JUDGMENT OF THE COURT
6 February 1996 *

In Case C-457/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesarbeitsgericht for a preliminary ruling in the proceedings pending before that court between

Kuratorium für Dialyse und Nierentransplantation e. V.

and

Johanna Lewark,

on the interpretation 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 (OJ 1975 L 45, p. 19),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers),

* Language of the case: German.

G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray (Rapporteur), P. Jann and H. Ragnemalm, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Regierungsrat in that Ministry, acting as Agents,

— the Commission of the European Communities, by Marie Wolfcarius, of its Legal Service, and Horstpeter Kreppel, a German civil servant seconded to the Commission's Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government and the Commission at the hearing on 2 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 29 June 1995,

gives the following

Judgment

1 By order of 20 October 1993, received at the Court on 7 December 1993, the Bundesarbeitsgericht (Federal Labour Court) referred to the Court for a

preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation 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 (OJ 1975 L 45, p. 19, hereinafter 'the Directive').

2 That question was raised in proceedings between Johanna Lewark (hereinafter 'the plaintiff') and Kuratorium für Dialyse und Nierentransplantation e. V. (hereinafter 'the defendant') concerning the latter's failure to compensate the plaintiff for the time spent on a training course which was necessary for the performance of her staff council functions but which took place outside her individual working hours.

3 The plaintiff is employed for 30.8 hours a week in the care unit of the defendant's dialysis centre. She is also on the local staff council, which consists of three members. Her working hours are spread over four days a week and she works for 7.7 hours a day.

4 The dialysis centre employs twenty-one employees in the care unit, seven men and fourteen women. Of the men, six work full-time and one part-time. Of the women, four work full-time and ten part-time. The plaintiff is the only member of the staff council to work part-time.

5 From 12 to 16 November 1990 the plaintiff, on the basis of a decision of the staff council and with the defendant's consent, attended a full-time training course in order to obtain the knowledge that was necessary for performing her staff council functions. The training course on 13 November 1990 lasted for 7.5 hours. If she had not been on the course, the plaintiff would not have worked on that day,

because of her being employed part-time. However, the defendant paid her on the basis of her contractual working hours of 30.8 hours a week, with no compensation for the time she had spent on that course.

6 Under Paragraph 37(2) in conjunction with Paragraph 37(6) of the Betriebsverfassungsgesetz (Industrial Relations Law, 'the BetrVG'), staff council members attending such courses are to be released by their employer from the obligations arising from their employment, without loss of pay.

7 The plaintiff seeks compensation for the 7.5 hours she spent on the course on 13 November 1990. In her opinion, staff council members who work part-time cannot be required to make special sacrifices compared with those who work full-time. She considers that the defendant's refusal constitutes discrimination incompatible with both Article 119 of the Treaty and the Directive.

8 The Arbeitsgericht (Labour Court) upheld the plaintiff's claim at first instance. Its judgment was confirmed on appeal by the Landesarbeitsgericht (Higher Labour Court).

9 The Landesarbeitsgericht took the view that the refusal to pay the plaintiff compensation constituted indirect discrimination contrary to Article 119 of the Treaty in conjunction with the Directive. It found that under the relevant provisions of the BetrVG staff council members working part-time were less well paid than those working full-time. Those provisions affected more women than men. According to the official statistics, at the end of June 1991 93.4% of all part-time workers were women and only 6.6% men. The court was consequently satisfied

that the proportion of men and women working part-time among staff council members was at least similar.

10 The Landesarbeitsgericht considered, finally, that there was no objective reason capable of justifying a difference in treatment between full-time and part-time workers serving on staff councils.

11 The Bundesarbeitsgericht disagrees with that reasoning, however. It considers that, contrary to what the Court of Justice held in Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin* v *Bötel* [1992] ECR I-3589, Paragraph 37(6) of the BetrVG does not cause indirect discrimination contrary to Article 119 of the Treaty and to the Directive.

12 It considers that the judgment of the Court of Justice in *Bötel* could be based on a misunderstanding of the legal position of staff council members under the German legislation.

13 It observes that the first paragraph of Article 119 of the Treaty refers to 'equal pay for equal work'. It considers that work within the meaning of that provision is the performance of services, due under a contract of employment, in the course of which the worker follows instructions.

