# JUDGMENT OF THE COURT (Fifth Chamber)
1 July 1986 *

In Case 237/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arbeitsgericht [Labour Court] Oldenburg, Federal Republic of Germany, for a preliminary ruling in the proceedings pending before that court between

**Gisela Rummler,** residing at Oldenburg,

and

**Dato-Druck GmbH,** a company incorporated under German law, established in Oldenburg,

on the interpretation 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,

THE COURT (Fifth Chamber)

composed of: U. Everling, President of the Chamber, R. Joliet, Y. Galmot, F. Schockweiler and J. C. Moitinho de Almeida, Judges,

Advocate General: C. O. Lenz
Registrar: K. Riechenberg, acting as Administrator

after considering the observations submitted on behalf of

Dato-Druck GmbH, the defendant in the main proceedings, by Ronald Meier, legal adviser, during the written procedure,

the United Kingdom, represented by B. E. McHenry, of the Treasury Solicitor's Department, during the written procedure,

* Language of the Case: German.

the Commission of the European Communities, by Jürgen Grunwald, a member of its Legal Department, during the written and oral procedures;

after hearing the Opinion of the Advocate General delivered at the sitting on 27 May 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

## Decision

1 By an order of 25 June 1985, which was received at the Court on 31 July 1985, the Arbeitsgericht Oldenburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation 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 (Official Journal 1975, L 45, p. 19).

2 Those questions were raised in the course of proceedings brought before the Arbeitsgericht by Gisela Rummler against her employer, Dato-Druck GmbH, a printing firm, for the purpose of obtaining classification in a higher category in the pay scale.

3 Conditions of remuneration in the printing industry are governed by the 'Lohnrahmentarifvertrag für die gewerblichen Arbeitnehmer der Druckindustrie im Gebiet der Bundesrepublik Deutschland, einschließlich Berlin-West' [Framework wage-rate agreement for industrial employees of the printing industry in the territory of the Federal Republic of Germany including West Berlin] of 6 July 1984, which provides for seven wage groups corresponding to the work carried out, determined according to the degree of knowledge, concentration, muscular demand or effort and responsibility. The following aspects are relevant to these proceedings: the activities covered by Wage Group II are described as those which

may be executed with slight previous knowledge and after brief instruction or training, require little accuracy, place a slight to moderate demand on the muscles and involve slight or occasionally moderate responsibility; the activities covered by Wage Group III are described as those which may be executed with moderate previous knowledge and instruction or training related to the particular job, require moderate accuracy, require moderate or occasionally great muscular effort and involve slight or occasionally moderate responsibility; the activities falling under Wage Group IV are described as requiring previous knowledge on the basis of instruction or training related to the particular job, occasionally a fair degree of occupational experience requiring moderate accuracy, involving moderate and occasionally great effort of different kinds, particularly as a result of work dependent on machines and involving moderate responsibility. It is specified that the evaluation criteria must not be regarded as cumulative in all cases.

4 The plaintiff in the main proceedings, who is classified in Wage Group III, considers that she ought to be classified in Wage Group IV since she carries out work falling under that wage group; in particular, she is required to pack parcels weighing more than 20 kilograms, which for her represents heavy physical work.

5 The defendant in the main proceedings denies that the plaintiff's duties are of the nature described by her; it considers that they do not even fulfil the conditions for classification in Wage Group III, in which the plaintiff is now classified and that having regard to the nature of her duties, which make only slight muscular demands, she should be classified in Wage Group II.

6 The Arbeitsgericht Oldenburg considered that in order to arrive at a decision on the classification of the plaintiff in one of the wage groups in question it needed to know first whether the classification criteria were compatible with Directive 75/117; it therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does it follow from the provisions of 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 that in job classification systems no distinction may be made on the basis of:

(a) the extent to which a job makes demands on or requires an effort of the muscles;

(b) whether the work is heavy or not?

(2) If Question (1) is answered essentially in the negative:

As regards the decision as to:

(a) the extent to which a job makes demands on or requires an effort of the muscles;

(b) whether the work is heavy or not,

is reference to be made to the extent to which it makes demands on or requires an effort from women or whether it is heavy for women?

