OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 28 March 1990 *

Mr President,
Members of the Court,

1. The specific difficulties of part-time working in relation to the principle of equal pay for men and women once again underlies the questions submitted for a preliminary ruling by the Arbeitsgericht Hamburg (Federal Republic of Germany).

2. Mrs Kowalska was employed by the Free Hanseatic City of Hamburg as a court clerk from 1 October 1974 to 31 July 1987. She occupied a part-time post. At the end of her 60th year she retired. Although since then she has been in receipt of a retirement pension, she was refused payment of a severance grant ('Übergangsgeld') under Article 62 of the Bundesangestelltentarifvertrag (Federal Civil Service Employees' Collective Agreement, hereinafter referred to as 'the Collective Agreement'), on the ground that she had not been in full-time employment. She thereupon commenced proceedings against the City of Hamburg before the Arbeitsgericht, claiming that the provisions of the Collective Agreement were contrary to Article 119 of the EEC Treaty and to Council Directive 75/117/EEC of 10 February 1975. [1]

3. In its decision referring the matter to the Court, the national court noted that, whereas the percentage of female workers in full-time employment in 1987 had been 55.5% in the public services properly so called and 52.5% in the other services, that percentage reached 77.3 and 97.8% respectively in the case of part-time employment. Moreover, among part-time workers working 20 hours or more a week, 90.2% are women.

4. Accordingly, two questions have been submitted for a preliminary ruling, which concern in essence, first, the compatibility of the Collective Agreement with Article 119 of the EEC Treaty and, secondly, the effects of any incompatibility on the freedom of contract of parties to collective agreements.

5. The first question presupposes the provision of a solution to a preliminary difficulty, namely the question whether the severance grant instituted by the Collective Agreement has, or has not, the legal attributes of 'pay'. The parties to the main proceedings disagree on this point. It should, however, be pointed out that the difficulty is relevant only in determining the Community measures by reference to which the relevant national provisions will have to be considered: Article 119 of the Treaty applies if pay is in issue, but Article 5(1) of Council Directive 86/378/EEC of 24 July 1986 [2] if it is a social security benefit. Incidentally, it may be added that both those articles have direct effect [3] and that either of them could therefore be relied on

* Original language: French.

1 — Council Directive 75/117/EEC 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 L 45, 19.2.1975, p. 19).

2 — Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ L 225, 12.8.1986, p. 40).

3 — In the case of Article 119 of the Treaty, see the judgment of 8 April 1976 in Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 10.

by Mrs Kowalska in proceedings against the City of Hamburg.

6. For many years the Court of Justice has had occasion to lay down the difficult dividing line between pay and social security benefits. [4] In the *Garland* judgment the Court defined the concept of pay as

'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'. [5]

It was by virtue of that case-law that, in the *Bilka* judgment, the Court was prepared to regard as 'pay' the occupational pensions provided by an agreement between the employer and the staff committee. [6]

7. I would add that, in a case still pending, [7] the Court also has to give a ruling as to whether a redundancy payment is in point of law 'pay'.

8. The Court seems to be guided by two criteria: first, whether there is a payment — albeit indirect — by the employer to the worker and, secondly, whether there is a close link between the employment and the award at issue. The severance grant established by the Collective Agreement should be set against those criteria. The grant is paid to full-time employees who, on termination of employment, are at least 21 years of age and have remained with the same employer for a continuous period of at least one year. [8] Certain other conditions, too, must be satisfied; most importantly, the termination of the employment may not be attributable to the fault of the employee, nor may the employee have obtained a grant payable on dismissal, have found alternative employment immediately afterwards or have refused to take up a new post. [9] Furthermore, entitlement to the severance grant does not arise in the event of redundancy due to internal rationalization. [10] It seems that, in practice, the severance grant is paid almost exclusively in cases of retirement, or departure connected with childbirth. [11] Lastly, the amount of the severance grant is determined by the latest wage and the length of employment. [12]

9. In denying that it is in the nature of 'pay', the City of Hamburg bases itself on the fact that provision for the severance grant had previously been made by regulation, until the conclusion of the Collective Agreement on 23 February 1961. [12]

10. I do not find that argument relevant. First, it rests on a legal situation which no longer prevails. Secondly, as was observed above, the criterion was not adopted by the Court in its judgments on the matter. On the contrary, I consider the grant in question to be directly connected with the employment relationship, by virtue both of

4 — See judgments of 25 May 1971 in Case 80/70 *Defrenne I* [1971] ECR 445, of 15 June 1978 in Case 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 19 and 20, of 13 May 1986 in Case 170/84 *Bilka* [1986] ECR 1607, of 11 March 1981 in Case 69/80 *Worringham and Humphreys* [1981] ECR 767, of 18 September 1984 in Case 23/83 *Liefting* [1984] ECR 3225 and of 3 December 1987 in Case 192/85 *Newstead* [1987] ECR 4753.

5 — Judgment of 9 February 1982 in Case 12/81 [1982] ECR 359, paragraph 5.

6 — Case 170/84, cited above, paragraphs 20, 21 and 22.

