OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 18 May 2006 [1]

1. This reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) concerns the development of the Community case-law concerning equal pay. At the heart of the debate is the continuing applicability of the *Danfoss* judgment, [2] which held that use of length of service as a criterion in a pay system need not be justified by the employer, even if it works to the disadvantage of women, since 'length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better'. The present case does not directly call into question pay systems that use length of service as a pay criterion, but it may indirectly affect such pay systems. What is at stake, is, first, the allocation of the burden of proof between the employer and the employee in a determination as to whether indirect discrimination arising from a pay system using length of service as a criterion can be justified and, second, the nature of the justification required and the extent of the burden of proof. If it is admitted as a general rule that length of service is a valid proxy for rewarding experience and efficiency, then it will be impossible for an employee to challenge a pay system that relies on length of service even if such a system in fact works to the disadvantage of women. Conversely, if it is found that an employer must justify any difference in treatment which arises out of the use of length of service as a criterion in the pay system, it may prove difficult for the employer to give precise and detailed evidence of the extent to which efficiency and productivity increase with seniority.

I — Legal Framework

2. The present case concerns equality between women and men which is a fundamental principle of EC law under Articles 2 EC and 3(2) EC and forms part of the

1 — Original language: Portuguese.

2 — Case 109/88 *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening ('Danfoss')* [1989] ECR 3199, paragraph 24.

foundations of the Community.[3] The principle of equal pay for equal work or work of equal value is enshrined in Article 141 EC, which provides:

'1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.'

3. Article 141 EC is supplemented by various pieces of secondary legislation. 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[4] ensures that the aspects and conditions of remuneration do not discriminate between men and women. Article 1 of Directive 75/117 specifically states:

'The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men

3 — Case 43/75 *Defrenne* [1976] ECR 455, paragraph 12.

4 — OJ 1975 L 45, p. 19.

and women and so drawn up as to exclude any discrimination on grounds of sex.'

4. Although not expressly provided for in Article 141 EC, the notion of indirect sex discrimination was developed by the case-law [5] and then incorporated into legislation. Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [6] gives a definition of indirect sex discrimination at Article 2(2): 'For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or 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.'

5. Although the following directives are not applicable in the present case, it is worth noting that the notion of indirect discrimination is now uniformly defined by Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [8] and 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 [9] as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002. [10] Article 2 of Directive 76/207, as amended, provides that there is 'indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.'

6. In relation to the allocation of the burden of proof in equality cases, Directive 97/80 also provides, at Article 4, that when plaintiffs establish 'facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the

5 — Case 96/80 *Jenkins* [1981] ECR 911.

6 — OJ 1998 L 14, p. 6.

7 — OJ 2000 L 180, p. 22.

8 — OJ 2000 L 303, p. 16.

9 — OJ 1976 L 39, p. 40.

10 — OJ 2002 L 269, p. 15.

respondent to prove that there has been no breach of the principle of equal treatment'. [11]

7. The relationship between Article 2(2) of Directive 97/80, defining the notion of indirect discrimination, and Article 4 thereof, concerning the allocation of the burden of proof, will be decisive in resolving the issues raised by the referring court and in assessing when a pay system in which length of service is a determinant of pay might result in indirect discrimination.

II — Facts, procedures and questions referred

8. Mrs Cadman is employed by the United Kingdom Health and Safety Executive (hereinafter 'the HSE'), the national statutory agency responsible for regulating health and safety risks arising from work activity in Great Britain.

9. Mrs Cadman joined the HSE in June 1990 as an Inspector of Factories. She was promoted at the end of her training in June 1993. In 1996, she became head of a Field Services Unit and was again promoted, this time to HM Principal Inspector of Health and Safety in Pay Band 2. In February 2001, she transferred to an operational post as head of a Field Management Unit.

10. During the period in which Mrs Cadman has been employed by the HSE, the pay system model has changed several times. Prior to 1992, the pay system was incremental, that is, each employee received an annual pay increment until he reached the top of the scale. In 1992, the HSE introduced a performance-related element which adjusted the amount of the annual increment to reflect the employee's performance. Under this system high performers could therefore reach the top of the scale more quickly. In 1995, following the introduction of a Long Term Pay Agreement, annual pay increases resulted from equity shares correlated to the employee's performance, thus effectively decreasing the rate at which pay differentials narrowed between the longer-serving and shorter-serving employees on the same grade. Finally, in 2000, employees lower down the pay bands were afforded larger annual increases so as to facilitate faster progression through the pay band.

11 — The same mechanism can be found in recital (31) to Directive 2000/78 and recital (21) to Directive 2000/43, which state that 'the rules of the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought'.

11. In the financial year 2000/01, Mrs Cadman's annual salary was GBP 35 129, while that of four male colleagues employed in the same grade was GBP 39 125, GBP 43 345, GBP 43 119 and GBP 44 183. The annual pay differential between Mrs Cadman and her comparators, which ranged from GBP 4 000 to GBP 9 000, stemmed from the fact that her four male comparators all had longer service with the HSE.