14 It states that staff council functions are performed on an honorary and unpaid basis outside any relationship of subordination. Their performance does not therefore constitute 'work' within the meaning of Article 119. The compensation provided for by the German legislation does not constitute pay, but is aimed only at ensuring that staff council members do not lose wages as a result of attending training courses related to their staff council functions.

15 It further considers that the German legislation does not differentiate between staff council members working full-time and those working part-time. They are all protected in the same way against loss of wages as a result of attending training courses necessary for their staff council functions.

16 It states, finally, that there is an objective ground of justification which in its opinion is capable of justifying any difference of treatment between staff council members working full-time and those working part-time. The principle that membership of a staff council is an unpaid and honorary office and the principle of compensating loss of wages are intended to ensure that staff council members remain independent. The performance of staff council functions must not be influenced by the attraction of special payment or by the fear of loss of earnings.

17 The Bundesarbeitsgericht accordingly stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does the prohibition of indirect discrimination on grounds of sex in connection with pay (Article 119 of the EEC Treaty and 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) preclude a national legislature from making membership of a staff council an honorary office to be performed without payment and protecting staff council members only against loss of income which they would otherwise suffer as a result of missing working hours because of staff council duties?'

18 The German Government explains that, in the German system, serving on staff councils and attending training courses necessary for performing that service are

honorary and unpaid functions, in the performance of which the staff council member is not subject to instructions from an employer. Those functions do not therefore constitute work for which pay is due.

9 It states that the compensation referred to in Paragraph 37(2) and (6) of the BetrVG is intended only to ensure that staff council members do not suffer a loss of earnings as a result of serving on staff councils or attending training courses during their working hours. It does not therefore constitute pay due in respect of workers' obligations under contracts of employment.

10 It must be observed first of all that legal concepts and definitions established or laid down by national law cannot affect the interpretation or binding force of Community law, or, consequently, the scope of the principle of equal pay for men and women laid down in Article 119 of the Treaty and in the Directive and developed by the Court's case-law (see the judgments in *Bötel*, cited above, and in Case 75/63 *Hoekstra* v *Bedrijfsvereniging Detailhandel* [1964] ECR 177).

11 Secondly, as the Court has consistently held, the concept of pay within the meaning 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 (see the judgments in *Bötel*, cited above, paragraph 12, and in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraph 12).

12 As the Court held in *Bötel*, paragraph 14, although compensation such as that at issue in the main proceedings does not derive as such from the contract of employment, it is nevertheless paid by the employer by virtue of legislative provisions and under a contract of employment. Staff council members must necessarily

be employees of the undertaking, to be able to serve on that undertaking's staff council.

23 It follows that compensation received for losses of earnings due to attendance at training courses imparting the information necessary for performing staff council functions must be regarded as pay within the meaning of Article 119, since it constitutes a benefit paid indirectly by the employer by reason of the existence of an employment relationship.

24 The German Government also considers, as does the referring court, that the legislation in question does not cause any difference in treatment between staff council members working part-time and those working full-time, since they all have the same protection against losses of earnings incurred through attending training courses.

25 The Court held in Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig and Others* [1994] ECR I-5727, paragraph 26, that there is unequal treatment whenever the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked on the basis of an employment relationship.

26 In the present case, it is indisputable that where training courses necessary for performing staff council functions are organized during the full-time working hours in force in the undertaking but outside the individual working hours of part-time

workers serving on those councils, the overall pay received by the latter is, for the same number of hours worked, lower than that received by the full-time workers serving on the same staff councils.

27 Nor can it be objected that the time spent by staff council members on such training courses is not a direct consequence of the existence of a contract of employment, since it is sufficient for that time to be spent by reason of the existence of an employment relationship, which is indeed the case, as was found in paragraphs 22 and 23 in connection with the concept of pay.

28 Since a difference in treatment has been found to exist, it follows from settled case-law that, if it were the case that a much lower proportion of women than men work full-time, the exclusion of part-time workers from certain benefits would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors excluding any discrimination on grounds of sex (judgments in Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911 and in Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607).

29 According to the order for reference, the official employment and social statistics show that at the end of June 1991 93.4% of all part-time workers were women and 6.6% were men. The Landesarbeitsgericht considered that in view of that very great difference between the numbers of men and women working part-time, it was to be supposed that the proportion of men and women working part-time among staff council members was at least similar.

