JUDGMENT OF THE COURT (Grand Chamber)
12 October 2004 *

In Case C-313/02,

REFERENCE for a preliminary ruling under Article 234 EC

from the Oberster Gerichtshof (Austria), made by decision of 8 August 2002, received at the Court on 5 September 2002, in the proceedings

Nicole Wippel

v

Peek & Cloppenburg GmbH & Co. KG,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Silva de Lapuerta and K. Lenaerts, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, F. Macken (Rapporteur), J.N. Cunha Rodrigues and K. Schiemann, Judges,

Advocate General: J. Kokott,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 March 2004,

after considering the observations submitted on behalf of:

— Nicole Wippel, by A. Obereder, Rechtsanwalt,

— Peek & Cloppenburg GmbH & Co. KG, by T. Zottl, Rechtsanawalt, and T. Eilmansberger, Wissenschaftlicher Berater,

— the Austrian Government, by E. Riedl and G. Hesse, acting as Agents,

— the United Kingdom Government, by J. Collins, acting as Agent, assisted by K. Smith, Barrister,

— the Commission of the European Communities, by N. Yerell, S. Fries and F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 141 EC, Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), Article 5 of 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 (OJ 1976 L 39, p. 40) and Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

2 That reference was submitted in the context of a dispute between Ms Wippel, who was employed part-time on the basis of a framework contract of employment based on the principle of 'work on demand', and her employer, Peek & Cloppenburg GmbH & Co. KG (hereinafter 'P&C'), concerning the absence in her contract of employment of an agreement as to hours of work and organisation of working time.

Legal framework

Community legislation

Directive 76/207

3 The purpose of Directive 76/207, according to Article 1(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 and, on the conditions referred to in paragraph 2, social security.

4 Article 2(1) of Directive 76/207 provides:

'For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.'

5 Article 5 provides:

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.'

Directive 93/104

6 Under Article 1 thereof, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) lays down minimum safety and health requirements for the organisation of working time and applies to all sectors of activity, both public and private, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

7 Section II lays down the measures to be taken by the Member States in order to ensure that every worker is entitled, inter alia, to minimum daily rest periods and to weekly rest and also regulates the maximum duration of the working week.

8 Under Article 3, entitled 'Daily rest':

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

9 As regards the maximum duration of the working week, Article 6 provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

...

2. the average working time for each 7-day period, including overtime, does not exceed 48 hours.'

Directive 97/81

10 Under Article 1 thereof, the purpose of Directive 97/81 is to implement the Framework Agreement on part-time work concluded on 6 June 1997 between the general cross-industry organisations (UNICE, CEEP and the ETUC) annexed thereto.

11 Clause 2 of the abovementioned framework agreement provides:

'1. This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.

2. Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish if the objective reasons for making them remain valid.'

12 Clause 3 thereof, entitled 'Definitions', provides:

'For the purpose of this Agreement:

1. The term "part-time worker" refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

2. The term "comparable full-time worker" means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.

Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.'

13 Under Clause 4(1) thereof:

'In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.'

National legislation

14 Under Paragraph 2(1) of the the Gleichbehandlungsgesetz (Law on equality, hereinafter 'the GlBG') all direct or indirect discrimination on the ground of sex is prohibited, including inter alia discrimination in the formation of an employment relationship (point 1), in the determination of pay (point 2) and in other conditions of employment (point 6). In the event of discrimination in connection with the determination of pay the worker is entitled to claim payment of the difference from the employer (Paragraph 2a(2) of the GlBG).

15 In regard to the hours of work and organisation of working time, Paragraph 3 of the Arbeitszeitgesetz (Law on working time, hereinafter 'the AZG') provides that the normal working time is to be 40 hours per week and eight hours per day.

16 As regards full-time workers, in particular, Paragraph 19c of the AZG provides as follows:

'(1) Normal working time and any change thereto are subject to agreement unless already determined by rules laid down in a collective agreement.

(2) Notwithstanding paragraph 1, normal working time may be changed by the employer if

1. such change is objectively justified on grounds relating to the nature of the work,

2. the worker is given at least two weeks' prior notice of normal working time for the week concerned,

3. the worker's justifiable interests do not preclude such an arrangement, and

4. there is no agreement to the contrary.

(3) Paragraph 19c(2)(2) may be derogated from if that proves essential, in the event of unforeseen circumstances, in order to prevent a disproportionate economic disadvantage and other measures cannot reasonably be adopted. By way of rules laid down in collective agreements provisions derogating from Paragraph 19c(2)(2) may be enacted in order to meet employment-specific requirements.'