12. In June 2001, Mrs Cadman lodged an application before the Manchester Employment Tribunal, alleging that HSE's pay system had a disproportionately detrimental impact upon women and that she was accordingly entitled to receive pay equal to that of her four male comparators. Mrs Cadman based her claim on the Equal Pay Act 1970, which transposes Article 141 EC.

13. Section 1 of the Equal Pay Act, which is relevant for these purposes, provides:

'(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that —

...

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment —

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to

a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.

...

(3) An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor —

(a) in the case of an equality clause falling within subsection 2 ... (b) above, must be a material difference between the woman's case and the man's;

...'

14. Moreover, under section 1(1)(b)(ii) of the Sex Discrimination Act 1975, indirect sex discrimination is unlawful unless it is justified.

15. The Employment Tribunal, which heard Mrs Cadman's case between 7 May and 8 July 2002, held that she was entitled to a declaration under section 1 of the Equal Pay Act that the term in her contract dealing with pay should be modified so as not to be less favourable than the comparable term in the contract of employment of her four comparators.

16. The HSE then appealed to the Employment Appeal Tribunal (hereinafter 'Appeal Tribunal') which, in its judgment of 22 October 2003, allowed the appeal on two grounds. First, it held that, in the light of the judgment of the Court in *Danfoss*, no specific justification was required from the employer where unequal pay arose from the use of length of service as a criterion in a pay system. Secondly, even if such justification were required, the Employment Tribunal had erred in law when considering the issue.

17. Mrs Cadman, in turn, appealed to the Court of Appeal. The Equal Opportunities Commission (hereinafter 'EOC') was permitted to make written and oral submissions as an intervener. The EOC provided evidence (accepted by all parties) that, in the United Kingdom and throughout the European Union, the length of service of female workers is, taken as a whole, less than that of male workers and that length of service as a determinant of pay plays a role in the continuing pay gap between male and female workers.

18. The HSE has continuously defended its pay practice, maintaining that the difference in pay resulted from Mrs Cadman's shorter service, a material and objective factor that distinguished her situation from that of her four male comparators, as provided for in *Danfoss*.

19. Mrs Cadman and the EOC, on the other hand, contend that the *Danfoss* judgment has been called into question by the Court's subsequent case-law. Indeed, they maintain that the employer is required to provide objective justification for the pay differentials between Mrs Cadman and her comparators.

20. Noting an apparent discrepancy between *Danfoss* and more recent cases, notably *Nimz*, [12] *Hill and Stapleton* [13] and *Gerster*, [14] the Court of Appeal concluded that the matter was 'not free from uncertainty' [15] and therefore referred the following three questions to the Court for a preliminary ruling:

'(1) Where the use by an employer of the criterion of length of service as a determinant of pay has a disparate impact as between relevant male and female employees, does Article 141 EC require the employer to provide special justification for recourse to that criterion? If the answer depends on the circumstances, what are the circumstances?

(2) Would the answer to the preceding question be different if the employer applies the criterion of length of service on an individual basis to employees so that an assessment is made as to the extent to which the greater length of service justifies a greater level of pay?

(3) Is there any relevant distinction to be drawn between the use of the criterion of length of service in the case of part-time workers and the use of that criterion in the case of full-time workers?'

21. Mrs Cadman, the EOC, the United Kingdom Government, Ireland and the Commission lodged written observations before the Court. They were also represented at the hearing, which took place on 8 March 2006, at which the French Government was also represented.

12 — Case C-184/89 [1991] ECR I-297.

13 — Case C-243/95 [1998] ECR I-3739.

14 — Case C-1/95 [1997] ECR I-5253.

15 — Paragraph 23 of the judgment deciding that a reference should be made to the Court.

III — Analysis

22. In order to answer the questions referred by the Court of Appeal, I shall start by describing how the burden of proof is allocated in indirect discrimination cases. I shall then elaborate on the extent to which seniority can be used in a pay system without infringing Article 141 EC, in order to establish whether Article 141 EC is to be interpreted in such a way as to allow a pay system such as the one operated by the HSE. Lastly, I shall address the issue which has been raised by the United Kingdom Government and Ireland of temporal limitation of the effects of the Court's judgment in this case.

A — *The allocation of the burden of proof in indirect discrimination cases*

1. Framework of analysis

23. Unlike direct discrimination, indirect discrimination arises from provisions which, on their face, apply equally to men and women. If a neutral provision in fact works to the disadvantage of women it can be deemed indirectly discriminatory. [16] A provision working to the disadvantage of younger or older workers, neutral on its face, could also constitute indirect discrimination based on age. [17] In the present case, although the question has not been raised by the referring court, it is not inconceivable that recourse to the length-of-service criterion in a pay system could, in certain circumstances, lead to indirect discrimination on grounds of age. [18] Inherent in the concept of indirect discrimination is a requirement that there should be a substantive notion of equality. [19]

24. There can be no justification for direct discrimination. However, in keeping with settled case-law and as provided for in Article 2(2) of Directive 97/80, indirect discrimination can be justified.

16 — See, to that effect, Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607, paragraph 31; *Gerster*, paragraph 30, Case C-100/95 *Kording* [1997] ECR I-5289, paragraph 16, and *Hill and Stapleton*, cited above, paragraph 24.

17 — The Court held, in Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75, that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law.

18 — It is possible to imagine a pay system which places younger workers at a disadvantage because it disproportionately favours length of service and therefore works to the benefit of older workers. Conversely, a different kind of pay system which takes no account of workers' past experience could be deemed to disadvantage older workers. As regards access to employment, Article 6(1)(b) of Directive 2000/78 nevertheless allows for the 'fixing of minimum conditions of age, professional experience or seniority in service'. In general, prohibition of age discrimination is set about with numerous provisos and limitations (Opinion of Advocate General Jacobs of 27 October 2005 in Case C-227/04 P *Lindorfer* v *Council*, pending before the Court, point 87).

19 — Prechal, S., 'Equality of treatment, non-discrimination and social policy: achievements in three themes', *CMLRev.*, Vol. 41 (2004) Issue 2, p. 533.

25. In relation to indirect discrimination cases, Article 4 of Directive 97/80 sets out the rules concerning the allocation of the burden of proof as between the employer and the employee. A complainant who makes an allegation of indirect discrimination must adduce proof that the contested provision actually produces a disparate impact on women. The burden of proof at this initial stage of procedure thus rests on the employee. The requirement for the employer or the legislature to produce justification for a practice or a policy that is neutral on its face will arise only if such proof is provided. Once such evidence has been produced, the employer or the legislature, depending on the origin of the measure, will have to demonstrate that the measures concerned pursue a legitimate aim, are strictly necessary to achieve this legitimate aim and are proportionate. [20]

26. Mrs Cadman's claim that she has suffered from indirect discrimination should be assessed in the light of this analytical framework. The Court of Appeal, however, wonders whether, in *Danfoss*, the Court in fact departed from this analysis with respect to the criterion of seniority in a pay system. The meaning of this judgment in relation to subsequent case-law, therefore, needs to be clarified.

20 — The same test is applied by English courts, whether they refer to the case-law of the Court or not: see the decision of the Employment Tribunal in *Crossley* v *Arbitration Conciliation and Advisory Service* (Case No 1304744/98, appended to Mrs Cadman's observations).

2. The Court's case-law on the employer's obligation to justify the use of seniority in a pay system

27. In *Danfoss*, the Court addressed questions raised by a Danish Arbitration Tribunal concerning a pay system in which the same basic wage was paid to employees in the same wage group but in which individual pay supplements were also awarded, calculated by reference to mobility, training and seniority. A female plaintiff alleged that the pay system indirectly discriminated against women. After considering how the burden of proof should be divided as between the employer and the employee in view of the fact that the pay system lacked transparency, the Court assessed the lawfulness of the three above mentioned criteria individually, taking account of the disparate impact the criteria might have on women. The Court found that recourse to mobility was a legitimate criterion in so far as it was used to reward the quality of work performed. If mobility rewarded the employee's adaptability to variable hours and varying places of work, however, it could not be considered a neutral criterion since women, 'because of household and family duties for which they

are frequently responsible, are not as able as men to organise their working time flexibly'. [21] As regards training, the Court held that 'the employer may justify remuneration of special training by showing that it is of importance for the performance of specific tasks entrusted to the employee'. [22]

28. Finally, and this is the part of the judgment which is in issue here, the Court went on to state that length of service 'may involve less advantageous treatment of women than of men in so far as women have entered the labour market more recently than men or more frequently suffer an interruption of their career'. [23] After making this statement, the Court considered that, 'since length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward it without having to establish the importance it has in the performance of specific tasks entrusted to the employees'. [24]

29. The United Kingdom Government defended the view that length of service should in principle be considered as justified even if the employee shows that it has a disproportionate impact on women. The employer would have to provide specific justification only if the employee were first to show that the weight given to length of service was wholly disproportionate.

30. Ireland and the French Government took a more radical approach, suggesting that it followed from *Danfoss* that length of service should always be considered as a legitimate criterion for the determination of pay.

31. Mrs Cadman and the EOC submit on the contrary that *Danfoss* should be interpreted to mean that 'in a job in which experience enables a person to perform his duties better, length of service may be used appropriately as a reasonable proxy for the measure of the differential ability of staff to perform their duties'. [25] In their view, the employer is therefore always required to provide specific justification. It is not completely clear what this specific justification amounts to. It seems that it could go as far as requiring justification on a case-by-case basis of the application of a pay-system policy based on length of service.

21 — Paragraph 21 of *Danfoss*.
22 — Paragraph 23 of *Danfoss*.
23 — Paragraph 24 of *Danfoss*.
24 — Ibid.

25 — Point 103 of the written observations of the EOC.

32. The Commission prefers to view *Danfoss* as 'a specific judgment based on its very particular factual circumstances',[26] which does not call into question the duty of justification imposed on employers where a pay system produces a disparate impact on men and women.

33. For reasons which I shall now address, it seems to me that, while I agree with the interpretation suggested by Mrs Cadman, the EOC and the Commission that the burden of proof regarding the justification of its pay system should fall on the employer, I also believe that it is important that the nature of that justification should be defined so as not to impose an undue burden on the employer.

34. It is true that under Article 2(2) of Directive 97/80 the fact that there is a disparate impact on one sex is not sufficient to establish indirect discrimination if that impact can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. However, the burden of proof in respect of such justification is dealt with by Article 4 of the directive. It is in the light of that that I find the arguments of the national governments difficult to accept. The French Government and Ireland ultimately defend the view that seniority will always amount to an objectively justified, appropriate and necessarily legitimate aim. As I shall argue below, I see no basis for such a general and unconditional endorsement of a seniority criterion. The United Kingdom Government, in turn, accepts that occasionally seniority does not constitute an acceptable criterion but submits that, in such a case, the burden of proof will fall on the employee. However, I see no reason why the employee should bear the burden of demonstrating that a wholly disproportionate weight is given to the length-of-service criterion instead of the employer having the burden of proving that the system is in fact proportionate. Article 4 runs counter to such an interpretation. Instead, the wording, the general scheme of the provision and the overall goal of the directive all suggest that it is the employer who must, under Article 2(2) and Article 4 of the directive, provide objective justification for that criterion and who must demonstrate that the criterion is both an appropriate means of achieving a legitimate aim and is necessary in order to do so. The nature of this justification, in other words the extent of the burden imposed on the employer, is another matter. It is in this respect that the traditional arguments in favour of a seniority criterion may be relevant and that some limits may have to be imposed on the burden which Mrs Cadman and the EOC would appear to be arguing should be imposed on the employer.

35. First of all, it should be noted that *Danfoss* was decided before the adoption of Directive 97/80. Prior to adoption of the directive, it was open to courts to make a finding, as the Court may have done in *Danfoss*, that the use of seniority did not

26 — Point 30 of the written observations of the Commission.

need to be justified by an employer. Following adoption of the directive, a criterion having a disadvantageous impact on women could no longer be excluded from the scope of Article 4 (cited at point 6 above).

36. There can be no doubt that Directive 97/80 is relevant in the present case, since according to Article 3 thereof, the directive applies to situations covered by Article 141 EC.

37. In addition, if the interpretation advocated by the French Government and Ireland were adopted, this would run counter to the aim of Directive 97/80, which, under Article 1, is 'to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective'. The principle of equal pay enshrined in Article 141 EC would thus be undermined as well.

38. Consequently, pursuant to Article 4 of Directive 97/80, it will be incumbent on the employer to prove that, where the use of seniority as a determinant in a pay system entails a disparate impact on women, use of the criterion can be justified because it is relevant in light of the overall pay system of the company and its activity.

39. Secondly, for the purpose of assessing whether *Danfoss* can still be relied upon by an employer to avoid providing any justification for a pay system that is based on seniority and has a disparate impact on women, subsequent case-law is relevant.

40. In *Nimz*,[27] the Court had to assess whether Article 141 EC could be interpreted so as to allow provisions applicable to part-time workers under the Collective Wage Agreement for Federal Employees in Germany. Under this collective agreement, employees were eligible for promotion after a qualifying period of six years. The period of service of workers employed for at least three quarters of normal working time was to be taken fully into account. For employees working between half and three quarters of normal working time, however, only half of the period of service was to be taken into account. The German Government based its argument about the legitimacy of the contested provision on the fact that full-time workers had more extensive experience and acquired the necessary abilities and skills for their job more quickly than part-time workers. Yet, the Court held, at paragraph 15 of the judgment, that Article 141 EC precluded the use of the provision 'unless the employer can prove that such a provision is justified by factors whose objectivity depends in parti-

27 — Cited above.

cular on the relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of working hours have been completed'.

41. In *Gerster*,[28] the Court again examined the method for calculating length of service in the German public service, which differed for full-time and part-time employees. In that case, the Court did not rule out the possibility that the national court might find a link between the acquisition of experience and the fact that an employee worked full-time rather than part-time, but nevertheless required the principle of proportionality to be applied.[29] In *Kording*,[30] the Court found that it was for the national court to establish whether the requirement that, in order to gain exemption from a qualifying examination, candidates employed part-time must work for a longer period than those employed full-time could be justified by objective factors unrelated to any discrimination on grounds of sex.

42. Advocate General La Pergola, in his Opinion in the last two cases had suggested a stricter approach. In his view, the promotion system in *Gerster* lacked internal coherence, since, on the one hand, it equated part-time employees working over two thirds of the normal working hours with full-time employees, whereas, on the other hand, those working for a marginally smaller fraction of the normal working hours continued to be classified as part-time employees.[31] More generally, he found that the promotion system was based on the mere assumption that officials who worked part-time needed to complete longer periods of service than those who worked full-time. Any evidence supporting that statement was, in his view, lacking.[32]

43. In the next case in which it had to deal with the equal treatment principle, this time in connection with the Irish civil servants' pay system, in *Hill and Stapleton*,[33] the Court confirmed that the onus was on the employer to establish that the reference to the criterion of service, defined as the length of time actually worked, in the assessment of the incremental credit to be granted to workers who converted from job-sharing to full-time work was justified by objective factors unrelated to any discrimination on grounds of sex.

28 — Cited above.

29 — In other words, the measures chosen should reflect a legitimate social policy aim and be appropriate and necessary to achieve that aim (*Gerster*, paragraph 40).

30 — Paragraph 26.

31 — Opinion in *Gerster*, point 47.

32 — Ibid., point 40.

33 — Paragraph 43.

44. In the last relevant case cited by the parties, *Nikoloudi*,[34] the Court touched on the criterion of length of service among other issues. Under a collective agreement, only full-time employees with two years' service were eligible for appointment to an established post. One of the questions raised in the case was whether length of service for part-time employees had to be calculated proportionally or whether their entire period of part-time employment should be taken into account. The Court recalled that 'the objectivity of [length of service] depends on all the circumstances in each individual case'.[35] The employer submitted that length of service was necessary to assess a worker's professional experience. Without specifying what impact those factors might have on the validity of the criterion used, the Court noted that length of service could also reward company loyalty.[36]

45. It is conspicuous that the Court did not rely on *Danfoss* to reach a decision in any of these cases. The Advocates General have endeavoured to explain the development of the case-law. According to Advocate General La Pergola, in his Opinion in *Hill and Stapleton*, the judgment in *Danfoss* could be understood only in its context and in the light of the facts then before the Court. Advocate General Stix-Hackl similarly considered that in *Nimz*, *Gerster* and *Kording*, the Court had departed from *Danfoss*.[37]

46. Subsequent decisions may not have expressly reversed *Danfoss* but there can be no doubt that it has nevertheless been qualified by later cases. No conclusion can be drawn from the mere fact that the Court has not expressly rejected the finding in *Danfoss* in subsequent cases, since it is only on very rare occasions that the Court will expressly reverse its own case-law, particularly where none of the subsequent cases expressly required it to review its earlier decision.[38]

47. In conclusion, it is clear that Directive 97/80,[39] which is based on Article 141 EC, has harmonised and codified the approach to be taken to the allocation of the burden of proof, so that the solution adopted by the Court in *Danfoss*, although it is understandable given the specific circumstances with which that case was concerned, cannot be relied on in the present case. In my view, the answer to the first question raised by the Court of Appeal should be that, where the use by an employer of the criterion of length of service as a determinant of pay has a disparate impact as between relevant male and female employees, Article 141 EC, together with Article 2(2) and Article 4 of Directive 97/80, require the employer to

34 — Case C-196/02 [2005] ECR I-1789.

35 — *Nikoloudi*, paragraph 55.

36 — Ibid., paragraph 63.

37 — Opinion in *Nikoloudi*, point 50.

38 — See my Opinion of 1 February 2006 in Cases C-94/04 *Cipolla* and C-202/04 *Macrino and Capodarte*, pending before the Court, points 28 and 29, on this question.

39 — See for instance Cases C-127/92 *Enderby* [1993] ECR I-5535, paragraphs 13 to 19, and C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraph 24.

justify recourse to that criterion. The nature of the justification to be provided will be discussed below.

B — *The nature of the justification required for recourse to the criterion of seniority in a pay system*

48. The nature of the justification which has to be provided by an employer in order to rebut the presumption of indirect discrimination resulting from the fact that a pay system works to the disadvantage of women must be assessed in the light of Directive 97/80 and of the case-law on indirect discrimination. This issue is central, since the standard of proof required of an employer will allow there to be judicial scrutiny of a pay system which is challenged in the light of the principle of equal pay. It is necessary to determine whether general justification for the use of a length-of-service criterion in a pay system can suffice or whether, by contrast, the justification to be provided must centre on the situation of each specific employee. In practice, employers and the legislature have advanced a variety of possible justifications for measures which work to the disadvantage of women. [40]

40 — See Hervey, T.K., 'EC law on justifications for sex discrimination in working life', in Collective bargaining, discrimination, social security and European integration, *Bulletin of comparative labour relations*, No 48, 2003, p. 103. Among the various justifications brought, the author distinguishes between job-related justifications such as physical abilities, qualifications and training, enterprise related justifications such as economic or financial efficiency and public interest related justifications such as the need to encourage employment or the willingness to encourage small businesses.

It will often be left to the national court to determine whether the measures adopted for the purpose of pursuing a legitimate aim are proportionate in view of the justification advanced by the employer.

49. Contrary to the contention of the French Government and Ireland, it is beyond question that *Danfoss* cannot be read as conferring a blanket justification on all pay systems based on length of service. But, contrary to what Mrs Cadman and the EOC appear to be arguing, a complaint of indirect discrimination by an employee cannot trigger a requirement for the employer to justify the pay awarded to one employee as compared with others. Acceptance of that argument would entail a risk of an intolerable burden being imposed on employers and the argument itself fails to take account of the fact that under Article 2(2) the justification can be centred on the criterion itself and not necessarily on each instance of differential treatment as between employees. In other words, the burden of proof borne by the employer can be satisfied if the criterion adopted for its pay system is justified and it will not always be necessary to provide justification for a difference in treatment between specific workers which may arise as a result of that criterion.

50. At the hearing, the United Kingdom Government's representative submitted that there are a great many reasons why an employer might decide to use a pay system based on seniority. An experienced worker will usually be more productive at work,

since he or she will be more familiar with the employer's business and with its clients. Stability of the workforce also allows the employer to reduce training costs and avoid a costly recruitment process. There is therefore an obvious business incentive for the employer to reward length of service.

51. In its oral submission the French Government further explained why a public employer has a legitimate reason for rewarding long-serving employees. In the French public service, seniority is not linked with the type of work performed but is justified by the relationship of the civil servant to the administration. A pay system based on seniority ensures the independence and neutrality of civil servants.

52. Although the legitimacy of the criterion of seniority is not questioned as such, the question does arise as to the extent to which the employer's economic interests have to accommodate the employees' interest in the equal-pay principle being respected. Indeed, although it is legitimate for employers to remunerate length of service and/or loyalty, it cannot be denied that there are situations where a pay system, though neutral in its conception, works to the disadvantage of women. In such cases, Article 2(2) of Directive 97/80 subjects the criterion used in a pay system disadvantaging women to a proportionality test in which it must be shown that the criterion is based on legitimate aims and is proportionate for the purpose of achieving the aims pursued.

53. As the United Kingdom Government has acknowledged, a pay system with automatic pay increases depending solely on length of service has a negative impact on female workers, since women generally enter the workforce later and interrupt their service more frequently for reasons associated with maternity and caring responsibilities.

54. The United Kingdom Government argues that, in *Danfoss*, the Court accorded special status to length of service, since 'the employer was entitled to prove justification by resort to a generalisation rather than by specific proof'.[41] Ireland broadly supports the same view. This would mean, in their opinion, that, since length of service can be considered a proxy for better performance, recourse to length of service in a pay system will always be compatible with Article 141 EC.

55. I do not agree with this assumption. In my view, it does not satisfy the proportion-

41 — Point 26 of the written observations of the UK Government.

ality test set out in Article 2(2) of Directive 97/80 defining the notion of indirect discrimination.

56. The proportionality test contained in Article 2(2) of Directive 97/80 [42] requires evidence demonstrating that the criticised criterion 'is appropriate and necessary and can be justified by objective factors unrelated to sex'.

57. If it were accepted that a general justification, such as the fact that length of service enables an employee to perform his or her duties better, was sufficient to justify a pay system disadvantaging women from the perspective of Article 141 EC, virtually no scope would remain for an employee to challenge a pay system on this ground.

58. Moreover, no judicial scrutiny would be possible in such circumstances. That is why in *Seymour-Smith*, [43] the Court rejected 'mere generalisations' as not being a valid means of justifying a discriminatory measure. In my view, the proportionality test imposed by Article 2(2) requires the employer to demonstrate that the pay system adopted, even where it is based on a legitimate aim, is conceived so as to minimise its disparate impact on women. This requires, as I shall argue below, a review of, for example, how length of service is taken into account and how it is balanced in the pay system with other criteria (such as merit) which are less disadvantageous to women.

59. For a fuller understanding of the nature of the justification that is required, it may be helpful to draw an analogy with cases concerning freedom of movement for workers because the balance which has to be struck in those cases may sometimes present similarities with the balancing exercise undertaken in a review of a length-of-service criterion where there is a suspicion of indirect discrimination. In *Köbler*, [44] the Court held that a special length-of-service increment granted by the Austrian State qua employer to university professors in addition to their basic salary under certain conditions [45] was contrary to Article 39 EC and could not be justified by any pressing reason of public interest. The Court balanced the right of an employer to reward loyalty with

42 — As well as in Directives 2000/78, 2000/43 and 76/207, as amended.

43 — Case C-167/97 [1999] ECR I-623, paragraph 76.

44 — Case C-224/01 [2003] ECR I-10239.

45 — That is to say, provided that they had been employed for at least 15 years with an Austrian university and had been receiving the normal length-of-service increment for at least four years.

the principle of freedom of movement for workers.[46] The Court did recognise that rewarding loyalty was a legitimate aim but found that it was not sufficient to justify the obstacle entailed. The State was required to justify the specific conditions upon which the remuneration was based in the light of its impact on the freedom of movement interests. Since the loyalty bonus was likely to discourage Austrian professors from exercising their right to freedom of movement and therefore led to a partitioning of the market for the employment of university professors, the Court concluded that it ran counter to Article 39 EC.

60. Similarly, for the purposes of Article 141 EC, together with Article 2(2) and Article 4 of Directive 97/80, it is not sufficient to demonstrate that a criterion based on length of service can, in general, pursue a legitimate aim (rewarding experience and loyalty). Such a criterion must be proportionate to that aim, account being taken of any disadvantageous impact it may have on women.

61. Finally, there are also indications in the case-law subsequent to *Danfoss* that the use of a length-of-service criterion in a pay system on the ground that it is a measure of experience cannot, in itself, constitute justification for any disparate effects which the pay system has on women's salaries.

62. Advocates General Darmon[47] and La Pergola[48] both expressed doubts as to whether the taking into account of experience should be accepted as a general and abstract rule. The Court has also rejected such an approach. Despite the fact that the case dealt with a comparison between part-time and full-time employees, in its ruling in *Nimz*, the Court held that: 'although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such criterion depends on all the circumstances in a particular case, and in particular on the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours.'[49] It follows from this that the Court intended to make the objectivity of the criterion of experience dependent upon the nature of the job concerned. Ireland's objection that the later cases deal only with the calculation of length of service for part-time employees cannot be

46 — *Köbler*, paragraph 86.

47 — In his Opinion in *Nimz*, at point 15, Advocate General Darmon stated that: 'Experience is not as decisive a criterion for the post of maintenance worker as it is for that of the head of an administrative department.'

48 — Opinion of Advocate General La Pergola in *Hill and Stapleton*, point 34. See also his Opinion in *Gerster and Kording*, in footnote 27.

49 — *Nimz*, paragraph 14. See also *Gerster*, paragraph 39, and *Kording*, paragraph 23.

accepted. Indeed, the question of whether the work was performed on a part-time or on a full-time basis did not make any difference.

63. In view of the foregoing considerations, the standard of proof which the employer must discharge in order to show that recourse to a length-of-service criterion does not lead to indirect discrimination can be summarised as follows. First, a degree of transparency as to how the length-of-service criterion is applied in the pay system is necessary, so that judicial scrutiny can take place. [50] In particular, it should be clear how much weight is placed, in the determination of pay, on length of service — conceived either as a way of measuring experience or as a means of rewarding loyalty — as compared with other criteria such as merit and qualifications. In addition, the employer should explain why experience will be valuable for a specific job, and why it is rewarded proportionally. In this respect, while an analysis will have to be carried out by the national court, there can be no doubt, for example, that experience will be more valuable — and therefore legitimately rewarded — in the case of posts involving responsibility and management tasks than in the case of repetitive tasks, in respect of which the length-of-service criterion can account for only a small proportion of pay. This criterion may be of particular relevance in the training phase but become less relevant once the employee has acquired sufficient command of his or her job. Finally, the way length of service is accounted for must also minimise the negative impact of the criterion on women. It seems to me, for example, that a system which excludes periods of maternity or paternity leave, although it is prima facie neutral, would result in indirect discrimination against women.

64. The standard of proof required in cases involving indirect discrimination remains general in the sense that the employer will not need to justify why a specific employee is paid more than another, as long as the pay system has been consistently structured so as to take into account job specifications and the undertaking's business needs and so as to minimise the disparate impact it may have on women. Once such proof is produced, there will be no grounds for finding that Article 141 EC has been infringed, unless the employee can show that misapplication of the system leads to indirect discrimination. Nevertheless, if the employer fails to prove that use of the criterion of length of service in the pay system is proportionate or if it is impossible to verify that that is the case because the pay system is not sufficiently transparent, the employer will then have to justify the differences in pay in relation to the specific situation of the employee challenging the pay system.

50 — Compare with Article 9(2) of Directive 76/207 which requires Member States to 'periodically assess the occupational activities referred to in Article 2(2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned'.

65. In Mrs Cadman's case, it will be for the national court to assess whether the HSE has provided sufficient justification for the use of length of service as a determinant in the remuneration of heads of Field Management Units. In this context, the HSE will have to explain how length of service is balanced with other criteria such as merit in determining employees' pay and why the length-of-service criterion is necessary and proportionate to the aim of remunerating experience and/or rewarding loyalty in view of the nature of the work concerned.

66. To answer the Court of Appeal's first question more fully, it should be added that, where the use by an employer of the criterion of length of service as a determinant of pay has a disparate impact as between relevant female and male employees, Article 141 EC, together with Article 2(2) and Article 4 of Directive 97/80, require the employer to demonstrate that the way in which the criterion is used as a pay determinant in respect of the post concerned takes into account the business needs of the undertaking and that the criterion is applied proportionately so as to minimise the disadvantageous impact it has on women. If the employer is unable to provide justification for the structure of the pay system, it will have to provide specific justification for the difference in pay levels as between the employee who has complained and other employees performing the same job.

C — *Need for a temporal limitation of the effects of the judgment*

67. Ireland and the United Kingdom Government have argued for a temporal limitation of the judgment if the Court were to hold that the employer must justify recourse to a length-of-service criterion in a pay system whenever an employee brings a claim alleging breach of the principle of equal pay on the ground that the pay system works to the disadvantage of women.

68. In support of that request, the United Kingdom submits that the Court's judgment would have retroactive effects which would cast doubt on legal relations between employers and employees established in good faith and in accordance with *Danfoss*. Thus, in its view, the principle of legal certainty requires that the reasoning of *Danfoss* should be upheld up to the date of the Court's judgment in this case. The United Kingdom argues that a large number of contractual relationships would be called into question if employers had to justify their past pay systems since, in the United Kingdom, an employee can bring a claim for equal pay extending back for up to six years. In addition, evidence of relevant objective facts will be hard to obtain after many years.

69. According to settled case-law, the Court will, only in exceptional circumstances, limit

the temporal effect of a preliminary ruling if two cumulative conditions are met. [51] First, the Court may apply the principle of legal certainty to restrict the possibility for any person concerned to rely upon a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Secondly, the Court requires evidence that there is a risk of serious economic repercussions owing, in particular, to the large number of legal relationships entered into in good faith.

70. In this case, it seems to me that the United Kingdom Government's argument that the suggested interpretation of Article 141 EC could call into question legal relationships entered into in good faith is convincing. Indeed — and this explains why the national court chose to stay the proceedings and to make a reference to the Court — there was some uncertainty as to how to interpret Article 141 EC in relation to the use of length of service in a pay system. First, the Court has never expressly reversed *Danfoss*. Second, subsequent cases dealing with the allocation of the burden of proof between the employer and the employee in relation to the potential discriminatory impact of pay or promotion systems did not rely on Directive 97/80. In view of those factors, the Member States and the parties concerned were reasonably entitled to conclude that indirect discrimination under Article 141 EC might not arise from recourse to length of service in a pay system. [52]

71. As regards the second condition, although I am convinced that my proposed interpretation of Article 141 EC, read together with Article 2(2) and Article 4 of Directive 97/80, will continue to allow the use of length of service as a criterion in pay systems, it cannot be ruled out that it may affect such pay systems as regards the way length of service is to be taken into account and balanced with other relevant criteria. As a consequence, if the Court accepts my proposed interpretation in the present case, a large number of employees could be concerned, [53] who could bring claims which undertakings could not have foreseen. [54]

72. In view of the good faith of all parties concerned as regards the obligation of the employer to justify a pay system based on length of service and producing a disparate impact on women, it seems appropriate to take into account considerations of legal certainty affecting all interested parties and to make it impossible in principle to reopen the question as regards the past. [55] Therefore, I would suggest that the Court hold that

51 — See, to that effect, Cases 24/86 *Blaizot* [1988] ECR 379, paragraph 28; C-262/88 *Barber* [1990] ECR I-1889, paragraph 41; C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 74.

52 — See, to that effect, *Barber*, paragraph 43.

53 — At the hearing, the United Kingdom Government suggested that 36% of all employees are remunerated according to a pay system based on length of service.

54 — See, to that effect, *Defrenne*, paragraph 70.

55 — See, to that effect, *Defrenne*, paragraph 74; *Barber*, paragraph 44.

the interpretation proposed of Article 141 EC, read together with Article 2(2) and Article 4 of Directive 97/80, cannot be relied on in order to support claims concerning indirect discrimination arising prior to the date of judgment in this case as a result of a pay system based on seniority, except as regards those workers who have before that date brought legal proceedings or made an equivalent claim.

IV — Conclusion

73. In light of the foregoing considerations, I suggest that the Court give the following answers to the questions referred to it:

(1) Where the use by an employer of the criterion of length of service as a determinant of pay has a disparate impact as between relevant female and male employees, Article 141 EC, together with Article 2(2) and Article 4 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, require the employer to demonstrate that the way in which the criterion is used as a pay determinant in respect of the post concerned takes into account the business needs of the undertaking and that the criterion is applied proportionately so as to minimise the disadvantageous impact it has on women. If the employer is unable to provide justification for the structure of the pay system, it will have to provide specific justification for the difference in pay levels as between the employee who has complained and other employees performing the same job.

(2) In view of the answer to the first question, it is not necessary to answer the second question.

(3) No distinction should be made between the use of the criterion of length of service in the case of part-time workers and the use of that criterion in the case of full-time workers.

(4) This interpretation of Article 141 EC, read together with Article 2(2) and Article 4 of Directive 97/80, cannot be relied on in order to support claims concerning indirect discrimination arising prior to the date of judgment in this case as a result of a pay system based on seniority, except as regards those workers who have before that date brought legal proceedings or made an equivalent claim.