OPINION OF ADVOCATE GENERAL LÉGER

delivered on 3 December 1998 *

1. The question referred by the Arbeitsgericht München (Labour Court, Munich), once again concerns the institution of 'minor' employment, found in the Federal Republic of Germany, and the problem of the compatibility of the treatment accorded, under the relevant national provisions to this type of employment — exercised for a small number of hours a week, for pay that does not exceed a certain threshold — with the Community provisions on equal treatment for men and women.

2. The cases which gave rise to the judgments of 14 December 1995 in *Nolte* [1] and *Megner and Scheffel* [2] led the Court to consider the exclusion of minor employment from social insurance schemes in relation to the principle of equal treatment for men and women in matters of social security; the present reference for a preliminary ruling requires it to rule on the same principle, this time in relation to pay and working conditions.

* Original language: French.

1 — Case C-317/93 [1995] ECR I-4625.

2 — Case C-444/93 [1995] ECR I-4741.

Facts and procedure

3. Before the birth of her child in spring 1995, Mrs Krüger, the plaintiff in the main proceedings, was employed full-time for nearly five years as a nurse at the Kreiskrankenhaus (district hospital) Ebersberg, the defendant in the main proceedings. As a result of this employment relationship she was subject to the Bundesangestelltentarifvertrag of 1961 (Collective agreement for public sector employees, hereinafter 'the BAT').

4. In accordance with the Bundeserziehungsgeldgesetz (Federal laws on child-care allowance, hereinafter 'the BErzGG'), Mrs Krüger obtained child-car leave for a period of almost three years and a child-care allowance, reserved — in accordance with Paragraph 1 of the BErzGG — for persons not exercising a full-time paid activity within the meaning of the said law (i.e. not employed for more than 19 hours a week).

5. However, shortly after giving birth, the plaintiff returned to work at the hospital on the 20 September 1995 in minor employ-

ment. Such employment is exempt from the obligation to pay social security contributions and is characterised under Paragraph 8 of the Fourth Book of the Sozialgesetzbuch (Code of Social Law, hereinafter 'the SGB IV') as involving a normal working week of less than 15 working hours and normal pay not exceeding a fraction of the monthly baseline. [3]

6. After working for several months in minor employment, the plaintiff in the main proceedings brought an action before the Arbeitsgericht München on 14 June 1996, to obtain payment of the special annual allowance. This is a bonus, paid at Christmas and equivalent to one month's salary, payable — pursuant to the applicable collective agreement the Tarifvertrag über eine Zuwendung für Angestellten of 12 October 1973 (hereinafter referred to as 'the ZTV') — to persons whose employment relationship falls within the scope of the BAT.

7. The defendant in the main proceedings refused to grant the disputed bonus on the ground that, under Paragraph 3n of the BAT, persons in minor employment within the meaning of Paragraph 8 of the SGB IV, are excluded from the scope of the said collective agreement. The defendant therefore concluded that, as she was in minor employment, the plaintiff was outside the scope of the BAT and was consequently not entitled to the annual bonus.

8. The Arbeitsgericht München regards 'Paragraph 3n of the BAT as indirect discrimination against women' since the great majority of persons receiving benefits under the BErzGG — more than 90% according to the order for reference — are women. [4] Despite already having reached this conclusion, the referring court feels the need of further clarification and has therefore asked the Court for a ruling on the following question:

'Is a rule of national law — in this case Paragraph 3n of the BAT in conjunction with the Zuwendungs-TV of 12 October 1993 [5] — compatible with 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, and with Article 119 of the EC Treaty, if it provides that employees who exercise an activity which is not subject to compulsory social insurance during child-care leave, by contrast with employees liable to compulsory social insurance, do not receive an annual special allowance under the relevant collective agreement? Is that rule compatible with the above provisions in particular if employees who are on child-care leave but are not working nevertheless receive the special allowance under the collective agreement in the first year?'

3 — During the course of the hearing, it was pointed out that this fraction represents one seventh of the monthly basic wage, i.e. DEM 620.

4 — Paragraph 1 of the order for reference.

5 — This is, in fact, a typing error, the correct date being 1973.

Relevant provisions of EC law

9. In the absence of any additional information in the order for reference, it is apparent from the wording of the question, that the Arbeitsgericht München feels that women in the position of the plaintiff in the main proceedings could object to two kinds of discrimination prohibited under Community law: the first relating to working conditions, the second to pay.