17 In regard to part-time workers, Paragraph 19d of the AZG provides:

'(1) Part-time work is defined as a situation in which the agreed weekly working time is, on average, less than either the statutory normal working time or any shorter period of normal working time laid down by rules of a collective agreement.

(2) Duration and hours of working time, as well as changes thereto, shall be subject to agreement unless fixed by rules laid down in a collective agreement. Paragraph 19c(2) and (3) shall apply.

(3) Part-time workers may be required to work for more than the agreed working time (additional work) only if:

1. so provided by law, by rules resulting from collective bargaining or by the contract of employment,

2. there is an increased need for labour or the additional work is necessary for completion of preparatory or final tasks (Paragraph 8), and

3. the worker's justifiable interests do not preclude such additional work.

...

(6) Part-time workers may not, on the ground of part-time working, be discriminated against as compared to full-time workers unless differential treatment is justified on objective grounds. ... In the event of a dispute it is for the employer to demonstrate that less favourable treatment is accorded otherwise than on the ground of part-time working ... .'

18 It is further apparent from the order for reference that the collective agreement governing commercial employees in Austria provides for normal working time of 38.5 hours per week.

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 On 28 September 1998, a framework contract of employment based on the principle of 'work on demand' was entered into between Ms Wippel and P&C. Under that contract, working hours and organisation of working time were determined on a case-by-case basis by agreement between the parties. P&C sought Ms Wippel's services according to workload. She could refuse the offer of work without having to justify such refusal. The annex to the contract of employment provided that Ms Wippel would not be guaranteed a fixed income since both parties expressly refrained from laying down a specified amount of work. The documents before the Court indicate in that respect that P&C merely offered the claimant the prospect of being able to work around three days per week and two Saturdays per month. Her pay was EUR 6.54 per hour plus any sales commission.

20 According to the order for reference, during the course of her period of employment, from October 1998 to June 2000, Ms Wippel worked irregularly, the amount of her remuneration varying accordingly. The maximum number of hours worked by her in one month was 123.32 hours in October 1999. The file shows that Ms Wippel stated several times that she would not be able or willing to work on certain days.

21 In June 2000, Ms Wippel brought proceedings before the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna), claiming that P&C should pay to her the amount of EUR 11 929.23, together with costs and ancillary amounts. She maintains that P&C is liable to her for the difference between the amount due in respect of the maximum amount of work that could have been demanded of her and the actual number of hours which she worked. Ms Wippel asserts that the maximum monthly working time should have constituted the basis for calculating her remuneration for each of the months during which she worked for P&C.

22 She maintained that the only part played by workers was to reply 'yes' or 'no' to work offered to them. There was therefore no question of a 'consensus' and the contract of employment with P&C was *contra bonos mores*. If a worker employed under this scheme were not used for some time, the employer, P&C, would have virtually no liability for holiday pay, sick pay and termination payments. Ms Wippel also claimed that the absence in her contract of employment of an agreement as to working hours and the organisation of working time constituted discrimination on the ground of sex.

23 The Arbeits- und Sozialgericht Wien dismissed the claim by reference to Paragraph 19d(2) of the AZG, pursuant to which working hours and organisation of working time are to be agreed between employer and employee, and ruled that in the present case, at any rate, each work placement had been determined by agreement between the parties.

24 The Oberlandesgericht Wien (Vienna Higher Regional Court) (Austria), set aside the judgment at first instance, and remitted the case to the first-instance court for an examination of the actual course of the employment relationship at issue. It also gave leave to appeal to the Oberster Gerichtshof (Supreme Court), before which the main dispute was subsequently brought.

25 The referring court considered, first, that Austrian law recognises as invalid and therefore null and void any clause, such as that in the main proceedings, which results in the waiver by the part-time worker during the currency of employment with the employer of the right under Paragraph 19d(2) of the AZG to have the duration of working hours determined by contract.

26 Secondly, that court took the view that, as regards full-time workers, the AZG provides not only, at Paragraph 19c, that the hours corresponding to normal working time must be agreed between employer and employee, unless they have been set by rules contained in a collective agreement, but also lays down, in Paragraph 3, basic normal working time of 40 hours per week and 8 hours per day. Conversely, as regards part-time workers, although Paragraph 19d(2) of the AZG also provides that the hours of work and organisation of working time must be agreed unless they are set by rules contained in a collective agreement, there is no other provision governing hours of work and organisation of part-time working time. Moreover, the referring court notes that, according to available statistics, over 90% of part-time workers are women.

27 In that connection, the referring court noted that the main dispute raises an issue of indirect discrimination, owing to the fact that the absence in part-time contracts of employment based on the principle of work on demand of an agreement on working hours and the organisation of working time operates to the disadvantage of a higher percentage of women than men. It therefore considers that replies to certain questions are necessary in order to determine both the interpretation of the clause of the contract of employment in conformity with Community law and appropriate reparation for Ms Wippel.

28 Under those circumstances, the Oberster Gerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. (a) Must Article 141 EC, Article 1 of Council Directive 75/117 and Clause 2 of the Framework Agreement on part-time work concluded by UNICE, CEEP

and the ETUC ... and Point 9 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 be construed as meaning (in regard to the concept of "worker") that full protection is also afforded to persons such as the claimant in the present case who, under a comprehensive framework contract of employment, agree terms on pay, termination of employment and the like but also include a provision for hours of work and working time to depend on workload and to be agreed by the parties on a case-by-case basis?

(b) Does a person come within the concept of "worker" for the purposes of Question 1(a) where there is a prospect, without any binding commitment, of work amounting to around three days per week and two Saturdays each month?

(c) Does a person come within the concept of "worker" for the purposes of Question 1(a) where she actually works around three days a week and two Saturdays in each month?

(d) Is the Community Charter of the Fundamental Social Rights of Workers ... legally binding, at least in so far as other provisions of Community law have to be interpreted in light of it?

2. Are Article 141 EC, Article 1 of Directive 75/117, Article 5 of Directive 76/207 ... and Clause 4 of the Framework Agreement on part-time work to

be construed as meaning that there is no objectively justified unequal treatment

if, in the case of full-time workers (of whom approximately 60% are men and 40% are women), provision is made by statute or collective agreement not only concerning the extent of working time but also (in part) concerning hours of work, and a full-time worker is entitled to have those provisions observed, even in the absence of a contractual agreement,

whereas no such provision exists in respect of part-time workers, who are preponderantly women (around 90% women to 10% men), even in the event that in that connection a contractual agreement, required by law, is not made by the contracting parties?

3. Must Article 141 EC, Article 1 of Directive 75/117, Article 5 of Directive 76/207 and Clause 4 of the Framework Agreement on part-time work be construed as meaning that there is no objectively justified unequal treatment if, in the case of part-time workers, of whom the vast majority may be assumed to be women (around 90% to 10% men), an employer expressly rules out an agreement on hours of work and the extent of working time, whereas in the case of full-time workers, who it may be assumed are not to that extent predominantly women, both the extent and, in part, the allocation of working time are already provided for by statute or collective agreement?

4. Must Article 141 EC, Article 1 of Directive 75/117, Article 5 of Directive 76/207 and Clause 4, together with Clause 1(b) (promotion of part-time work), of the Framework Agreement on part-time work be construed as meaning that, in

order to compensate for unequal treatment which is not objectively justified, it is necessary and permissible

(a) with regard to the extent of working time, to presume a specific extent and, if so, to take as the basis

— normal working time, or

— the maximum length of weekly working time actually worked, unless the employer can prove that this was attributable to an unusually high demand for work at that particular time, or

— the demand for labour ascertainable at the date when the contract of employment was entered into, or

— average weekly working time, and

(b) as regards hours of work, to offset the additional burden on the worker occasioned by flexibility and the benefit afforded to the employer, to award the worker

— a "reasonable" supplement to the hourly wage, to be determined on a case-by case basis, or

— a minimum supplement equal to that paid to full-time workers who work more than normal working hours (eight hours a day or 40 hours a week), or

— irrespective of the period actually worked, compensation for time not remunerated as working time during which, under the contract, it would be possible to schedule working time (potential working time), where the length of prior notice of work is less than

— 14 days or

— a reasonable period?'

The questions referred

Preliminary observations

29 In order for a useful reply to be given to the referring court, it must first be determined whether a contract of employment, such as that in the present case, under which hours of work and the organisation of working time are dependent upon quantitative requirements in terms of work to be performed and are determined only on a case-by-case basis by common agreement of the parties comes within Directive 76/207, which establishes the principle of equal treatment as between men and women in regard, particularly, to working conditions, or whether it comes within Article 141 EC and Directive 75/117, on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

30 A contract of employment such as that at issue in the main proceedings lays down neither weekly working time nor the organisation of working time, which are dependent on quantitative requirements in terms of work to be performed,

determined on a case-by-case basis by agreement between the parties. That being the case, the contract at issue affects the pursuit of occupational activity by the workers concerned by scheduling their working time according to need.

