

6. Article 3 of the Directive is the provision which defines the scope of the principle of equal treatment as regards access to employment. Article 3(1) provides that application of the principle means that there is to 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. Article 3(2)(a) provides that the Member States are to take the measures necessary to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished.

7. Under Article 6 of the Directive the Member States must introduce the measures necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process.

German law

8. The relevant provisions of German law concerning equal treatment of men and women in matters of employment are contained in the Bürgerliches Gesetzbuch (German Civil Code, hereinafter 'the BGB') and in the Arbeitsgerichtsgesetz (Law on the Organization of the Labour Courts, hereinafter 'the ArbGG').

9. Paragraph 611a(1) of the BGB provides that an employer must not discriminate against any worker on grounds of sex in connection with an agreement or the adoption of a measure, particularly as regards establishment of the employment relationship, promotion, the giving of instructions or dismissal. However, a difference in treatment on grounds of sex is permissible if an agreement or measure concerns an activity which, owing to its specific nature, can only be performed by workers of a particular sex. Paragraph 611a(2) provides that if, in the establishment of an employment relationship, an employer becomes *liable* for an infringement of the prohibition of discrimination laid down in subparagraph (1), 'the applicant discriminated against may claim appropriate financial compensation not exceeding three months earnings'. A month's earnings is to be what the applicant would have been entitled to earn, in cash or in kind, by working normal hours in the month in which an employment relationship would have arisen.

10. Paragraph 611b(1) of the BGB provides that an employer may not offer a job only to

workers of a particular sex except in the cases set out in Paragraph 611a(1).

11. Paragraph 61b(2) of the ArbGG provides that, if a number of persons discriminated against in the establishment of an employment relationship claim compensation pursuant to Paragraph 611a(2) of the BGB, the amount of compensation granted is to be limited, upon application by the employer, to six months' earnings or, when a single recruitment procedure was held with the aim of establishing several employment relationships, to 12 months' earnings. Where the employer has already satisfied claims for compensation, the maximum amount is to be reduced proportionately; if the cumulated compensation to which the plaintiffs are entitled exceeds in total that maximum amount, the individual grants of compensation are to be reduced in proportion to that maximum amount.

Facts

12. On 17 November 1994 Nils Draehmpaehl, the applicant in the main proceedings, replied by letter to an offer of employment advertised in the press by Urania Immobilienservice OHG. It was worded as follows:

'We are seeking an experienced female assistant in our sales management department. If you can get along with the chaotic members of a sales-orientated firm, are willing to make them coffee, get little praise and can work hard, you are the right person for us. We need someone who is able to work on the computer and think with and for others. If you can really face this challenge, we await your application with documents giving full information. But do not say we have not warned you ...'

13. Urania did not reply to Mr Draehmpaehl's letter. Claiming that he was the best-qualified applicant for the post and that he had therefore suffered discrimination on grounds of sex, Mr Draehmpaehl brought proceedings for damages in the Arbeitsgericht Hamburg against Urania Immobilienservice. He sought compensation equal to three-and-a-half months' salary.

14. The Arbeitsgericht stated that, in separate proceedings before a different chamber of the same court, another candidate had also brought proceedings for damages against Urania on similar grounds.

15. Urania did not appear at the conciliation hearing and did not make any observations on the proceedings pending. Neither the Arbeitsgericht nor the plaintiff succeeded in contacting Urania or in ascertaining its present address.

16. According to the Arbeitsgericht, Urania's offer of employment infringed Paragraph 611b of the BGB since it was manifestly reserved for women, for no apparently justifiable reason. [3] Taking the view that the plaintiff had been discriminated against on the grounds of his sex, it held that Urania was bound to pay compensation.

17. However, it found that Mr Draehmpaehl's claims conflicted with the first sentence of Paragraph 611a(2) of the BGB, which required detailed proof of fault on the employer's part to be adduced by the plaintiff [4] whereas the latter was relying on mere presumptions.