7 — Case C-262/88 *Barber*, (judgment of 17 May 1990, [1990] ECR I-1889, at page I-1912), see the Opinion of Mr Advocate General Van Gerven, paragraphs 13 to 16.

8 — Article 62(1) of the Collective Agreement.

9 — Article 62(2) of the Collective Agreement.

10 — Article 7(4) of the Collective Agreement on the protection of employees from redundancy measures, referred to by the City of Hamburg in its written observations, at p. 21.

11 — See the observations of the City of Hamburg, at p. 16.

12 — Ibid., at p. 15.

the conditions governing entitlement to the award and of the rules regarding its quantification. Moreover, the severance grant is paid to the employee by the employer direct. As was explained during the oral procedure, the employer alone bears the cost of financing the award. All those factors seem to suggest that the severance grant should be recognized as 'pay' within the meaning of Article 119.

11. I now propose to consider whether or not the disqualification of part-time workers from the award is discriminatory. The case-law of the Court in this field is now well established. In the *Bilka* judgment, the Court held that:

'Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, *unless* the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex'. [13]

In this context the Court reverses the onus of proof, irrespective of whether the provision at issue is contractual or legislative. [14] The Court of Justice leaves to the national court or tribunal the task of appraising whether the reasons set out as justification for the contested measure are unrelated to any discrimination [15] and it requires the means chosen to meet a genuine need and to be suitable and necessary for attaining the desired aim. [16]

12. The first condition, under which the measure in question must affect a far larger number of women than men, is undeniably fulfilled in this case, in view of the statistics supplied by the Arbeitsgericht in its decision requesting a preliminary ruling.

13. With regard to the justification put forward for the disputed provision, the City of Hamburg submits: 'On account of the difference in the basic social situation between part-time and full-time staff, entitlement to the severance grant was deliberately limited to the latter, because it is only in the case of full-time workers, who meet their own needs and those of their families entirely from the income derived from employment, that there is a need for temporary assistance financed by the employer'. [17]

14. The Court has already dismissed such justification. Where the German Government claimed, in the *Rinner-Kühn* case, that

'workers engaged in less than 10 hours' work a week or 45 hours' work a month did not show the same degree of integration in the undertaking, or the same economic dependence upon it, as did other workers', [18]

the Court ruled that

'inasmuch as those considerations stand as mere generalizations affecting certain categories of workers, they do not point to

13 — Case 170/84, cited above, in the operative part of the judgment (emphasis supplied).

14 — See judgment of 13 July 1989 in Case 171/88 *Rinner-Kühn* [1989] ECR 2743, and also the judgment of 13 December 1989 in Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311.

15 — Ibid.

16 — Case 170/84, cited above, paragraph 36.

17 — Written observations, at p. 18.

18 — Case 171/88, cited above, paragraph 13.

objective criteria which are free from any discrimination on grounds of sex'. [19]

15. The marked similarity of the justification produced in the present case seems to call for the same response. Accordingly, I propose that the answer to the first question should be that Article 119 of the EEC Treaty must be interpreted as rendering unlawful the provisions of a collective agreement which enable employers to exclude part-time workers from the benefit of a severance grant on termination of their employment for reasons which are not attributable to the worker, if those provisions affect a far higher number of women than men, unless the employer can demonstrate in proceedings before the national court that they are justified by objective factors unrelated to any discrimination on grounds of sex.

16. The second question concerns the effects of any finding of incompatibility on the freedom of contract enjoyed by the parties to a collective agreement. The question is whether, in the event that Article 62(1) of the Collective Agreement in question is declared incompatible with Community law, part-time workers become entitled to a severance grant proportionate to the hours they work or, conversely, whether the freedom of contract of the parties to a collective agreement precludes conferment of such a right.

17. Similar difficulties have long since been resolved by the Court in circumstances where the measure at issue was a legislative provision rather than a collective agreement. Quite recently, in the *Ruzius-Wilbrink* case, the national court submitted questions as to the implications which would flow from a finding that the Netherlands law in question was incompatible with Article 4(1) of Directive 79/7/EEC, [20] introducing equal treatment in matters of social security. On that point the Court ruled as follows:

'in the absence of adequate measures implementing Article 4(1) of Directive 79/7, and in the face of indirect discrimination on the part of the State, the group set at a disadvantage by that discrimination is entitled to be treated in the same manner, and to have the same rules applied to it, as the other recipients, since, where the said directive has not been properly implemented, those rules remain the only valid point of reference'. [21]

That judgment merely confirmed an established line of case-law whereby, in the absence of measures to implement Article 4(1) of Directive 79/7,

'women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation'. [22]

18. The only novel feature of the present case is that it concerns a contractual rather than a legislative provision, since it is contained in a collective agreement.

19 — Case 171/88, cited above, paragraph 14.

20 — Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6, 10.1.1979, p. 24).

21 — Case C-102/88, cited above, paragraph 21.