(3) If Question (2) is answered in the affirmative:

Does a job classification system which uses the criterion of demand on or effort of the muscles or the criterion of heaviness of work but does not make clear that it is significant to what extent the work makes demands on or requires an effort of the muscles as regards women or whether the work is heavy for women satisfy the requirements of the directive? '

**Question (1)**

7 By its first question the national court seeks to ascertain whether a job classification system based on the criteria of muscle demand or muscular effort and the heaviness of the work is compatible with the principle of equal pay for men and women.

8 According to Dato-Druck GmbH, pay criteria must in essence be established in accordance with the duties actually performed, and not by reference to the personal attributes of the worker who carries them out. In its view, the criteria of muscle demand and the heaviness of the work are in no way discriminatory in so far as they correspond to the characteristics of the duties performed and are used in a system which also refers to the criteria of ability, mental effort and responsibility.

9 The United Kingdom considers that the principle of non-discrimination does not preclude the use of a criterion in relation to which one sex has greater natural ability than the other, so long as that criterion is representative of the range of

activities involved in the job in question. A system based on the criterion of muscular effort is discriminatory only if it ignores movements of small muscle groups characteristic of manual dexterity.

10 According to the Commission, the criteria of muscle demand and of the heaviness of the work constitute common criteria for the purposes of the second paragraph of Article 1 of Directive 75/117. However, it is also necessary to ascertain whether the system as a whole is discriminatory. The issue whether or not the system is discriminatory must be determined not on the basis of each criterion separately but according to the job classification system as a whole.

11 In replying to Question (1), reference must first be made to the general rule laid down by the first paragraph of Article 1 of Directive 75/117, which provides for the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration for the same work or for work to which equal value is attributed.

12 That general rule is applied in the second paragraph of Article 1, which provides that a job classification system 'must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex'.

13 It follows that the principle of equal pay requires essentially that the nature of the work to be carried out be considered objectively. Consequently, the same work or work to which equal value is attributed must be remunerated in the same manner whether it is carried out by a man or by a woman. Where a job classification system is used in determining remuneration, that system must be based on criteria which do not differ according to whether the work is carried out by a man or by a woman and must not be organized, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex.

14 Consequently, criteria corresponding to the duties performed meet the requirements of Article 1 of the directive where those duties by their nature require particular physical effort or are physically heavy. In differentiating rates of pay, it

is consistent with the principle of non-discrimination to use a criterion based on the objectively measurable expenditure of effort necessary in carrying out the work or the degree to which, reviewed objectively, the work is physically heavy.

15 Even where a particular criterion, such as that of demand on the muscles, may in fact tend to favour male workers, since it may be assumed that in general they are physically stronger than female workers, it must, in order to determine whether or not it is discriminatory, be considered in the context of the whole job classification system, having regard to other criteria influencing rates of pay. A system is not necessarily discriminatory simply because one of its criteria makes reference to attributes more characteristic of men. In order for a job classification system as a whole to be non-discriminatory and thus to comply with the principles of the directive, it must, however, be established in such a manner that it includes, if the nature of the tasks in question so permits, jobs to which equal value is attributed and for which regard is had to other criteria in relation to which women workers may have a particular aptitude.

16 It is for the national courts to determine on a case-by-case basis whether a job classification system as a whole allows proper account to be taken of the criteria necessary for adjusting pay rates according to the conditions required for the performance of the various duties throughout the undertaking.

17 The answer to Question (1) must therefore be that Council Directive 75/117 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 does not prohibit the use, in a job classification system for the purpose of determining rates of pay, of the criterion of muscle demand or muscular effort or that of the heaviness of the work if, in view of the nature of the tasks involved, the work to be performed does require the use of a certain degree of physical strength, so long as the system as a whole, by taking into account other criteria, precludes any discrimination on grounds of sex.

