# OPINION OF ADVOCATE GENERAL JACOBS
delivered on 29 June 1994 *

*My Lords,*

1. In this case the plaintiff, a German female part-time employee, has instituted proceedings before the Arbeitsgericht Bremen challenging a German rule which permits her employer to pay part-time employees who also have a main occupation proportionately less than full-time employees. Although the Arbeitsgericht assumes that the part-time employees adversely affected by the rule are predominantly men, it considers that the plaintiff may be able to rely on the Community provisions on equal treatment and equal pay to claim higher pay, on the basis of the rather elaborate line of reasoning described below.

2. Mrs Grau-Hupka has been a music teacher employed by the Stadtgemeinde Bremen (City of Bremen) in the Jugend-und Volksmusikschule since 1 October 1956. When she retired from full-time employment on 1 October 1991 she continued to work there part-time and is now also in receipt of both a statutory and a supplementary old-age pension. Because she receives a full pension, her employer (the defendant) takes the view that the Bundes-Angestellten-Tarifvertrag (Collective Wage Agreement for Federal Employees, hereafter 'the BAT') does not apply to her, since Paragraph 3n of that agreement excludes employees with a second occupation. As a result Mrs Grau-Hupka is paid less than if she came under the BAT and receives a lower hourly wage than a full-time employee, which she claims to be unlawful.

3. Paragraph 2(1) of the Beschäftigungsförderungsgesetz (Law to Promote Employment, hereafter 'the BeschFG') provides that an employer must not treat a part-time employee differently from full-time employees, unless there are objective grounds justifying such different treatment. According to the case-law of the Bundesarbeitsgericht (Federal Labour Court), however, the fact that a part-time employee has a main occupation providing him with a secure social position constitutes such an objective ground for different treatment. It appears to be established case-law in Germany that the receipt of an old-age pension must be regarded as equivalent to having such a main occupation.

* Original language: English.

4. It may also be noted that in the course of her previous career, which serves as the basis for calculating her pension, the plaintiff worked part-time for five years in order to bring up her children. According to the rules of the Sozialgesetzbuch (Code of Social Law) VI, the periods spent bringing up children are also taken into account in the pension calculation. However, the plaintiff falls under a transitional provision of the Code which has the effect in her case of limiting that period to one year. The referring court deduces that Mrs Grau-Hupka is thereby put at a disadvantage in terms of pension entitlement as a result of having worked part-time when bringing up her children.

5. On the face of it, those facts and rules do not seem to give rise to any questions involving the Community provisions on equal treatment and equal pay. That is not however the view of the Arbeitsgericht Bremen, which has put the following questions to the Court:

'1. Does the principle of equal treatment for men and women as regards access to employment under Article 1(1) and Article 3 of Council Directive 76/207/EEC of 9 February 1976 require a national law which prohibits any discrimination without objective reason against part-time employees to be interpreted as meaning that the fact that such an employee also has a main occupation affording him social security does not constitute an objective reason for paying him less in respect of the part-time employment?

2. If question (1) is answered in the negative:

Does the principle of equal pay for men and women in Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 prohibit drawing a pension from being treated in the same way as a main occupation affording social security if that pension is reduced by loss of earnings as a result of bringing up children?'

6. Those questions, and in particular the first, can only really be understood after a description of the reasoning developed by the referring court. Before examining that reasoning, however, I should mention the Commission's suggestion that the Court should not answer the questions. The Commission considers that the referring court does not give a sufficient account of the facts in relation to the first question, and that the second question seems to present no link with the claim before the national court. It will be more convenient to deal with those observations together with the substance of the questions.

**The first question**

7. The Arbeitsgericht argues that Paragraph 2(1) of the BeschFG, requiring an objective ground for different treatment of full-time and part-time employees, must be interpreted in accordance with Community law. The Arbeitsgericht then develops an elaborate argument to the effect that to regard the fact that part-time employees also have a main occupation as such an objective ground — as does the defendant, in accordance with established German case-law — is not in conformity with Community law, because it entails indirect discrimination on the basis of sex. Indeed, the argument goes, in today's society most of the part-time workers who also have a main occupation are men, because the traditional role of women in the family generally does not allow them to have such a workload outside the home. If the relevant rules are interpreted as allowing part-time workers who also have a main occupation to be paid less than other part-time workers, employers will primarily seek to employ part-time workers of the first kind. Since that category *ex hypothesi* largely consists of men, such an interpretation constitutes indirect discrimination against women with respect to access to employment, which infringes Articles 1(1), 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. [1]

8. That reasoning is corroborated, in the view of the Arbeitsgericht, by the fact that public service employers such as the Stadtgemeinde Bremen are obliged to operate on the basis of sound economic principles, by virtue of rules laid down in the Haushaltsgrundsätzegesetz (Framework Law on the Budget), which applies to the Federal authorities and the Länder, and in the Bremischen Landeshaushaltsordnung (Budget Regulations for the Land Bremen). Such employers would therefore be required to employ, if possible, people they can pay less, such as part-time workers who also have a main occupation.

9. The defendant claims, however, that constitutional rules do not allow it to have regard to remuneration when employing a person. Those rules guarantee equal rights for all Germans as regards access to public sector employment. The German Government adds in its observations that for ease of calculation most of the public employers pay all part-time employees equally anyway.

1 — OJ 1976 L 39, p. 40.

10. At this point it may be useful to recall the purpose of the plaintiff's action before the Arbeitsgericht and the question put by the latter to the Court. The plaintiff claims that she should receive higher pay, i. e. pay in proportion to that received by full-time employees. In order to succeed in an action based on discrimination with respect to pay she would have to show that she is paid less by reason of her sex. However, the plaintiff has made no such claim. On the contrary, the Arbeitsgericht states that part-time employees who also have a main occupation, and hence are proportionately less well paid than full-time employees, are predominantly men. It might therefore be wondered how Community law can be invoked to support the plaintiff's claim.

