# OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 14 March 2000 *

1. In its reference for a preliminary ruling, the Hamburg Landesarbeitsgericht (Higher Labour Court, Hamburg) requests the Court to interpret Directive 76/207/EEC of 9 February 1976 [1] (hereinafter 'the Directive') implementing in the Member States the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The national court in particular requests interpretation of Article 5(1) of that directive in relation to the German Law on Employment Protection which, as interpreted by current national case-law, does not recognise full-time employees as being comparable with part-time employees where the selection of employees for dismissal on social criteria is concerned.

## The relevant provision of Community law

2. Article 2(1) of the Directive defines the principle of equal treatment. It states that, 'For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. Article 5(1) the concerns the application of that principle to all working conditions, including dismissal. It provides that '[A]pplication of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex'.

3. Article 2(1) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, a directive not applicable *ratione temporis* to this case, states that '[F]or the purposes of this Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex, either directly or indirectly'. Paragraph 2 of the same article provides that '[F]or purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or

* Original language: Italian.

1 — OJ 1976 L 39, p. 40.

practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex'.

## The relevant provisions of national law

4. In this case, the relevant national provisions are contained in the Kündigungsschutzgesetz (Law on Employment Protection) (hereinafter 'the KSchG'). Articles 1(1) and (2) of that law states that the dismissal of any employee who has been employed without interruption for over six months with the same company shall be ineffective if it is socially unjustified, in other words if the reason for the dismissal is not connected with the person or conduct of the employee, or with constraints that severely limit the company's freedom of action, making it necessary to eliminate a particular post. The latter case constitutes 'dismissal on economic grounds'.

Articles 1(3) establishes that dismissal for economic reasons is also unjustified if the employer took no, or insufficient, account of social factors when selecting the employee to be dismissed. This provision is generally interpreted as meaning that the employer does not have the freedom to decide whom to dismiss but must select from among his employees whose posts are comparable the employee to whom loss of employment will cause least harm ('selection on the basis of social criteria').

5. The KSchG does not explain what is meant by comparable posts for purposes of selection on the basis of social criteria. However, according to the order for reference, the case-law of the Bundesarbeitsgericht (the Federal Labour Court; hereinafter the 'BAG') makes it clear that in general the comparability of two posts must be assessed on the basis of the substantive content of the employment contract and therefore of the characteristics of the job performed. For this purpose, absolute similarity is not necessary and it is enough if the duties, although different, are at any rate equivalent. Consequently, two posts will be deemed comparable if, by virtue of his right to organise the business of his company, the employer is able to assign either of the two employees to the other's other post without amending their employment contracts. BAG case-law consequently also establishes that full-time and part-time employees cannot be considered comparable because transformation of a part-time working relationship into a full-time relationship (or vice versa) in any event involves amendment of the contract.

6. Up to the date of the order for reference, the BAG had never delivered any judgment specifically on the comparability of full-time and part-time employment so far as this relates to selection on the basis of social criteria. During the hearing, how-

ever, the plaintiff stated, and was not contradicted, that recently the BAG had delivered two judgments on this question. According to those judgments, if a part-time post is eliminated, full-time employees must be taken into consideration for the purposes of the selection on the basis of social criteria if the employer's sole purpose in eliminating that post was to reduce the total number of hours worked, but those same employees should not be included if the elimination is the result of a decision taken by the employer to use only full-time workers for specific jobs, that is to say, a decision relating to the organisation of the company dictated, as such, by criteria relating to operating costs. In the latter case, the employer's decision must be deemed to be an expression of his right to organise his own business and therefore cannot be subject to any form of control, unless this is clearly incorrect, unreasonable or arbitrary.

**The facts and the question referred for a preliminary ruling**

7. For over five years Ms Kachelmann (hereinafter 'the plaintiff') worked under a part-time contract (76.92%) in the loan recovery department at the Hamburg branch of Bankhaus Hermann Lampe KG (hereinafter the 'Bankhaus') as a qualified bank clerk and certified bi-lingual German/English draftsman with case-management duties. She is divorced with three dependent children, one of whom is severely handicapped.

8. As a result of the reduction in its international work, the Bankhaus decided to merge the section in which the plaintiff worked with the larger documentary credit section. It consequently decided to reduce the number of its employees and therefore in a letter dated 21 June 1996 gave the plaintiff notice of her dismissal on economic grounds with effect from 30 September 1996.

9. At that time the Hamburg branch of the Bankhaus had five part-time employees, three of whom were men and two women, and 22 full-time employees, ten of whom were men and ten women. The second group included Ms Grabbert, who had been working for five months in the credit section.