18. The Arbeitsgericht Hamburg was uncertain about (i) the compatibility of Paragraph 611a(2) of the BGB with the interpretation which the Court gave, in its judgment in *Dekker*, [5] of Article 2 of Directive 76/207 and (ii) the compatibility of the provisions of German law limiting the amount of compensation which the person discriminated against may claim [6] with the interpretation which the Court gave, in its judgment in *Marshall II*, [7] of Article 6 of Directive 76/207 and therefore considered that it was unable to determine the proceedings. It therefore decided to submit the following four questions to the Court for a preliminary ruling:

'1. Does a statutory provision which makes it a condition for an award of compensation for discrimination on grounds of sex in the making of an appointment that there must be fault on the part of the employer conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions?

2. Does a statutory provision which prescribes an upper limit of three months' salary as compensation for discrimination on grounds of sex in the making of an appointment — in contrast to other domestic provisions of civil and

3 — Within the meaning of Paragraph 611a(1) of the BGB.

4 — Page 6, point (a), of the English translation of the order for reference.

5 — Case C-177/88 [1990] ECR I-3941.

6 — Paragraph 611a(2) of the BGB and 61b(2) of the ArbGG.

7 — Case C-271/91 [1993] ECR I-4367.

labour law — for applicants of either sex who have been discriminated against in the procedure, but who would not have obtained the position to be filled even in the event of non-discriminatory selection by reason of the superior qualifications of the applicant appointed, conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC 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?

4. Does a statutory provision which, where compensation is claimed by several parties for discrimination on grounds of sex in the making of an appointment, prescribes an upper limit of the aggregate of six months' salary for all persons who have suffered discrimination — in contrast to other domestic provisions of civil and labour law — conflict with Articles 2(1) and 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?'

Analysis

3. Does a statutory provision which prescribes an upper limit of three month's salary as compensation for discrimination on grounds of sex in the making of an appointment — in contrast to other domestic provisions of civil and labour law — for applicants of either sex who, in the event of non-discriminatory selection, would have obtained the position to be filled, conflict with Articles 2(1) and 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?

19. First of all, it must be pointed out that it is settled case-law that, in proceedings under Article 177 of the EC Treaty, the Court has no jurisdiction to rule on the compatibility of a national measure with Community law. However, the Court may provide the national court with interpretations of all relevant points of Community law to enable it to assess the compatibility of national provisions with Community law. [8]

8 — See, in particular, the judgment in Case C-177/94 *Perfili* [1996] ECR I-161, paragraph 9.

20. Consequently, the questions submitted must be reworded. Thus, by its first question, the Arbeitsgericht asks the Court whether paragraph (1) of Articles 2 and 3 of Directive 76/207 is to be interpreted as precluding compensation for damage suffered as a result of discrimination on grounds of sex in the making of an appointment from being made subject to proof of fault on the employer's part. The second and third questions concern the compatibility of a ceiling on any award of compensation with Directive 76/207. By its fourth question the Arbeitsgericht asks whether Community law precludes national provisions setting a ceiling on aggregate compensation, as provided for by Paragraph 61b(2) of the ArbGG.

The first question

21. The Arbeitsgericht wonders whether the reply which the Court gave in *Dekker* is relevant to the proceedings before it.

22. In *Dekker*, the job applicant was not engaged owing to her being pregnant. The Netherlands court was uncertain, in particular, whether a national legislative provision making an award of damages for breach of the principle of equal treatment conditional on proof of the employer's fault was compatible with Articles 2 and 3 of Directive 76/207.

23. The Court followed the Opinion of Advocate General Darmon [9] and, relying on established case-law, [10] the Court confirmed that, whilst the Member States are at liberty to choose the means of ensuring real and effective judicial protection, as referred to by Article 6 of Directive 76/207, if the sanction chosen forms part of rules governing the employer's civil liability, breach of the prohibition of discrimination is sufficient *in itself* to cause liability to be incurred, without requirement of proof of a distinct fault on the employer's part or consideration of the exonerating factors provided for by national law. [11]

24. The Commission and the applicant in the main proceedings [12] submit that this judgment already provides an answer to the first question now submitted to the Court.