31 Accordingly, it must be held that such a contract lays down rules concerning working conditions within the meaning of, in particular, Article 5(1) of Directive 76/207.

32 Moreover, those rules on working conditions also come within the scope of the concept of employment conditions for the purposes of Clause 4(1) of the Framework Agreement annexed to Directive 97/81.

33 The fact that that type of contract has financial consequences for the worker concerned is not, however, sufficient to bring such conditions within the scope of Article 141 EC or of Directive 75/117, those provisions being based on the close connection which exists between the nature of the work done and the amount of the worker's pay (see, to that effect, Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 51).

34 It follows from those considerations that for the purposes of the main proceedings it is not necessary to interpret either Article 141 EC or Directive 75/117.

First question

35 In the first question the referring court is asking essentially whether a worker with a contract of employment, such as that in the main proceedings, under which hours of

work and the organisation of working time are dependent upon quantitative requirements in terms of available work and are determined only on a case-by-case basis by agreement between the parties, comes within Directive 76/207 and the Framework Agreement annexed to Directive 97/81.

36 As regards Directive 76/207, such a contract of employment comes within the scope of that directive, as the Court has already held at paragraph 31 hereof. Accordingly, a worker with such a contract also comes within that directive.

37 Under Clause 2(1) of the Framework Agreement annexed to Directive 97/81, that agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State. Under Clause 3(1), the term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

38 Under Clause 2(2) thereof, 'Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis'.

39 As the United Kingdom Government rightly pointed out, it is for the referring court to make such determinations as may be necessary in order to verify whether that is the situation in the case before it.

40 In the light of the foregoing considerations the reply to the first question must be that a worker with a contract of employment, such as that in the main proceedings, under which hours of work and the organisation of working time are dependent upon the quantity of available work and are determined only on a case-by-case basis by agreement between the parties, comes within the scope of Directive 76/207.

Such workers also come within the scope of the Framework Agreement annexed to Directive 97/81 where:

— they have a contract or employment relationship as defined by the law, collective agreement or practices in force in the Member State;

— they are employees whose normal working hours, calculated on a weekly basis or on average over an employment period which may be up to a year, are less than those of a comparable full-time worker within the meaning of Clause 3(2) of that Framework Agreement, and

— in regard to part-time workers working on a casual basis, the Member State has not, pursuant to Clause 2(2) of the Framework Agreement, excluded them, wholly or partly, from the benefit of the terms of that agreement.

Second question

41 In the second question the referring court is asking essentially whether, in circumstances where the national provisions themselves determine for part-time workers neither the hours of work nor the manner in which working time is to be organised, Clause 4 of the Framework Agreement annexed to Directive 97/81 and Articles 2(1) and 5(1) of Directive 76/207 must be interpreted as precluding another provision, such as Paragraph 3 of the AZG, which lays down a basic normal working time of 40 hours per week and 8 hours per day.

42 First, in regard to Clause 4 of the Framework Agreement annexed to Directive 97/81, under that provision, part-time workers are not to be treated less favourably as regards employment conditions than comparable full-time workers on the sole ground that they work part time unless different treatment is warranted on objective grounds.

43 Secondly, in regard to Articles 2(1) and 5(1) of Directive 76/207, it is settled case-law that national provisions discriminate indirectly against women where, although worded in neutral terms, they work to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex (see, in particular, Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29; Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 23; and Case C-25/02 *Rinke* [2003] ECR I-8349, paragraph 33).

44 Accordingly, in order to provide a useful reply to the referring court, it must be ascertained whether application of Paragraph 3 of the AZG results, in regard to Clause 4 of the Framework Agreement annexed to Directive 97/81, in less favourable treatment of part-time workers in relation to comparable full-time workers and, in regard to Articles 2(1) and 5(1) of Directive 76/207, in a difference of treatment as between those two categories of workers.

45 In that regard the AZG, which transposed into national law the provisions of Directive 93/104, provides in Paragraph 3 thereof that the normal, that is to say the maximum, length of working time is 40 hours per week and 8 hours per day. Moreover, Paragraph 19d of the AZG defines part-time work as a situation in which the agreed weekly working time is less than the abovementioned statutory maximum working time.

46 It should be stated at the outset that it is clear both from Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), which is the legal basis of Directive 93/104, and from the first, fourth, seventh and eighth recitals in the preamble as well as the wording of Article 1(1) itself, that the purpose of the directive is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time (Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 37, and Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 45).

47 According to the same provisions, such harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods — particularly daily and weekly — and adequate breaks and

by providing for a ceiling on the duration of the working week (see Case C-303/98 *Simap* [2000] ECR I-7963, paragraph 49; *BECTU*, paragraph 38, and *Jaeger*, paragraph 46). That protection constitutes a social right conferred on each worker as an essential minimum requirement in order to ensure the protection of his security and health (*BECTU*, paragraph 47).

48 Finally, it is possible, in certain cases, for maximum working time and the organisation of working time to coincide with the weekly hours actually worked by a full-time worker and with that worker's organisation of his working time, respectively. None the less, Directive 93/104 applies without distinction to full-time workers and part-time workers and thus specifically regulates maximum working time and the organisation of working time for both those categories of workers.

49 Accordingly, as the Austrian Government rightly pointed out, inasmuch as Paragraph 3 of the AZG requires working time to be organised and for there to be a maximum working time, which is by definition greater than that for part-time work, it also regulates maximum working time and the organisation of working time in regard to both full-time workers and part-time workers.

50 Accordingly, Paragraph 3 of the AZG does not result, in regard to Clause 4 of the Framework Agreement annexed to Directive 97/81, in less favourable treatment of part-time workers in relation to comparable full-time workers or, in regard to Articles 2(1) and 5(1) of Directive 76/207, in a difference of treatment as between those two categories of workers.

51 In the light of the foregoing, the reply to the second question must be that Clause 4 of the Framework Agreement annexed to Directive 97/81 and Articles 2(1) and 5(1) of Directive 76/207 must be interpreted as not precluding a provision, such as Paragraph 3 of the AZG, which lays down a basic maximum working time of 40 hours per week and 8 hours per day and which thus also regulates maximum working time and the organisation of working time in regard to both full-time and part-time workers.

Third question

52 By the third question the referring court is asking essentially whether, on the one hand, Clause 4 of the Framework Agreement annexed to Directive 97/81 and, on the other, Articles 2(1) and 5(1) of Directive 76/207 must be construed as precluding a contract for part-time employment, such as that at issue in the present proceedings, under which weekly working time and the organisation of working time are not fixed but are dependent on quantitative requirements in terms of the work to be performed, which are to be determined on a case-by-case basis, with the workers concerned having the choice to accept or refuse such work.

53 That question is raised in the circumstances of the main proceedings in which, as is clear from the file, Ms Wippel's contract of employment ought in her view to have contained a clause stipulating a fixed weekly working time with a predetermined salary, whether the person concerned had or had not worked for the whole of that working time.

54 In that regard, first, as has already been pointed out at paragraph 42 hereof, Clause 4 of the Framework Agreement annexed to Directive 97/81, in regard to employment conditions, precludes part-time workers from being treated less favourably than

comparable full-time workers on the sole ground that they work part-time unless different treatment is warranted on objective grounds.

55 Secondly, in accordance with the settled case-law cited at paragraph 43 hereof concerning Articles 2(1) and 5(1) of Directive 76/207, national provisions discriminate indirectly against women where, although worded in neutral terms, they operate to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex. The same is true of a contract of employment such as that in the main proceedings.

56 The prohibition on discrimination enunciated in the abovementioned provisions is merely a particular expression of a fundamental principle of Community law, namely the general principle of equality under which comparable situations may not be treated differently unless the difference is objectively justified (see Case C-381/99 *Brunnhofer* [2001] ECR I-4961, paragraph 28, and Case C-320/00 *Lawrence and Others* [2002] ECR I-7325, paragraph 12). That principle can therefore apply only to persons in comparable situations (Joined Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319, paragraph 48).

57 Accordingly, it must first be examined whether a contract of part-time employment according to need, such as that at issue in the main proceedings, results in less favourable treatment of a worker such as Ms Wippel than of full-time workers in a situation comparable to hers within the meaning of Clause 4 of the Framework Agreement annexed to Directive 97/81.

58 In that regard, Clause 3 of the Framework Agreement provides guidelines for determining what is a 'comparable full-time worker'. Such a person is defined as 'a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills'. Under the same clause, where there is no comparable full-time worker in the same establishment, the comparison is to be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

59 A part-time employee working according to need, such as Ms Wippel, works under a contract which stipulates neither the weekly hours of work nor the manner in which working time is to be organised, but it leaves her the choice of whether to accept or refuse the work offered by P&C. The work is remunerated by the hour only for hours actually worked.

60 A full-time worker works under a contract which fixes a working week of 38.5 hours, fixing the organisation of the working week and salary, and which requires him to work for P&C for the whole working time thus determined without the possibility of refusing that work even if the worker cannot or does not wish to do it.

61 Under those circumstances, the employment relationship referred to in the preceding paragraph hereof differs, as to subject-matter and basis, from that of a worker such as Ms Wippel. It follows that no full-time worker in the same establishment has the same type of contract or employment relationship as Ms Wippel. It is apparent from the file that in the circumstances of the main proceedings, the same is true of all the full-time workers, in respect of whom the applicable collective agreement provides for a working week of 38.5 hours.

62 In the circumstances of the main proceedings, there is therefore no full-time worker comparable to Ms Wippel within the meaning of the Framework Agreement annexed to Directive 97/81. It follows that a contract of part-time employment according to need which makes provision for neither the length of weekly working time nor the organisation of working time does not result in less favourable treatment within the meaning of Clause 4 of the Framework Agreement.

63 Secondly, in regard to Articles 2(1) and 5(1) of Directive 76/207, it is apparent from the file that, according to Ms Wippel, the situations of the workers to be compared are, first, the situation of part-time employees working according to P&C's needs whose contracts of employment make provision neither for the length of weekly working time nor for the organisation of working time and, secondly, the situation of all P&C's other workers, both full-time and part-time, whose contracts of employment make such provision.

64 Given that the latter category of workers has the obligation to work for P&C for a fixed weekly period, without the possibility of refusing that work should the workers concerned not be able or not wish to work, it is sufficient to note that, for the reasons set out at paragraphs 59 to 61 hereof, the situation of those workers is not analogous to that of part-time employees working according to need.

65 Accordingly, in circumstances such as those of the main proceedings, in which the two categories of workers are not comparable, a contract of part-time employment according to need which makes provision for neither the length of weekly working time nor the organisation of working time does not constitute an indirectly discriminatory measure within the meaning of Articles 2(1) and 5(1) of Directive 76/207.

66 In the light of all the foregoing, the reply to the third question must be that Clause 4 of the Framework Agreement annexed to Directive 97/81 and Articles 2(1) and 5(1) of Directive 76/207 must be interpreted as meaning that, in circumstances where all the contracts of employment of the other employees of an undertaking make provision for the length of weekly working time and for the organisation of working time, they do not preclude a contract of part-time employment of workers of the same undertaking, such as that in the main proceedings, under which the length of weekly working time and the organisation of working time are not fixed but are dependent on quantitative needs in terms of work to be performed determined on a case-by-case basis, such workers being entitled to accept or refuse that work.

67 In the light of the replies to the second and third questions there is no need to reply to the fourth question.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber), hereby rules:

1. **A worker with a contract of employment, such as that in the main proceedings, under which hours of work and the organisation of working**

time are dependent upon the quantity of available work and are determined only on a case-by-case basis by agreement between the parties, comes within the scope of 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.

Such workers also come within the scope of the Framework Agreement annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC where:

— they have a contract or employment relationship as defined by the law, collective agreement or practices in force in the Member State;

— they are employees whose normal working hours, calculated on a weekly basis or on average over an employment period which may be up to a year, are less than those of a comparable full-time worker within the meaning of Clause 3(2) of that framework agreement, and

— in regard to part-time workers working on a casual basis, the Member State has not excluded them, wholly or partly, from the benefit of the terms of that agreement.

2. **Clause 4 of the Framework Agreement annexed to Directive 97/81 and Articles 2(1) and 5(1) of Directive 76/207 must be interpreted as meaning that:**

— **they do not preclude a provision, such as Paragraph 3 of the Arbeitszeitgesetz (Law on working time), which lays down a basic maximum working time of 40 hours per week and eight hours per day, and which thus also regulates maximum working time and the organisation of working time in regard to both full-time and part-time workers;**

— **in circumstances where all the contracts of employment of the other employees of an undertaking make provision for the length of weekly working time and for the organisation of working time, they do not preclude a contract of part-time employment of workers of the same undertaking, such as that in the main proceedings, under which the length of weekly working time and the organisation of working time are not fixed but are dependent on quantitative needs in terms of work to be performed determined on a case-by-case basis, such workers being entitled to accept or refuse that work.**

Signatures.