10. The plaintiff appealed against her dismissal to the Arbeitsgericht Hamburg (Labour Court, Hamburg), maintaining that in taking the decision to eliminate her post the Bankhaus had not effected the selection on the basis of social criteria prescribed by the statute since it had not compared her position with that of Ms Grabbert who performed equivalent duties. That conduct, according to the plaintiff, had to be regarded as unlawful also in the light of the fact that she had said she was prepared to increase her working hours.

11. The Arbeitsgericht rejected her claim on 18 February 1997 stating that, although there was no doubt that the plaintiff's social position was weaker than that of Ms Grabbert, no comparison was possible between the two workers' posts because Ms Grabbert was a full-time employee and for this reason the employer could not transfer the plaintiff to Ms Grabbert's post simply by virtue of its managerial power and without amending her contract of employment.

12. The plaintiff appealed against the judgment of the Arbeitsgericht to the Landesarbeitsgericht Hamburg (Higher Labour Court, Hamburg). That court upheld the contested judgment while recognising that the Bankhaus employs a full-time employee, other than the plaintiff, who performs duties comparable with those performed by the plaintiff herself, and stated that, according to the social criteria defined in the KSchG, the plaintiff had to be regarded as in greater need of protection than the full-time worker. Furthermore, the Landesarbeitsgericht confirmed that, in the light of current case-law,[2] full-time and part-time employees cannot be considered comparable for the purposes of selection on the basis of social criteria because in order to transform either employment relationship into the other amendment of the employment contract is necessary. However, the Landesarbeitsgericht also added that if the only reason for considering that the plaintiff is not comparable with Ms Grabbert is that she has so far been employed on a part-time basis, her dismissal might constitute indirect discrimination on grounds of sex which is prohibited under Community law.

13. Considering that solution of the dispute depends on the interpretation of the Directive, the Landesarbeitsgericht stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is Article 5(1) of Directive 76/207/EEC to be interpreted as meaning that, when applying Paragraph 1(3) of the KSchG (Law on Employment Protection) — in this case the version in force until 30 September 1996 — part-time female employees are to be regarded as comparable to male and female full-time employees when selecting employees for dismissal according to social criteria if substantially more women than men are employed on a part-time basis in a particular sector?'

## Admissibility

14. The German Government has expressed its doubts as to the admissibility of the reference for a preliminary ruling, arguing that Article 5(1) of the Directive on the implementation of the principle of

2 — See paragraph 6 of this Opinion.

equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, including those relating to dismissal, is totally irrelevant for the purpose of resolving the dispute in the main proceedings inasmuch as the selection according to social criteria prescribed by Article 1(3) of the KSchG concerns two workers of the same sex and more specifically two women.

15. That argument claim is unfounded. It must first be borne in mind that, in general, the purpose of a reference for a preliminary ruling is to 'supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them' [3] and that for this co-operation between national courts and the Community court to function, there must be a separation of the duties of those two categories of court which, according to consistent case-law, means that 'it is solely for the national court hearing the case, which must assume responsibility for the subsequent judicial decision, to determine, in particular, the need for a preliminary ruling in order to enable it to deliver judgment'. Using this as a basis, the Court concluded that it 'may refuse a request made by such a court only where it is *quite obvious* that the interpretation of Community law sought bears no relation to the actual facts of the main proceedings or their purpose, or where it does not have before it the factual or legal material necessary to give a useful answer to the questions submitted'. [4]

16. If these criteria are applied, it does not seem to me that it can be said that in this instance the answer to the question is clearly irrelevant to the decision on the dispute before the national court. In fact, it must be considered that the question is directed to the possible discriminatory effects resulting, in general, from the application of the German Law on employment protection. As we have seen, the Directive implements in the Member States, in regard to employment relationships, the fundamental principle that there should be no discrimination on grounds of sex. It therefore seems clear to me that compliance with this principle cannot fail to influence the correct application of the relevant national legislation and that therefore a ruling on the scope of the Community principle, with reference to the equal treatment of workers without distinction as to sex at the time of dismissal, must be considered helpful for the assessments to be made by the national court.

17. The German Government also claims that the facts stated by the national court in the order for reference are inadequate for

3 — Case C-104/79 *Foglia* v *Novello* [1980] ECR 745, paragraph 11.