30 As those figures have not been disputed, it must be considered that the application of legislative provisions such as those at issue in the main proceedings in principle causes indirect discrimination against women workers, contrary to Article 119 of the Treaty and to the Directive.

31 It would be otherwise only if the difference of treatment found to exist was justified by objective factors unrelated to any discrimination based on sex. On this point, the Court held in *Bötel*, cited above, that it remained open to the Member State to prove that the legislation was justified by such factors.

32 However, although in preliminary-ruling proceedings it is for the national court to establish whether such objective factors exist in the particular case before it, the Court of Justice, which has to provide the national court with helpful answers, may provide guidance based on the documents before the national court and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see the judgment in Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 13).

33 The German Government considers that, assuming that there is a proven difference of treatment, it is justified by the principle that staff council members are not paid, which is intended to ensure their independence. The unpaid and honorary nature of staff council functions and the principle that they must not confer any benefit or entail any disadvantage have the purpose of ensuring staff council members' independence from both internal and external pressures.

34 It is also apparent from the order for reference in the present case that the Bundesarbeitsgericht considers that the German legislature's wish to place the independence of staff councils above financial inducements for performing staff council functions, as expressed in the provisions at issue, is an aim of social policy.

35 Such a social policy aim appears in itself to be unrelated to any discrimination on grounds of sex. It cannot be disputed that the work of staff councils does indeed play a part in German social policy, in that the councils have the task of promoting harmonious labour relations within undertakings and in their interest. The concern

to ensure the independence of the members of those councils thus likewise reflects a legitimate aim of social policy.

36 If a Member State is able to show that the measures chosen reflect a legitimate aim of its social policy, are appropriate to achieve that aim and are necessary in order to do so, the mere fact that the legislative provision affects far more women workers than men cannot be regarded as a breach of Article 119 (see the judgments in Case C-343/92 *De Weerd and Others* [1994] ECR I-571 and in Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741).

37 However, it should be noted that, as the Court held in *Bötel*, cited above, paragraph 25, legislation such as that at issue is likely to deter workers in the part-time category, in which the proportion of women is undeniably preponderant, from performing staff council functions or from acquiring the knowledge necessary for performing them, thus making it more difficult for that category of worker to be represented by qualified staff council members.

38 In the light of all those considerations and taking into account the possibility of achieving the social policy aim in question by other means, the difference in treatment could be justified from the point of view of Article 119 of the Treaty and of the Directive only if it appeared to be suitable and necessary for achieving that aim. It is for the national court to ascertain whether that is so in the present case.

39 Consequently, where the category of part-time workers includes a much higher number of women than men, the prohibition of indirect discrimination in the matter of pay, as set out in Article 119 and in the Directive, precludes national

legislation which, not being suitable and necessary for achieving a legitimate social policy aim, has the effect of limiting to their individual working hours the compensation which staff council members employed on a part-time basis are to receive from their employer for attending training courses which impart the knowledge necessary for serving on staff councils and are held during the full-time working hours applicable in the undertaking but which exceed their individual part-time working hours, when staff council members employed on a full-time basis receive compensation for attendance at the same courses on the basis of their full-time working hours.

Costs

40 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Bundesarbeitsgericht by order of 20 October 1993, hereby rules:

Where the category of part-time workers includes a much higher number of women than men, the prohibition of indirect discrimination in the matter of

pay, as set out in Article 119 of the EEC Treaty and in 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, precludes national legislation which, not being suitable and necessary for achieving a legitimate social policy aim, has the effect of limiting to their individual working hours the compensation which staff council members employed on a part-time basis are to receive from their employer for attending training courses which impart the knowledge necessary for serving on staff councils and are held during the full-time working hours applicable in the undertaking but which exceed their individual part-time working hours, when staff council members employed on a full-time basis receive compensation for attendance at the same courses on the basis of their full-time working hours.

Rodríguez Iglesias Kakouris Edward

Puissochet Hirsch

Mancini Schockweiler Moitinho de Almeida

Kapteyn Gulmann

Murray Jann Ragnemalm

Delivered in open court in Luxembourg on 6 February 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President