**Questions (2) and (3)**

18 It appears from the wording of those questions and from the grounds of the order for reference that the national court wishes in substance to know whether, in the event that the criteria of muscle demand or muscular effort and of the heaviness of the work are compatible with Directive 75/117, the fact that in determining to what extent work requires an effort or is demanding or heavy, regard is had to the degree to which the work requires an effort or is demanding or, for women workers, satisfies the requirements of the directive.

19 The defendant argues that regard must be had only to the objective nature of the work to be carried out and the objectively measurable demands it makes.

20 The United Kingdom adds that to use an absolute level of muscular effort or an absolute degree of heaviness of the work, which in fact amounts to using male points of reference, can constitute no more than indirect discrimination, which is not prohibited by Article 119 of the EEC Treaty in so so far as it is based on objectively justifiable grounds. Such grounds exist where an employer must, in order to attract workers to and retain them in a specific job, set the rate of pay for that job in accordance with the particular effort required by it.

21 The Commission considers that in this regard the directive contains no general legal principle, so that national courts are not precluded from basing themselves mainly or exclusively on female values if the principle of non-discrimination so requires in order to avoid discrimination against women.

22 The answer to Questions (2) and (3), seen in those terms, follows from what has already been said in answer to Question (1), that is to say that nothing in the directive prevents the use in determining wage rates of a criterion based on the degree of muscular effort objectively required by a specific job or the objective degree of heaviness of the job.

23 The directive lays down the principle of equal pay for equal work. It follows that the work actually carried out must be remunerated in accordance with its nature. Any criterion based on values appropriate only to workers of one sex carries with it a risk of discrimination and may jeopardize the main objective of the directive, equal treatment for the same work. That is true even of a criterion based on values corresponding to the average performance of workers of the sex considered to have less natural ability for the purposes of that criterion, for the result would be another form of pay discrimination: work objectively requiring greater strength would be paid at the same rate as work requiring less strength.

24 The failure to take into consideration values corresponding to the average performance of female workers in establishing a progressive pay scale based on the degree of muscle demand and muscular effort may indeed have the effect of placing women workers, who cannot take jobs which are beyond their physical strength, at a disadvantage. That difference in treatment may, however, be objectively justified by the nature of the job when such a difference is necessary in order to ensure a level of pay appropriate to the effort required by the work and thus corresponds to a real need on the part of the undertaking (see the judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus* v *Weber von Hartz* [1986] ECR 1607). As has already been stated, however, a job classification system must, in so far as the nature of the tasks in question permits, include other criteria which serve to ensure that the system as a whole is not discriminatory.

25 The answer to Questions (2) and (3) must therefore be that it follows from Directive 75/117 that:

(a) the criteria governing pay-rate classification must ensure that work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman;

(b) the use of values reflecting the average performance of workers of one sex as a basis for determining the extent to which work makes demands or requires effort or whether it is heavy constitutes a form of discrimination on grounds of sex, contrary to the directive;

(c) in order for a job classification system not to be discriminatory as a whole, it must, in so far as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show particular aptitude.

## Costs

26 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 (Fifth Chamber),

in answer to the questions referred to it by the Arbeitsgericht Oldenburg by order of 25 June 1985, hereby rules:

**(1) Council Directive 75/117 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 (Official Journal 1975, L 45, p. 19) does not prohibit the use, in a job classification system for the purpose of determining rates of pay, of the criterion of muscle demand or muscular effort or that of the heaviness of the work if, in view of the nature of the tasks involved, the work to be performed does require the use of a certain degree of physical strength, so long as the system as a whole, by taking into account other criteria, precludes any discrimination on grounds of sex.**

**(2) It follows from Directive 75/117 that:**

**(a) the criteria governing pay rate classification must ensure that the work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman;**

(b) the use of values reflecting the average performance of workers of one sex as a basis for determining the extent to which work makes demands or requires effort or whether it is heavy constitutes a form of discrimination on grounds of sex, contrary to the directive;

(c) in order for a job classification system not to be discriminatory as a whole, it must, in so far as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show particular aptitude.

Everling Joliet

Galmot Schockweiler Moitinho de Almeida

Delivered in open court in Luxembourg on 1 July 1986.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber