JUDGMENT OF THE COURT

11 May 1999 *

In Case C-309/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberlandesgericht Wien, Austria, for a preliminary ruling in the proceedings pending before that court between

Angestelltenbetriebsrat der Wiener Gebietskrankenkasse

and

Wiener Gebietskrankenkasse

on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 to 143 EC) and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application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 (OJ 1975 L 45, p. 19),

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J.-P. Puissochet (Rapporteur), G. Hirsch and P. Jann (Presidents of Chambers), J. C. Moitinho de Almeida, C. Gulmann, D. A. O. Edward, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: G. Cosmas,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Angestelltenbetriebsrat der Wiener Gebietskrankenkasse, by Stefan Prochaska, of the Vienna Bar,

— the Wiener Gebietskrankenkasse, by Josef Milchram, of the Vienna Bar,

— the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

— the Commission of the European Communities, by Viktor Kreuschitz, Legal Adviser, and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Angestelltenbetriebsrat der Wiener Gebietskrankenkasse, represented by Stefan Prochaska and Gabriel Lansky, of the Vienna Bar, the Wiener Gebietskrankenkasse, represented by Josef Milchram, and the Commission, represented by Viktor Kreuschitz and Marie Wolfcarius, at the hearing on 10 November 1998,

after hearing the Opinion of the Advocate General at the sitting on 19 January 1999,

gives the following

Judgment

1 By order of 5 May 1997, received at the Court on 4 September 1997, the Oberlandesgericht (Higher Regional Court), Vienna, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) seven questions on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 to 143 EC) and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application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 (OJ 1975 L 45, p. 19; hereinafter 'the Directive').

2 Those questions were raised in proceedings between the Angestelltenbetriebsrat der Wiener Gebietskrankenkasse (Staff Committee, Vienna Area Health Fund, hereinafter 'the Staff Committee') and the Wiener Gebietskrankenkasse (Vienna Area Health Fund, hereinafter 'the Health Fund') concerning the salaries of graduate psychologists employed as psychotherapists.

3 It appears from the order for reference that the salaries of employees of the Austrian social insurance institutions are fixed in accordance with various sets of staff regulations (Dienstordnungen), which are in the form of collective agreements, each applying to a specific category of personnel. Psychologists qualified to practice their profession on a self-employed basis are classified in salary group F, grade I of Dienstordnung A or 'Staff Regulation A', which applies to administrative staff, health staff and dental technicians. Doctors qualified to practice as specialists on a self-employed basis are classified in salary group B, grade III of Dienstordnung B or 'Staff Regulation B', which applies to doctors and dentists. By way of comparison, in 1995 the basic net remuneration of an employee in salary group F, grade I of Staff Regulation A was between ATS 24 796 and ATS 51 996, whereas that of a doctor in salary group B, grade III of Staff Regulation B was between ATS 42 197 and ATS 73 457.

4 It also appears from the order for reference that the institutions concerned may employ three different classes of psychotherapists: doctors who have completed their general practitioners' or specialists' training, graduate psychologists qualified to practice in the health sector on a self-employed basis and, lastly, those who are neither doctors nor psychologists but who have a general education and have undergone specialised training in psychotherapy.

5 The Staff Committee applied to the Arbeits- und Sozialgericht (Labour and Social Security Court) for a declaration that the employment relationship between the Health Fund and psychotherapists with a degree (*Doktorat*) in psychology is governed by Staff Regulation B and that the psychotherapists concerned should be classified in the same category as doctors employed as psychotherapists (that is to say in salary group B, grade III). In support of this application, the Staff Committee argued in particular, first, that such a classification by analogy was justified by the

training and duties of psychologists engaged in psychotherapy, who do, after all, work in the therapy sector covered by Staff Regulation B. Secondly, most of such practitioners receiving lower salaries were women.

6 The Health Fund contested the merits of the application which, it argued, failed to take into account the differences in the training and qualifications of graduate psychologists and specialist doctors and which would amount to treating graduate psychologists as if they were specialist doctors. The fact that there was a majority of women amongst the psychologists employed in psychotherapy was a pure coincidence. More women than men were also employed as doctors in the Health Fund's outpatient clinics.