11. The Arbeitsgericht's question does not however relate to 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 [2] but to Directive 76/207 on equal treatment. It asks in substance whether the latter directive precludes reliance by an employer on the existence of a main occupation in order to justify different treatment with respect to pay. In its order for reference it reasons that, if the Court gave an affirmative reply to that question, the defendant in the main proceedings would not be able to rely on Paragraph 3n of the BAT, which by purporting to exclude persons with another occupation from the scope of the BAT allows the plaintiff to be paid less. However, quite apart from the fact that the plaintiff, who is in part-time employment, has not herself been the victim of discrimination with respect to access to employment contrary to Directive 76/207, she cannot in my view rely indirectly on that directive in order to challenge discrimination with reference to pay. Indeed it is clear from the preamble to Directive 76/207 that the scope of the latter is distinct from that of Directive 75/117 on equal pay. Directive 76/207 is intended to complement Directive 75/117 by extending the principle of equal treatment to access to employment, vocational training and promotion and to other working conditions: see the second and third recitals. Moreover, the two directives are based on different provisions of the Treaty. Directive 75/117, which implements the principle of equal pay specifically laid down in Article 119 of the Treaty, is based on Article 100, whereas Directive 76/207 is based on Article 235, which provides for the adoption of measures to attain one of the objectives of the Community in cases where the Treaty has not provided the necessary powers.

12. The position would be different if the Stadtgemeinde Bremen had refused to employ the plaintiff as a part-time worker because she did not also have a main occupa-

2 — OJ 1975 L 45, p. 19.

tion and therefore could not be paid less. She might then have sought to argue that the rules providing the opportunity to pay part-time workers who also have a main occupation less than others involved indirect discrimination against women.

13. The Commission considers that the Court should not answer the Arbeitsgericht's first question. It refers to the Court's judgment in *Telemarsicabruzzo*, where it was held that the referring court should at least define the factual and legal framework in which the questions referred arise, as well as the factual hypotheses on which the questions are based. [3] According to the Commission, the Arbeitsgericht has not supplied enough factual information to enable the Court to decide whether indirect discrimination actually occurs. It seems to me however that the *Telemarsicabruzzo* judgment is not relevant here. What was lacking in that case was a sufficient account of the factual and legal framework of the main action. In that respect, the Arbeitsgericht has provided all the necessary information. While it has not yet established to what extent the alleged indirect discrimination against women actually occurs, it none the less explains the factual hypothesis underlying its question. Moreover, it would serve no useful purpose to receive further information from the Arbeitsgericht since it would still have to be held that Directive 76/207 cannot be relied upon in relation to a claim for higher pay. It is certainly possible to have doubts about the relevance of the Arbeitsgericht's question having regard to the nature of the plaintiff's claim and the circumstances of the main proceedings. However, it appears sufficient, in order to provide the Arbeitsgericht with the guidance which it seeks, to give a negative reply to its question.

14. I therefore consider that the first question should be answered in the negative.

**The second question**

15. With respect to the second question, which is prompted by the plaintiff's claim that insufficient account was taken, for the purposes of calculating her pension, of the period which she spent bringing up children, the reasoning of the Arbeitsgericht again seems to me rather far-fetched. It starts from the very reasonable assumption that more women than men stay home for some time for the purpose of bringing up children, and that as a result more women than men see their pension 'reduced' in application of the relevant German rules, which — it will be remembered — were of a transitional nature. It is then suggested that, where such a

3 — Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393, paragraph 6 of the judgment.

'reduced' pension is regarded as income from a person's main occupation, thus allowing his employer to pay him a lower remuneration in respect of his part-time employment, there is indirect discrimination with respect to such remuneration, contrary to Article 119 of the Treaty and to Directive 75/117.

16. The Commission takes the view that this second question has no connection with the plaintiff's action, as in her case the 'reduction' of her pension is only minimal. I do not think, however, that that is the appropriate answer to the question.

17. I fail to see any possible discrimination against Mrs Grau-Hupka in relation to her pay. Her total income may be less, but that is due to the 'reduction' of her pension, not to any inequality in her pay. If anything, she would have to argue that the reduction of her pension is not in accordance with the Community's equal treatment rules. However, in relation to her pension there is clearly no discrimination incompatible with the provisions of Council Directive 79/7/EEC on equal treatment in social security matters. [4] In fact, Article 7(b) of that directive allows the Member States, in derogation from the rules on equal treatment, to grant 'advantages in respect of old-age pension schemes ... to persons who have brought up children', and to provide 'benefit entitlements following periods of interruption of employment due to the bringing up of children'. But the directive in no way obliges them to do so.

18. I therefore consider that the second question should also be answered in the negative.

## Conclusion

19. I am accordingly of the opinion that the questions referred by the Arbeitsgericht Bremen should be answered as follows:

(1) The principle of equal treatment for men and women as regards access to employment under Article 1(1) and Article 3 of Council Directive

4 — OJ 1979 L 6, p. 24.

76/207/EEC does not preclude a national law which prohibits any discrimination without objective reason against part-time employees from being interpreted as meaning that, where a part-time employee also has a main occupation providing him with a secure social position, that constitutes an objective reason for paying him less in respect of the part-time employment.

(2) The principle of equal pay for men and women in Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 does not preclude the receipt of a pension from being treated as a main occupation if the pension is reduced by loss of earnings as a result of bringing up children, with the result that the person concerned receives a lower wage in respect of part-time employment than a person who does not have a main occupation.