22 — Judgments of 4 December 1986 in Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 22, of 24 June 1987 in Case 384/85 *Borrie Clarke* [1987] ECR 2865, paragraph 13; see also the judgments of 24 March 1987 in Case 286/85 *Norah McDermott and Ann Cotter* [1987] ECR 1453, paragraph 17 and of 8 March 1988 in Case 80/87 *A. Dik, A. Menkutos-Demirci and H. G. W. Laar-Vreeman* [1988] ECR 1601, paragraph 10.

19. I do not consider that this difference should preclude the application of the case-law cited above. Article 4 of Directive 75/117 provides: 'Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended'. Several later directives reproduce the same provisions.[23] Moreover, the Court construes that obligation very strictly, since it requires that clauses in agreements which are incompatible with the principle of equal treatment may be rendered inoperative even when the collective agreements are not legally binding.[24]

20. It is also my opinion that in its judgment in *Defrenne II* the Court, by acknowledging that Article 119 of the Treaty applied not only to legislative provisions but also to collective labour agreements[25] and by limiting *ratione temporis* the direct effect vested in that article,[26] necessarily took the view that the national courts had to extend to the disadvantaged group those provisions contained in collective agreements whose benefits had previously been withheld from it, and that only the Court of Justice itself could, in its judgment, confine that consequence to those workers who had commenced judicial proceedings or had lodged an equivalent complaint.

23 — Articles 3(2)(b) and 5(2)(b) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40); Article 7 of Directive 86/378/EEC, cited above.

24 — Judgment of 8 November 1983 in Case 165/82 *Commission* v *United Kingdom* [1983] ECR 3431.

25 — Case 43/75, cited above, paragraph 1 of the operative part of the judgment.

26 — Case 43/75, cited above, paragraph 5 of the operative part of the judgment.

21. It is only in respect of clauses in collective agreements '[where] the concern for protection which originally inspired them is no longer founded' that Directive 76/207 requires the Member State to request labour and management to undertake their revision.[27] Thus, with regard to working conditions and access to employment, the directive draws a distinction according to whether or not the contested clauses in the collective agreements were justified by a concern for protection which has ceased to exist — for example, the protection of women in their capacity as parents or older workers (both being categories to which male as well as female workers may belong).[28] Although that is so, the Court has none the less set limits on referring the matter back for collective negotiation; in a judgment declaring that the French Republic had failed to fulfil its obligations, the Court criticized

'national legislation which, several years after the expiry of the period prescribed for the implementation of the directive, makes the two sides of industry responsible for removing certain instances of inequality without laying down any time-limit for compliance with that obligation'.[29]

22. As far as equal pay is concerned, it is undeniable that Directive 75/117 contains no provision referring the matter back for collective negotiation. It need hardly be added that the clause depriving part-time workers of the benefit of the severance grant cannot be regarded as arising out of

27 — Articles 3(2)(c) and 5(2)(c).

28 — On this point, see judgment of 25 October 1988 in Case 312/86 *Commission* v *France* [1988] ECR 6315, paragraph 14.

29 — Case 312/86, cited above, paragraph 22; for a commentary on that judgment, see M. T. Lanquetin and H. Masse-Dessen, 'Les droit particuliers pour les femmes dans les conventions collectives', *Droit social*, No 718, p. 551.

'concern for protection'. Consequently, merely by virtue of the incompatibility of Article 62 of the Collective Agreement with Article 119 of the EEC Treaty, part-time workers must receive the same rights to claim the severance grant — in proportion to their previous wage, of course — as those occupying full-time posts.

23. There is, moreover, no impairment of the freedom of contract enjoyed by the parties to the Collective Agreement, because those parties are free to undertake the revision of the relevant provisions of that agreement, and may even remove the benefit of the severance grant from all workers, on condition that no discrimination between full-time and part-time employees is introduced.

24. It is still open to the Court to limit the effects of the judgment in this case *ratione temporis*, as it did in the *Defrenne II* judgment. However, I propose that the Court should refrain from doing so. As the Commission noted during the oral procedure, the direct effect of Article 119 has been recognized in Community law since 1976. Labour and management cannot therefore exempt themselves from observance of its requirements when negotiating collective agreements. The situation today is not what it was at the time of the *Defrenne II* judgment, when for the first time the Court was about to recognize the direct effect of Article 119. It does not therefore seem to me that considerations of legal certainty should induce the Court to limit *ratione temporis* the effects of the ruling it gives.

25. I therefore conclude that the Court should rule as follows:

'(1) Article 119 of the EEC Treaty must be interpreted as rendering unlawful the provisions in a collective agreement which enable employers to exclude part-time workers from the benefit of a severance grant on the termination of their employment for reasons not attributable to the worker himself, if those provisions affect a far higher number of women than men, unless the employer can demonstrate that they are justified by objective factors unrelated to any discrimination on grounds of sex.

(2) If indirect discrimination in matters of pay is practised by an employer acting in pursuance of a collective agreement, the group set at a disadvantage by that discrimination is entitled to be treated in the same manner and to have the same rules applied to it pro rata as the other recipients, since, where there has

not been a proper application of Article 119 of the EEC Treaty or of Article 4 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, those rules remain the only valid point of reference.'