10. Let us recall that the first kind of discrimination is prohibited under 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, [6] the purpose of which, as stated in Article 1 paragraph 1, is:

'1.... to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions...'.

11. For its part, Article 119 of the Treaty requires the Member States to ensure and maintain the application of the principle that men and women should receive equal pay for equal work, a principle which — as the Court has consistently held — 'forms part of the foundations of the Community'. [7]

Analysis

12. In the light of the information provided by the referring court, I am not of the opinion that a woman in the position of the plaintiff in the main proceedings can claim that the national provisions are contrary to the principle of equal treatment for men and women, as regards either working conditions or pay.

13. Before setting out the considerations that have led me to this conclusion, I should like to first clarify several points.

14. The German court refers, at least implicitly in the wording of its question, and explicitly in the considerations of its order for reference, [8] to two kinds of national provisions, which, when applied

6 — OJ 1976 L 39, p. 40.

7 — Settled case-law since Case C-43/75 *Defrenne* v *Sabena (Defrenne II)* [1976] ECR 455, paragraph 12. See for example Case C-243/95 *Hill and Stapleton* v *Revenue Commissioners and Department of Finance* [1998] ECR I-3739, paragraph 18.

8 — See the wording of the relevant passage of the referring order, reproduced in point 8 of the present Opinion.

jointly, may in its view contravene the abovementioned rules of Community law. The provisions in question are Paragraph 3n of the BAT — which, when applied in conjunction with the provisions of the ZTV, effectively excludes persons in minor employment from receiving the Christmas bonus — and the BErzGG, which governs both child-care leave and the child-care allowance to which persons not in full-time employment within the meaning set out in the BErzGG are entitled.

15. As the defendant and the Commission point out,[9] there is clearly a confusion here.

16. Without entering into an assessment of the national provisions, which is a matter for the referring court alone, it is clear that simply applying Paragraph 3n of the BAT in conjunction with the ZTV suffices to exclude persons in minor employment from receiving the contested special annual bonus. The relevant provisions governing child-care leave and the child-care allowance, both of which the plaintiff incidentally received, are absolutely immaterial in this connection. Moreover, according to the information provided, there seems to be no connection between the Christmas bonus and the child-care allowance.

9 — Point 2 of the defendant's observations and point 22 of those of the Commission.

17. In other words, the plaintiff was refused the contested bonus on the ground that she was in minor employment exempt from compulsory social security contributions, and not for reasons connected with child-care leave to which she was entitled.

18. Nevertheless, it may be noted in passing, for the sake of completeness, that the German court's reference to the national provisions governing the child-care allowance and child-care leave could, it is true, be understood as inferring a difference of treatment likely to constitute discrimination.

19. Pursuant to those provisions, the treatment of persons on child-care leave (a majority of whom, according to the information provided, are women) varies according to whether or not they are in minor employment. Thus those who were previously employed full-time but opt not to work during the period of leave, remain entitled — pursuant to the combined provisions of the ZTV and the BAT — to receive the contested bonus during the first year of child-care leave. Conversely, anyone taking up minor employment during the period of leave, ceases — pursuant to Article 3n of the BAT in conjunction with the ZTV — to be entitled to receive the contested bonus.

20. Nevertheless, within this predominantly female group of persons on child-care leave, there does not appear to be any

discrimination on grounds of sex between those in minor employment and the others. At first glance, the situations described seem to involve a difference of treatment between women and not between men and women, the latter being the only difference that falls within the scope of the Community rules. Thus, while one may concede that, as the national court observes, 'access to employment or working conditions are thus made more difficult for women, once they wish to combine work and child-rearing', [10] nevertheless, such 'difficulties' are not prohibited under Community law. This aspect of the case should if necessary be decided by the referring court on the sole basis of its national law.

21. It follows that the referring court's question should be understood as seeking to ascertain whether Article 119 of the Treaty and Directive 76/207 must be interpreted as meaning that a national rule excluding persons in employment — classified as minor employment — which involves a limited number of working hours and low pay, and is not subject to compulsory social insurance, as opposed to those in employment that is subject to compulsory social insurance, from entitlement to a special annual bonus as provided for under the relevant collective agreement, constitutes discrimination on grounds of sex, where such provisions affect considerably more women than men.

10 — Final paragraph of the order for reference.