4 — Case C-60/98 *Butterfly Music* v *Carosello Edizioni Musicali e Discografiche* [1999] ECR I-3939, paragraph 13, my emphasis.

the purpose of enabling the Court to give a ruling. I believe that this claim too is unfounded. As the Commission has observed, although the order is drafted in summary fashion and although it does not specify the categories of worker to which reference must be made in order to establish whether there is a discrimination on grounds of sex, it nevertheless contains enough information on the legal context and on the facts to enable the Court to give a ruling that will be of assistance.

18. Finally, at the hearing it was asserted that the reference for a preliminary ruling had become superfluous as a result of a recent decision of the BAG laying down the criteria according to which full-time and part-time workers are to be compared for the purpose of selection on the basis of social criteria. [5] That assertion is also unfounded. It must be borne in mind that, as the Commission has stated, the need to ensure legal certainty is as a rule enough to justify the intervention of the Court of Justice [6]; furthermore, if the national court, which must be assumed to be acquainted with the new German case-law, has not withdrawn its request, it is reasonable to assume that it still considers that a reply is necessary for the resolution of the dispute in the main proceedings.

19. On the basis of the foregoing considerations, I consider that the question referred by the national court should be deemed admissible and that the Court must rule on the merits.

## The merits

20. The national court asks whether Articles 2 and 5(1) of the Directive, which prohibit any direct or indirect discrimination in working conditions, constitute an obstacle to the application of Article 1(3) of the German Law on employment protection, which holds full-time workers not to be comparable with part-time workers for the purposes of the 'selection on the basis of social criteria' that the employer is required to make if a part-time post is eliminated in order to reduce operating costs.

21. The abovementioned German provisions clearly do not give rise to any form of direct discrimination between workers for the simple reason that the comparability criteria it lays down do not take account of any distinctions based on sex. This of course does not rule out, at least theoretically, the possibility that it might give rise to some form of indirect discrimination. And this is essentially what the national court is asking this Court to determine.

5 — See paragraph 7 of this Opinion.

6 — Case 146/73 *Rheinmühlen Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 139, paragraph 3.

22. In this connection the Court has repeatedly stated that 'national rules discriminate indirectly against women where, although worded in neutral terms, they are more disadvantageous to women than men, unless that difference in treatment can be justified by objective factors unrelated to sex'. [7]

23. As regards the category of part-time workers, it is not hard to see that that category is characterised by a clear predominance of women, with the result that any unfavourable treatment of it almost automatically translates into discrimination on grounds of sex. The Court has hitherto had occasion to rule in cases in which the unfavourable treatment suffered by women as a result of legislation that directly discriminated against part-time employment, [8] and has considered that the national provisions gave rise to indirect discrimination against women and direct discrimination against part-time employment.

In this case, however, the discrimination against part-time workers is, once again, indirect because, although the treatment penalising that category of worker is not specifically prescribed in the national legislation, the application of that regime could have discriminatory effects.

24. In the *Bötel* judgment [9] the Court considered legislation similar to that at issue in this case, in other words a case in which the discriminatory effects resulting from the application of formally neutral national legislation to specific situations, and held that such effects are incompatible with the principle of equality where they give rise to a different treatment of part-time workers that penalises them, treatment which, in its turn, entails, at least as a rule, discrimination on grounds of sex. In point in the case examined by the Court was national legislation by virtue of which the members of a works council who took part in the training courses necessary for performance of the council's specific duties were to be absolved from their employment duties without any reduction in salary. The Court held that such legislation entailed discrimination against part-time workers (and therefore women) because the length of the training courses exceeded the individual working hours of the various part-time employees, with the result that for the hours they spent on the course they received less than the compensation paid, for the same reason, to full-time workers.

7 — Case C-189/91 *Kirsammer-Hack* v *Sidal* [1993] ECR I-6185, paragraph 22. See also C-100/95 *Kording* v *Senator für Finanzen* [1997] ECR I-5289, paragraph 30; C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 52; and C-50/96 *Deutsche Telekom* v *Schröder* [2000] ECR I-743, paragraph 28.

8 — See, particularly as regards equal pay, Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607; C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR 2591 and C-184/89 *Nimz* v *Freie und Hansestadt Hamburg* [1991] ECR 297.

9 — Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin* v *Bötel* [1992] ECR I-3589. See also, Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation* v *Lewark* [1996] ECR I-243; and Case C-278/93 *Freers and Speckmann* v *Deutsche Bundespost* [1996] ECR I-1165.

25. The German legislation in point today provides that an employer, when he decides to eliminate a post in order to reduce operating costs, is obliged to select, according to social criteria, the worker who will have to be dismissed and must make that selection from among comparable workers. In so doing, he must ensure that he selects the worker who, in comparative terms, will suffer the least harm from dismissal. This makes it necessary to establish the categories of worker between which the comparison must be made.