25. The German Government, on the other hand, states that the judgment in *Dekker* provides no basis for automatically conclud-

9 — Opinion in the *Dekker* case (paragraphs 34 to 37).

10 — Judgment in Case 14/83 *Von Colson and Kamann* [1984] ECR 1891.

11 — Judgment in *Dekker* (paragraphs 22 to 26).

12 — Observations of the Commission (paragraphs 19 to 22) and of the applicant in the main proceedings (paragraphs 39 to 43).

ing that the national provision in question is incompatible with the provisions of the Directive. In its view, that judgment concerns only the requirement of fault in Netherlands law. In contrast to that position, fault in German law does not call in question the effectiveness of Community provisions. In German law, if the requirement of fault is always necessary in order for an employer to incur liability, proof of such fault is easy to adduce since deliberate acts or *simple negligence* are sufficient for such liability to be incurred. Furthermore, cases in which employers are exempt from liability are particularly strictly defined. [13]

26. I do not share the German Government's view. In my view, the *Dekker* judgment is clear and perfectly transposable to the present case. Apart from the difference in the sexes involved, the cases forming the subject-matter of the two sets of proceedings referred to the Court are identical. In both cases, an employment relationship was not established, [14] or even considered, [15] for reasons exclusively related to the sex of the candidate. In both cases, by its own terms, the national legislation in question makes it a condition, in order for an employer to incur liability, that proof of fault in the discriminatory act or conduct be adduced. Such a national legislative provision thus allows an employer to escape liability for a reason extraneous to sexual discrimination and clearly jeopardizes the effectiveness of the Directive's provisions. I refer in this regard to the argument of Advocate General Darmon. [16]

27. Consequently, I propose that the Court answer the first question as follows: If the sanction chosen by a Member State forms part of the rules governing an employer's civil liability, Articles 2(1) and 3(1) of Directive 76/207 preclude reparation of damage arising from discrimination on grounds of sex in the making of an appointment from being made subject to the existence of fault, no matter how slight.

The second and third questions

28. By these two questions, the Arbeitsgericht asks whether the interpretation which the Court gave of Article 6 of Directive 76/207 in its judgment in *Marshall II* precludes measures such as those enacted in German law setting a ceiling on any compensation claimable. [17] It is stated in the order for reference that other provisions of national civil law and national labour law do not impose that type of ceiling. This point was the subject of lengthy discussion at the hearing, on the outcome of which it is not

13 — Observations of the German Government (paragraphs 4 and 5).

14 — *Dekker* case.

15 — This case.

16 — Paragraph 35 of his Opinion in the *Dekker* case.

17 — Paragraph 611a(1) of the BGB and Paragraph 61b(2) of the ArbGG.

for me to comment. For it is clear from settled case-law that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice [18] and that, therefore, the Court must not be led into interpreting or applying national law. [19] We must therefore decide the case on the basis of the legal and factual information provided by the national court.

The Arbeitsgericht has also asked whether the answer depends on the qualifications of the candidate who was discriminated against on grounds of sex.

29. I shall first consider whether the reply to be given to the question posed by the national court depends on the level of the qualifications of the candidate suffering sexual discrimination.

30. I do not think so, for at least three reasons.

31. *First*, as in the *Dekker* case, the employer declined to consider establishing an employment relationship with the candidate on the grounds of his sex and not for reasons related to his qualifications. The Arbeitsgericht is mixing up two quite different notions: loss of an opportunity because of one's sex and objectively erroneous assessment by the employer of the candidate's qualifications.