22. I would therefore suggest that the Court should rule without regard to the distinction made by the referring court between persons who are in minor employment during the period of child-care leave and persons, also on parental leave, who do not work during that time.

23. That being established, in order to provide the referring court with a useful answer, it would be advisable to examine whether the case does in fact fall within the material scope of the abovementioned Community provisions, since the fact that persons in minor employment fall within the personal scope of such provisions is no longer open to discussion since the Court's judgments in *Nolte* and *Megner and Scheffel*, cited above. [11]

24. In this connection, I am inclined to agree with the Commission [12] that the reference to Directive 76/207 is of no relevance.

25. Let us recall, first that the purpose of the Directive, as set out in Article 1, is 'to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions...'. However, it is not immediately

11 — See paragraphs 19 and 21, and paragraphs 18 and 20 respectively.

12 — Point 35 of its observations.

apparent that the contested provisions bear any relation to those factors. [13]

26. It should also be noted that, where a situation suspected of being discriminatory falls within the scope of the provisions relating to pay, it cannot be examined in the light of Directive 76/207 as well since 'that directive, as is clear from its second recital in the preamble, does not apply to pay within the meaning of the abovementioned provisions'. [14]

27. There can, however, be little doubt that the contested Christmas bonus which the plaintiff is claiming constitutes 'pay' within the meaning of Article 119 of the Treaty and of Council Directive 75/117/EEC [15] which 'sets out in detail' the principle as laid down in the Treaty. [16]

28. In the context of those provisions and according to the actual wording of the second paragraph of Article 119 of the Treaty, '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'.

29. This initial definition has gradually been expanded upon by the case-law of the Court, which has been inclined to interpret it in broad terms. Thus the origin of such 'considerations' is irrelevant: they constitute pay regardless of '...whether they are paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis'. [17] And the nature of such consideration is not important for the purpose of the application of Article 119 'provided that it is granted in respect of employment'. [18]

30. The special annual bonus, which is based on the employment relationship and is paid by the employer, pursuant to the collective agreement applicable to workers whose employment relationship falls within the scope of the BAT, thus constitutes pay within the meaning of Article 119 of the Treaty and Directive 75/117.

31. I therefore conclude that the question whether the principle of equal treatment has been applied should in this case be examined only with reference to pay.

13 — In reality it would appear from the order for reference that the mention of Directive 76/207 refers to an examination of the BErzGG, which I have already rejected.

14 — Case C-342/93 *Gillespie and Others* v *Northern Health and Social Services Boards and Others* [1996] ECR I-475, paragraph 24.

15 — Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

16 — See for example the judgments in *Gillespie* and *Hill and Stapleton*, cited above, paragraphs 11 and 19 respectively.

17 — Case C-262/88 *Barber* v *Guardian Royal Exchange* [1990] ECR I-1889, paragraph 20.

18 — *Gillespie*, cited above, paragraph 12.

32. Without further ado it can be stated at this stage of the deliberations that the joint application of the contested provisions — Paragraph 3n of the BAT and the ZTV — does not give rise to unlawful direct discrimination: sex is not the criterion upon which application of the collective agreement — which would confer entitlement to the Christmas bonus — is being denied.

33. Thus it now remains to be seen whether there may nevertheless be indirect discrimination, characterised in accordance with settled case-law by 'a national measure, which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex'. [19]

34. Such discrimination can, as we know, equally well arise from a legislative provision or — as in this case — from a collective agreement. [20]

35. The national court assumes that, in accordance with the requirements of the Court's case-law, the contested provisions concern a significantly higher number of persons from one sex than from the other or, to be precise, 'far more women than men' [21] because 90% of the persons affected by the combined provisions of Paragraph 3n BAT and the ZTV are alleged to be women.

36. It is not for me, or for the Court, to verify this matter of fact, which I shall therefore accept as established. [22]

37. Do these persons in minor employment, who are predominantly of the female sex, suffer disadvantages from being excluded from the personal scope of the collective agreement, which confers entitlement to the Christmas bonus?

38. At first glance there appears to be little doubt that that is the case, going on the information provided. Depending on whether or not they work for a certain number of hours, employees exercising the same activity, and subject to the same rules, do or

19 — Judgment in *Hill and Stapleton*, cited above, paragraph 24. See also, among recent judgments to the same effect those in, *Megner and Scheffel*, cited above, paragraph 24; Case C-1/95 *Gerster* v *Freistaat Bayern* [1997] ECR I-5253, paragraph 30, and Case C-100/95 *Kording* v *Senator für Finanzen* [1997] ECR I-5289, paragraph 20.

20 — See for example Case C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591, paragraph 16, and Case C-184/89 *Nimz* v *Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 15.

21 — *Gerster* and *Kording* cited above, paragraphs 30 and 16 respectively.

22 — It should however be noted, to be precise, that this figure given by the Arbeitsgericht München refers, according to the order for reference, to persons receiving benefits under the BErzGG (see point 8 of the present Opinion). In any case, it is for the national court to verify the accuracy of the figure given in so far as it relates to persons who were denied the annual bonus on the ground that they were in minor employment.

do not receive a special bonus at Christmas, equivalent to one month's wages. If there is no other arrangement, with equivalent results, for those in minor employment — which, according to the information submitted, does not seem to be the case — the relevant national provisions, in so far as they accord this bonus only to certain employees, are disadvantageous for the others.

39. In these circumstances the contested national rule, in so far as it is disadvantageous to a significantly higher proportion of female employees than male workers, produces discriminatory effects on the basis of sex, which are prohibited under Article 119 of the Treaty and Directive 75/117.

40. It would be otherwise only if such apparent discrimination could be objectively justified.

41. In this connection the defendant in the main proceedings invokes the judgment in *Megner and Scheffel*, cited above, in which the Court held that 'national provisions under which employment regularly consisting of fewer than 15 hours a week and regularly attracting remuneration of up to one-seventh of the monthly reference amount is excluded from compulsory insurance under the statutory sickness and old-age insurance schemes... do not constitute discrimination on grounds of sex, even where the relevant provisions affect considerably more women than men, *since the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve a social policy aim unrelated to any discrimination on grounds of sex*'. [23]

42. It will be remembered that, in that case, it was argued that equivalence must be maintained between the contributions paid by employees and employers and the benefits paid in the event of the materialisation of one of the risks covered by the contributory scheme and that the structure of the scheme could not be maintained if the provisions in question had to be abolished. [24] Moreover, the contested provision could also be justified on grounds of employment policy aims. [25] I shall come back to this.

43. Thus, according to the defendant in the main proceeding, the exclusion of persons in minor employment from the national social insurance scheme, which holds to be non-discriminatory, justifies the exclusion, pursuant to Paragraph 3n of the BAT, of these same persons from the contested bonus: in the defendant's view, the fact that persons in minor employment are not required to pay social insurance contributions constitutes a legitimate criterion for excluding them from the scope of the collective agreement.

23 — Paragraph 32, my emphasis.
24 — Ibid., paragraph 26.
25 — Ibid., particularly paragraphs 27, 28 and 30.

44. The defendant in the main proceedings also contends, conversely, that to include persons in minor employment within the scope of the BAT and thus to grant them the same special annual bonus accorded to employees obliged to deduct the amount of contributions to the insurance scheme from their gross salaries, would be tantamount to according them, without objective justification, much higher net hourly pay than that earned by employees who are required to pay contributions.

45. Such a line of reasoning does however seem to me to be somewhat biased.

46. In the first place I fail to see how the absence of an obligation to pay social insurance contributions can justify — or even have any possible connection with — exclusion from a benefit, provided under a collective agreement, that constitutes pay. Two areas are involved — social insurance and pay — which are not necessarily, or even apparently, connected.

47. On the other hand, the judgment in *Megner and Scheffel*, for example, drew attention to the interdependence that can exist, within a contributory scheme, between the contributions paid, on the one hand, and the benefits paid, on the other. In the eyes of certain governments — and the Court has not contradicted them on this point — the viability of such a scheme, which requires strict equivalence to be maintained between contributions and benefits, justifies the exclusion of persons in minor employment from statutory social insurance schemes.[26]

48. Furthermore, I consider the concerns expressed by the defendant in the main proceedings, that persons in minor employment might be paid more, in real terms, than other employees covered by the same collective agreement, to be unfounded.

49. To be sure, if employees in minor employment were to benefit, like other employees, from the end-of-year bonus, they would, in a way, be placed at an advantage since, being exempt from the obligation to contribute to the statutory social insurance scheme, they would effectively be paid more, in real terms, than employees subject to the BAT.

50. It must however be borne in mind that, as the Commission has pointed out,[27] such an advantage in terms of pay does not suffice to eliminate the disadvantages, notably in the area of social insurance,

26 — Ibid., paragraph 26.

27 — Point 55 et seq. of its observations.

inherent in such a form of employment. Exemption from compulsory social insurance does not, in the majority of cases, constitute a particular privilege.[28] This follows, moreover, from the judgments in *Nolte* and *Megner and Scheffel*, cited above, since by proceeding directly to its examination of the objective justifications advanced the Court implicitly but undoubtedly considered that such exemption constituted a disadvantage.

51. Even if such an argument cannot be said to constitute an objective justification, I am none the less of the opinion — unlike the Commission[29] — that the potentially deterrent effect that rendering payment of the annual bonus compulsory could have on recruiting persons in minor employment, should be considered very particularly.

52. In my Opinion in *Nolte* and *Megner and Scheffel*,[30] cited above, I already took the view that, despite its shortcomings, the institution of minor employment had the advantage of integrating part of the population into the working population who would otherwise probably be excluded. Within the framework of a policy which seeks to combat unemployment and work in the black economy, it does not seem illogical to endeavour to make it attractive for employers to employ workers in this category by waiving the obligation to pay social insurance contributions or special bonuses. It will also be recalled that, in the same spirit, the Court held that a policy intended to alleviate the constraints burdening small businesses 'which play an essential role in economic development and the creation of employment in the Community' might be justified by objective reasons unrelated to the sex of employees.[31]

53. This is an argument to which the Court was also particularly sympathetic in its judgments in *Nolte* and *Megner and Scheffel*. Although it is frequently observed that the Court accepted a social policy argument on that occasion,[32] it nonetheless considered an *employment policy* objective to be objectively devoid of any discrimination based on sex, and as such, to be such as to justify a prohibited difference of treatment.

54. This approach is, in my opinion, the one to take in the present case.

55. It does in fact seem to me to be quite likely that, with a view to a recruitment

28 — This is the conclusion I came to in points 44 and 51, and particularly in point 47 of my Opinion in *Nolte* and *Megner and Scheffel*, cited above.

29 — Point 51 of its observations.

30 — See point 74 in particular.

31 — Case C-189/91 *Kirsammer-Hack* v *Sidal* [1993] ECR I-6185, paragraph 33.

32 — Doubtless because the operative part of those judgments, unlike the grounds, refer only to the social policy aim to justify the presumed discrimination and does not mention the employment policy aim, which is, however, discussed in paragraphs 30 and 34 respectively of the judgments in *Megner and Scheffel* and *Nolte*, cited above.

policy or a policy to encourage employment in a more general sense, the social partners who signed the collective agreement should wish to accord special treatment to persons in minor employment. The Court admitted as much in regard to such persons' social security cover in the judgments cited above. There is no reason why the same argument should not apply to pay.

56. I therefore consider that an employment policy objective may constitute an objective justification without reference to any criterion based on sex, for excluding persons in minor employment from the scope of the BAT and, as a result, from receiving the contested annual bonus.

57. Moreover, as agreed during the hearing, to include persons in minor employment in the scope of the provisions of collective agreements confirming entitlement to the Christmas bonus, would radically alter the very concept of this type of employment. In fact, were persons in minor employment to receive, at the end of the year, the equivalent of one month's pay, their pay would exceed the threshold below which they are exempt from the obligation to contribute to the German social insurance scheme. Thus the institution of minor employment — a constituent element of which is precisely its exemption from affiliation to the social insurance scheme — would be called into question. It is for the German Government alone to decide, in the context of its employment policy, whether it is advisable to call that institution into question in this way.

Conclusion

58. In the light of the foregoing considerations, I propose that the Court give the following answer to the question referred by the Arbeitsgericht München:

Article 119 of the EC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women must be interpreted as meaning that the combined provisions of collective agreements excluding persons in employment — classified as minor employment — which is not subject to compulsory social insurance and involves a normal working week of less than 15 hours and normal pay not exceeding a fraction of the monthly

baseline, from entitlement to a special annual bonus to which other workers who are covered by the said collective agreement are entitled, do not constitute discrimination based on sex. This is also the case, even where such provisions affect a considerably larger number of women than men, since both parties to such collective agreements were reasonably entitled to consider that those agreements were necessary in order to achieve an employment policy aim unrelated to any discrimination on grounds of sex.