As I have already mentioned, the German courts, when interpreting the concept of comparability, have stated that it applies only when the employer can move workers from one post to another without also having to make changes to their contracts of employment. This obviously supposes that the employment relationship is substantively the same and that therefore comparison between part-time and full-time workers is excluded. The same courts have observed that the transfer of a part-time worker to a full-time post (and vice versa) entails amendment of the contract of employment as these two categories of worker are not comparable.

It follows, in my opinion that, if a part-time post is eliminated, the only situations that can be considered and compared, for the purposes of selection on the basis of social criteria, are those of part-time workers and that consequently they alone will suffer the harmful effects of the elimination of that post: the social circumstances of those workers, even where workers more disadvantaged than full-time workers are concerned, will be assessed by comparison only with other part-time workers, thus limiting the employment protection afforded under the German law. Consequently, if, among the part-time workers, there are substantially more women than men, the number of male workers taken into account for the purpose of the selection according to social criteria will necessarily be lower, with the further consequence that adequate protection for the purposes of retention of the post will not be guaranteed to women workers who are particularly disadvantaged and who therefore need such special protection.

26. The Bankhaus disputes this analysis. It maintains that in reality, in the present case, the application of the national legislation disadvantages neither full-time nor part-time employees in any way because, on the one hand, in the event of elimination of a part-time post, full-time workers are not taken into consideration when selecting an employee for dismissal on the basis of social criteria and therefore they do not run the risk of dismissal, and on the other hand, in the event of elimination of a full-time post, part-time workers would not rank among the workers who would be dismissed. According to the Bankhaus, this proves that in reality not only the legislation but also its application are as a whole neutral in that the situations of disadvantage which arise according to whether the

elimination is of a part-time or a full-time post offset each other. This is an unconvincing argument. It does not seem right to maintain that a situation of disadvantage resulting from the application of national legislation can be regarded as legitimate and, for the purposes of the present case, compatible with the Directive if 'offset' by the effects of the application of the same legislation to a different situation.

27. Now that it is found that the German legislation in point gives rise to unequal treatment, to the detriment of part-time workers, it is necessary to establish if, and under what conditions, this inequality gives rise, if only potentially, to discrimination on grounds of sex. In order to do this, it is necessary to identify the reference group of workers, that is, the group of workers to be taken into consideration in order to establish if there is a disproportion between the numbers of men and women employees. On this point the parties put forward opposing arguments.

28. The Bankhaus and the German Government maintain that the reference group for establishing whether any disproportion exists must be that of the part-time workers employed in the undertaking and that consequently in this case there can be no discriminatory effect to the detriment of the plaintiff since, at the time of her dismissal, the Bankhaus employed five part-time workers, of whom three were women and two men. The plaintiff, on the other hand, maintains that in order to establish whether the national legislation gives rise to discriminatory effects to the detriment of women reference must be made to all part-time workers in Germany. The national court proposes something midway between the two, maintaining the that the reference group should be all the workers employed in a given sector.

29. I consider that the national court's proposal should be followed. It makes no sense to refer to the part-time workers employed in the undertaking in order to determine whether there are substantially more women than men workers. It must be considered that the situation of a particular undertaking, particularly if of limited size, may not be significant for the purpose of inferring from the percentage of women in part-time employment in that undertaking that there is indirect discrimination against women as a result of the (social) choice to dismiss a woman following elimination of a part-time post. It also does not seem reasonable to me to refer to the totality of part-time workers in a Member State, since working arrangements and employment problems usually have features that vary from sector to sector; and this state of affairs cannot be ignored when, following the elimination of a post, the employer has recourse to 'selection according to social criteria'. On the other hand, I find it reasonable, precisely because of the last-mentioned consideration, to refer to part-time employees in the sector to which the undertaking that has eliminated a part-time post belongs. This means that the difference in treatment between part-time and full-

time workers will constitute discrimination on the grounds of sex only if, in the sector to which the undertaking in which a part-time post has been eliminated belongs, the number of women in part-time work is significantly higher than the number of men. In any event, therefore, the duty of carrying out this assessment lies with the national court which, on the basis of the information in its possession, must verify whether there is any disproportion and, if so, evaluate it.

30. However, if such a situation exists, it is still necessary to consider a final factor, namely whether the disparity in treatment as between the two categories of worker can be regarded as justified for objective reasons unrelated to any discrimination of ground of sex, in other words, whether the application of the national legislation pursues objectives that justify the different treatment and whether the means used to achieve them are necessary and not disproportionate.

31. In this regard, it should first be observed that it is now settled case-law that 'it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision, which, though applying independently of the sex of the worker, actually affects a considerably higher percentage of women than men, can be justified by objective factors unrelated to sex'. Nevertheless, 'the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment'. [10]

32. As the Commission points out, the order for reference does not expressly indicate any possible justification for the disparity in treatment as between part-time and full-time workers as a result of the application of the German legislation on selection according to social criteria. As I have already said, the national court merely states that, according to the case-law of the BAG, two posts cannot as a rule be deemed comparable if the transfer of a worker from one to another would involve amendment of the employment contract and that, since changing a part-time post into a full-time post (or vice versa) requires amendment of the contract, there can be no comparability between full-time and part-time workers in the context of selection according to social criteria.

33. It does not seem to me that these considerations can suffice to justify a

10 — Judgment in *Seymour-Smith and Perez*, cited above, paragraphs 68 and 69. See also judgment in *Freers and Speckmann* v *Deutsche Bundespost*, cited above, paragraph 24 and Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247, paragraph 13.

difference in treatment between the two categories of worker.

First, it must be borne in mind that the application of the national legislation in the light of the case-law cited above means that the exclusion of full-time workers from the selection according to social criteria is effected automatically and in a generalised way, on the basis of the presumption that the difference in working hours excludes always and in any event the possibility for a part-time worker to take the post of a full-time worker, which would make it necessary for their contracts of employment to be amended and their employment relationship to be transformed. The Court has repeated on a number of occasions that, 'it is impossible to identify objective criteria unrelated to any discrimination [on the basis of] no more than a generalisation concerning certain categories of worker'. [11] Consequently, although it can generally be said that working hours constitute a factor to be taken into consideration when comparing two posts, its effective importance, however, will necessarily depend on the circumstances of the case. Furthermore, in the context of such circumstances, this is only one of the factors that must be considered, together with, for example, the type of duties carried out or the possibility of allocating the tasks between the various employees in a different way, without affecting work efficiency. The need to amend the contract of employment must be assessed, case by case, in the light of the facts.

Second, both where transformation of the contract of employment is unavoidable and where no amendment is necessary to enable the part-time employee to take the post of the full-time employee, the comparability of the two categories of worker must in the context of selection according to social criteria be assessed in relation to the conflict of interests that will inevitably exist between, on the one hand, the employer's right to organise work within his business as he wishes and, on the other, the right of part-time workers (and therefore of women) not to suffer discrimination. As between those two interests it is necessary to ascertain, on a case-by-case basis, which is the weightier and, as such, deserving of greater protection. [12] There is no need even to add that identification of the prevailing interest, since it is linked to the ascertainment of the specific circumstances of each case, is a matter exclusively for the national court.

Finally, therefore, it may be said that disparity in treatment as between part-time and full-time workers in the context of the selection according to social criteria fol-

11 — Case C-1/95 *Gerster* v *Freistaat Bayern* [1997] ECR I-5253. See also judgment in *Kording* cited above, paragraph 23 and judgment in *Nimz*, cited above, paragraph 14.

12 — It may be useful here to recall that, in its judgment in Joined Cases C-270/97 and C-271/97, *Sievers and Schrage* [2000] ECR I-929, the Court, referring to the comparability of the exclusion of part-time workers from an occupational retirement pension scheme with the principle of equal pay for men and women, and therefore in a context different from that in this case, stated that 'the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right'. I consider that it is specifically this principle that constitutes the ground for asserting that it is unlawful to take into account only part-time workers for the purposes of the selection according to social criteria.

lowing the elimination of a part-time post can be justified only if the national court finds that, in the light of the facts, the two categories of worker cannot be compared except at the cost of a limitation on the employer's freedom that is disproportionate in relation to the objective of the protection of part-time workers, which as a rule is regarded as of paramount importance.

## Conclusions

34. In the light of the aforementioned considerations, I propose that the Court reply to the question referred by the Landesarbeitsgericht Hamburg, Germany, as follows:

Articles 2 and 5(1) of 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 must be interpreted as meaning that they preclude a provision such as that contained in Article 1(3) of the German Law on Employment Protection which, according to its interpretation by the German courts, does not deem part-time and full-time workers to be comparable in the context of the selection according to social criteria that the employer is required to make where a part-time post is eliminated, provided always that, in the productive sector to which the undertaking belongs, the number of women employed in part-time posts is significantly higher than the number of men in part-time posts, and that such application is not justified by objective criteria unrelated to any discrimination on grounds of sex.