32. Since the harm suffered owing to sexual discrimination in the making of an appointment is quite different, it must be made good independently of any other harm which may have been incurred by the injured candidate and without reparation of this other harm having any possible effect on the basis or extent of compensation for that discrimination.

33. *Furthermore*, according to settled case-law, in the event of breach of the principle of discrimination, Article 6 of the Directive requires the Member States to apply a sanction which must provide real and effective judicial protection [20] and have a real dissua-

18 — See, in particular, the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1, Case 5/77 *Tedeschi* [1977] ECR 1555, paragraphs 17 to 19, and Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 10.

19 — See, in particular, the judgments in Case 13/61 *De Geus* [1962] ECR 45, and Case C-10/92 *Balocchi* [1993] ECR I-5105, paragraphs 16 and 17.

20 — Judgments in *Von Colson and Kamann* (paragraph 23) and *Dekker* (paragraph 23).

sive effect on the employer. [21] In my view, it would impair the effectiveness of the Directive if reparation of the damage suffered through this kind of discrimination were to be subject to proof, by the injured candidate, that his qualifications were superior or equal to those claimed by the candidate engaged by the employer.

34. *Finally*, reparation of the damage suffered through undervaluation of the merits and qualifications of an individual, man or woman, does not come within the scope of Directive 76/207 — *provided, of course, that there is no covert sexual discrimination.* Here the court dealing with the case can therefore only be referred to its own national law.

35. Consequently, the Arbeitsgericht's inquiry, explicit in the second question and implicit in the third question, concerning the qualifications of the candidate discriminated against on the grounds of sex is not relevant to the outcome of the case.

36. In these preliminary questions, the Arbeitsgericht is therefore asking the Court to rule on the application to this case of the solution adopted in *Marshall II*. [22] It points out that, in German domestic law, contrary to the usual domestic provisions of civil law and labour law, [23] the sanction imposed for breach of the principle of non-discrimination on grounds of sex in conditions of access to employment consists in financial compensation, under rules governing employers' civil liability, limited to an amount corresponding to three months' earnings. The earnings are those which the candidate would have obtained if he had been engaged.

37. In that case, the Court was in fact replying to a similar question put by a United Kingdom court.

38. Mrs Marshall, who had been dismissed on discriminatory grounds, sought payment of compensation. The Industrial Tribunal assessed her financial loss due to her discriminatory dismissal at an amount higher than the ceiling set for this type of damage by Section 65(1)(b) of the Sex Discrimination Act 1975. The tribunal had doubts, in par-

21 — See, in particular, the judgment in *Marshall II* (paragraph 24).

22 — English translation of the order for reference, p. 7, point (b).

23 — See paragraph 28 of this Opinion.

ticular, about the compatibility of that national provision with Article 6 of Directive 76/207.

39. The Commission and the plaintiff in the main proceedings maintain that this judgment is partly transposable to this case.

40. The German Government contests this. In its view, the judgment in *Marshall II* is not relevant because it was given in the particular situation of a discriminatory dismissal, not transposable to the present case involving discriminatory selection in the making of an appointment. It adds that the judgment in *Von Colson and Kamann* is relevant and that the German legislative provisions in question respect the principles laid down by the Court in that judgment. Thus, they provide for the award of adequate compensation in relation to the damage suffered and are sufficiently dissuasive.

41. I do not think that the principles laid down in those two judgments can be reconciled. In my view, *Marshall II* defines and develops the principles underlying *Von Colson and Kamann*. What, precisely, are those principles?

42. In *Von Colson and Kamann*, the Court recalled first of all that, in accordance with Article 5 and the third paragraph of Article 189 of the Treaty, it was for the Member States to adopt all appropriate measures, whether general or particular, to ensure fulfilment of the aims pursued by Directive 76/207 and for the national courts to interpret national law in the light of the wording and the purpose of the Directive. [24] As regards that directive, the Court also pointed out that the purpose pursued by the Community legislature was to ensure the effectiveness of the prohibition of discrimination on grounds of workers' sex.