7 The Arbeits- und Sozialgericht dismissed the Staff Committee's claim on the ground that the Gleichbehandlungsgesetz 1979 (Law on Equal Treatment) did not apply to all forms of differential treatment within professional groups, but simply provided for the equal treatment of men and women at work. In particular, the court observed that the differential rates of pay for doctors and psychologists working as psychotherapists had been agreed upon by the parties to the collective agreements and are justified by the fact that the obligations incumbent on the two groups of professionals are not the same: only doctors employed as specialists are required also to perform other medical tasks in an emergency.

8 The Staff Committee appealed to the Oberlandesgericht, Vienna, which recorded the agreement of the parties on the following facts. The Health Fund employs 248 doctors in all, 135 of whom are women. In the clinic referred to by the Staff Committee, six psychologists, five of whom are women, are employed as psychotherapists, together with six doctors, one of whom is a woman. Out of a total of 34 psychotherapists employed by social insurance institutions, 24 are graduate psychologists and 10 are doctors. Eighteen of the psychology graduates and two of the doctors are women. It was also noted that in Austria 1 125 men and 2 338 women were formally registered as psychologists trained in psychotherapy.

9 In the light of this information, the Oberlandesgericht took the view that an interpretation of certain provisions of Community law was necessary to enable it to give judgment, and accordingly stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the terms "the same work" and "the same job" apply, for the purposes of Article 119 of the EC Treaty or Directive 75/117/EEC, where the same tasks are performed over a considerable length of time (several salary periods) by persons the basis of whose qualification to exercise their profession is different?

(2) Is it material, in deciding whether there is discrimination for the purposes of Article 119 of the EC Treaty or Directive 75/117/EEC, that:

(a) pay is fixed solely by the parties to an employment contract who are at liberty to incorporate therein the terms of collective agreements, or that

(b) minimum rates of pay are fixed for all employees in a given sector by general rules (collective agreements), or that

(c) pay is governed definitively by mandatory collective agreements?

(3) Where a collective agreement specifies, in definitive rules relating to remuneration, different levels of pay for the same work or work of equal value depending on professional qualifications, must reference be made, when selecting groups for comparison in determining whether a measure gives rise to discrimination, to

(a) the persons actually employed in the undertaking, or

(b) the employees working in the field covered by the collective agreement, or

(c) all those who are qualified to pursue the occupation in question?

(4) In such a case (Questions 2 and 3), must account be taken of the proportion of men to women in the disadvantaged group only, or in both groups?

(5) Where the tasks under consideration which are the same in both groups are only some of the tasks covered by the professional qualifications in question, must account be taken of

(a) all persons employed in the relevant context (undertakings, collective agreements — see Question 3) who have the professional qualifications in question (all specialist doctors and all psychologists), or

(b) all persons actually entitled to perform the duties in question (e. g. doctors with a specialist qualification in psychiatry), or

(c) only those who actually perform such duties?

(6) Where staff perform the same duties in an undertaking, may different training be regarded as a factor justifying lower pay? Is a broader professional

qualification to be regarded as an objective factor justifying different pay, regardless of the duties actually performed in the undertaking?

Is the decisive factor therefore

(a) whether the better paid group of employees may also be called upon to perform other tasks within the undertaking, or

(b) must it be shown that they were in fact called upon to perform other tasks?

In this connection, must account be taken of the fact that the applicable rules of the collective agreements include protection against unfair dismissal?

(7) Does it follow from Article 222 of the EC Treaty, or the application by analogy of Article 174 thereof, that any right to pay under another collective agreement (between the same parties) which may be inferred from Article 119 of the EC Treaty or Directive 75/117/EEC only arises when the Court of Justice rules that such a right exists?'

First question

10 The first paragraph of Article 119 of the Treaty provides that 'each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.' Pursuant to the third paragraph of Article 119, '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.'