43. The Court then explained that real equality of opportunity cannot be established without an appropriate system of sanctions. [25] As regards Article 6, the Court held: 'It follows from [that] provision that the Member States are required to adopt measures which are *sufficiently effective* to achieve the objective of the Directive and to ensure that those measures may in fact be relied on before the national courts by the person concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate *equal* financial compensation, backed up where necessary by a system of fines. However, the Directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions

24 — Paragraphs 15 and 26.
25 — Paragraph 22.

suitable for achieving its objective.' [26] Furthermore, the measures adopted by the Member States must '... have a *real deterrent effect on the employer*'. [27]

44. In *Marshall II*, after recalling those principles, [28] the Court held that account had to be taken of the particular circumstances of each breach of the principle of equal treatment [29] and the Court made observations on the question of the 'adequate' nature of the sanction for ensuring restoration of the principle of equal treatment following a discriminatory dismissal.

45. Advocate General Van Gerven, in his Opinion in *Marshall II*, defined 'adequate compensation' as that which is sufficiently high to act as an effective, proportionate and dissuasive sanction. [30] Thus, this type of compensation must be distinguished from full reparation. [31]

46. Departing from that analysis, the Court held that, in the case of discriminatory dismissal, only reinstatement of the person discriminated against or, alternatively, full financial reparation for the damage suffered can restore a situation of equality [32] and meet the requirements underlying the notion of an 'adequate sanction'. The Court therefore held that Article 6 of the Directive did not allow the fixing of an upper limit on compensation payable in the event of a discriminatory dismissal '... since it limits the amount of compensation *a priori* to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through *adequate reparation* for the loss and damage sustained as a result of discriminatory dismissal'. [33] In doing so, it made clearer the judgment in *Von Colson and Kamann*.

47. The discretion left to the Member States in implementing the solution chosen for ensuring restoration of the principle of equal treatment in the case of discriminatory dismissal is therefore limited: there must either be reinstatement or full reparation of the damage suffered, calculated according to the national rules in force. [34]

48. From those judgments I deduce that the Court has laid down a principle whereby if the Member States choose to make good damage arising from a discriminatory situation prohibited by Directive 76/207 under rules governing employers' civil liability, such compensation must constitute full reparation.

26 — Paragraph 18, my emphasis.
27 — Paragraph 23, my emphasis.
28 — Paragraphs 23 and 24.
29 — Paragraph 25.
30 — Paragraph 18 of his Opinion.
31 — Ibid., paragraph 17.
32 — Judgment in *Marshall II* (paragraphs 25 and 26).
33 — Ibid., paragraph 30, my emphasis.
34 — Ibid., paragraph 36.

49. In the present case, the measure chosen by the German legislation to ensure respect for the rights of a candidate discriminated against on the grounds of his or her sex in the making of an appointment is payment of compensation not exceeding three months' earnings which, according to the court making the reference, is not equivalent to the compensation awardable under the other rules of domestic civil law and labour law. I can think of two reasons why such provisions must be prohibited.

50. *First*, the ruling in *Von Colson and Kamann* and in *Marshall II* precludes them, since I have deduced from those judgments that they establish a principle that damage arising from discrimination prohibited by Directive 76/207 must be made good in full. [35]

51. If such an interpretation were not adopted, that would mean accepting that reparation of damage arising from such discrimination would not always be full reparation and that it would therefore be necessary to adapt this principle according to the different discriminatory situations. Consequently, the Court would be called upon, case by case, to determine the rule to be applied; for example, it would have to rule that, in a case of refusal to engage, reparation is not to be full reparation; it would have to do likewise in the case of a denial of professional training ...; the situations in which workers suffer discrimination on grounds of their sex can be multiplied and so could the cases in which the Court would have to give a ruling and sometimes change its case-law.