11 The first paragraph of Article 1 of the Directive provides that 'the principle of equal pay for men and women outlined in Article 119 of the Treaty ... 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'. The second paragraph of Article 1 states that 'in particular, where a job classification system is used for determining pay, it 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'.

12 The Staff Committee suggests that the first question should be answered in the affirmative. It argues that the principle laid down by the Court in Case C-127/92 *Enderby* [1993] ECR I-5535, according to which categories of employees with different professions and qualifications may perform work of equal value, must apply *a fortiori* where identical functions are performed by people with different professional qualifications.

13 The Health Fund and the Commission contend that, where the same activity is performed by persons with different professional qualifications, involving different skills and obligations, that does not constitute the same work for the purposes of the foregoing provisions. They attach particular importance to professional training and the qualifications obtained. The Commission also observes that the Court did not rule in *Enderby* that the professional duties in question should be regarded as constituting the same work.

14 The German Government points out that, according to the case-law of the Court, different pay for the same work may be justified by different professional training

or qualifications. However, it submits that it is for the national court to evaluate the facts of the case before it.

15 It should be noted at the outset that the Court has consistently held that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, Case C-342/93 *Gillespie and Others* v *Northern Health and Social Services Board and Others* [1996] ECR I-475, paragraph 16).

16 As for the argument relied on by the Staff Committee, suffice it to note that in *Enderby* the Court did not rule on whether the functions performed by members of the different professions in question were of equal value. It merely answered the questions referred to it on the basis of the assumption that those functions were of equal value, without concerning itself with the validity of that assumption (*Enderby*, paragraphs 11 and 12).

17 In order to determine whether the work being done by different persons is the same, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation (see, to that effect, Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraphs 32 and 33).

18 Thus, where seemingly identical tasks are performed by different groups of persons who do not have the same training or professional qualifications for the practice of their profession, it is necessary to ascertain whether, taking into account the nature of the tasks that may be assigned to each group respectively, the training requirements for performance of those tasks and the working conditions under which they are performed, the different groups in fact do the same work within the meaning of Article 119 of the Treaty.

19 As Advocate General Cosmas stated at point 32(c) of his Opinion, professional training is not merely one of the factors that may be an objective justification for giving different pay for doing the same work (see, to that effect, Case 109/88 *Handels-og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening, 'Danfoss'* [1989] ECR 3199, paragraph 23); it is also one of the possible criteria for determining whether or not the same work is being performed.

20 It appears from the information contained in the order for reference that, although psychologists and doctors employed as psychotherapists by the Health Fund perform seemingly identical activities, in treating their patients they draw upon knowledge and skills acquired in very different disciplines, the expertise of psychologists being grounded in the study of psychology, that of doctors in the study of medicine. Furthermore, the national court emphasises that, even though doctors and psychologists both in fact perform work of psychotherapy, the former are qualified also to perform other tasks in a field which is not open to the latter, who may only perform psychotherapy.

21 In those circumstances, two groups of persons who have received different professional training and who, because of the different scope of the qualifications resulting from that training, on the basis of which they were recruited, are called on to perform different tasks or duties, cannot be regarded as being in a comparable situation.

22 That finding is not contradicted by the fact that a single tariff is charged for psychotherapeutic treatment, an arrangement which may be the result of social policy.

23 The answer to the first question must therefore be that the term 'the same work' does not apply, for the purposes of Article 119 of the EC Treaty or the Directive, where the same activities are performed over a considerable length of time by persons the basis of whose qualification to exercise their profession is different.

The remaining questions

24 Given the answer to the first question, there is no need to answer the other questions referred by the national court.

Costs

25 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberlandesgericht Wien by order of 5 May 1997, hereby rules:

The term 'the same work' does not apply, for the purposes of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) or 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, where the same activities are performed over a considerable length of time by persons the basis of whose qualification to exercise their profession is different.

Rodríguez Iglesias	Puissochet	Hirsch
Jann	Moitinho de Almeida	Gulmann
Edward	Ragnemalm	Wathelet

Delivered in open court in Luxembourg on 11 May 1999.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President