52. That interpretation I find neither justifiable nor reasonable. In the various situations (dismissal, refusal to engage ...), the worker or candidate for a job has been placed in the same situation: he or she has suffered discrimination on the grounds of his or her sex since the employer has engaged in the same blameworthy conduct. However, under the general principle of equal treatment in Community law, comparable situations must not be treated differently and different situations must not be treated equally, unless such treatment is objectively justified. [36] Consequently, where there are similar situations experienced by workers, the same rule must be applied and the damage suffered by them must be repaired in full. [37]

53. However, the extent of the damage suffered by the workers discriminated against may be different. The national court must not only deal with the different cases of breach of the principle of equal treatment which arise but also consider the different circumstances of each instant case where the same type of breach of the principle of equal treatment is involved. At all events, it is for the national court alone to assess, according

35 — Paragraph 48 of this Opinion.

36 — See, most recently, the judgment in Case C-241/95 *Accrington Beef and Others* [1996] ECR I-6699.

37 — Judgment in *Marshall II* (paragraph 26).

to the national rules in force, the damage suffered by taking into account all the factors which it usually takes into consideration.

54. *Second*, and in the alternative, the principle of procedural autonomy of national legal systems also precludes application of provisions like those applying in Germany. Respect for this principle presupposes that, in the absence of harmonization pursuant to Community law, the Member States are at liberty to choose the appropriate solution for guaranteeing this judicial protection, but the sanction chosen must offer the same degree of protection as that adopted under the comparable national legal rules. [38] The Arbeitsgericht tells us, however, that this is not the case.

55. In conclusion, as far as the second and third questions are concerned, I submit that the Court should hold that limitation of compensation payable for a discriminatory refusal to appoint a candidate is contrary to Articles 2(1), 3(1) and 6 of Directive 76/207.

The fourth question

56. By this question the Arbeitsgericht asks the Court whether the provisions of Directive 76/207 preclude measures such as those enacted in German law under which the amount of compensation to which a person discriminated against on the grounds of his sex in the making of an appointment from an employer can be limited where several claims for compensation based on discrimination on grounds of sex are made. In other words, that national legislative provision, unlike other provisions of German civil law and German labour law, [39] allows the amount of compensation payable to be varied according to the number of candidates. Consequently, the compensation which the persons concerned may claim can undergo a sharp reduction on account of the ceiling imposed.

57. I would refer the Court to my reasoning set forth above, because there is no difference between the two questions. Here again, the rules concerned have the consequence of limiting the amount of compensation for the damage actually suffered by the candidate discriminated against on the grounds of his or her sex in the making of an appointment.

58. Consequently, I submit that the Court should answer the fourth question in the affirmative.

38 — See, in particular, the judgment in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 23 and 24.

39 — See paragraph 28 of this Opinion.

Conclusion

59. In view of the foregoing considerations, I propose that the questions submitted by the Arbeitsgericht Hamburg should be answered as follows:

(1) Where the sanction chosen by a Member State to penalize breach of the principle of non-discrimination in the matter of recruitment is laid down by rules governing civil liability, Articles 2(1) and 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, must be interpreted as precluding a national legislative provision from making reparation of damage arising from discrimination on grounds of sex in the making of an appointment subject to the condition that there must be fault on the employer's part.

(2) Articles 2(1), 3(1) and 6 of Directive 76/207 must be interpreted as precluding national legislative provisions which — unlike other provisions of domestic civil law and domestic labour law — place an upper limit of three months' earnings on the amount of compensation which may be claimed, in the event of discrimination on grounds of sex in the making of an appointment, by male or female candidates who have suffered discrimination in the making of the appointment.

(3) Articles 2(1), 3(1) and 6 of Directive 76/207 must be interpreted as precluding national legislative provisions which — unlike other provisions of domestic civil law and domestic labour law — place an upper limit of six months' earnings on the aggregate compensation payable to persons suffering discrimination on grounds of sex in the making of an appointment where several persons claim compensation.