JUDGMENT OF THE COURT (Fifth Chamber)

6 July 2000 *

In Case C-407/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Överklagandenämnden för Högskolan (Sweden) for a preliminary ruling in the proceedings pending before that court between

Katarina Abrahamsson,

Leif Anderson

and

Elisabet Fogelqvist

on the interpretation of Article 2(1) and (4) 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),

* Language of the case: Swedish.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P.J.G. Kapteyn (Rapporteur), P. Jann and H. Ragnemalm, Judges,

Advocate General: A. Saggio,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr Anderson, by himself,

— the Swedish Government, by A. Kruse, Departmentsråd in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by K. Oldfelt, Principal Legal Adviser, and A. Aresu, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 November 1999,

gives the following

Judgment

1 By decision of 14 October 1998, received at the Court on 26 October 1998, the Överklagandenämnden för Högskolan (Universities' Appeals Board) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions on the interpretation of Article 2(1) and (4) 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, hereinafter 'the Directive').

2 Those questions were raised in proceedings brought by Ms Abrahamsson and Mr Anderson against Ms Fogelqvist concerning the appointment of the latter as Professor of Hydrospheric Science at the University of Göteborg.

Legal background

Community law

3 Article 2(1) and (4) of the Directive provides:

'1. 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.

...

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).'

4 According to the third recital in the preamble to Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ 1984 L 331, p. 34), 'existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract

the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures;'. Referring expressly to Article 2(4) of the Directive, the Council recommended the Member States:

'1. [T]o adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry, in order:

(a) to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women;

(b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.'

5 Since the entry into force of the Treaty of Amsterdam on 1 May 1999, Article 141(1) and (4) EC 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.

...

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

6 Declaration No 28 concerning Article 141(4) (ex Article 119(4)) of the Treaty establishing the European Community, annexed to the final act of the Treaty of Amsterdam, states:

'When adopting measures referred to in Article 141(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life.'

National law

7 Point 2 of the second paragraph of Article 16 of the Jämställdhetslagen (1991:433) (Swedish Law on equality) provides that positive discrimination measures are authorised where they contribute to efforts to promote equality in the workplace. That article provides:

'Unlawful sexual discrimination shall be deemed to exist where an employer, at the time of recruitment, promotion or training with a view to promotion, appoints one person rather than another of the opposite sex even though the person not chosen better satisfies the objective conditions for holding that post or taking part in the training.

Those conditions shall not apply where the employer can prove that:

(1) the decision has no direct or indirect connection with the sex of the person not chosen;

(2) the decision forms part of efforts to promote equality between men and women in the workplace, or

(3) the decision is justified in that it takes account of a moral interest or another special interest which does not manifestly have to give way to the interest in securing equality in professional life.'

8 Article 15 of Chapter 4 of the Högskoleförordningen (1993:100) (Swedish Regulation on universities) as in force before 1 January 1999 (hereinafter 'Regulation 1993:100') provides, in relation to the grounds for promotions and appointments to teaching posts:

'Appointments to teaching posts must be based on merits of a scientific, artistic, pedagogical, administrative or other nature relating to the discipline covered by the post in question and its nature in general. Account must also be taken of the candidate's ability in reporting on his or her research and development work.

Account must also be taken, when an appointment is made, of objective reasons consistent with the general aims of policies relating to the labour market, equality, social matters and employment.'

9 Article 15a of Chapter 4 of Regulation 1993:100 establishes a specific form of positive discrimination for cases where a higher educational institution has decided that such discrimination is permissible in the filling of posts or certain categories of posts with a view to promoting equality in the workplace. In such cases, a candidate belonging to an under-represented sex and possessing sufficient qualifications for the post may be chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen, provided that the difference in their respective qualifications is not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments.

10 Pursuant to Article 16 of Chapter 4 of Regulation 1993:100, in any procedure for the appointment of a professor, particular importance must be attached to scientific and educational abilities.

11 Under Article 4(2) of the Lagen (1994:260) om offentlig anställning (Swedish Law on public employment), which is applicable to public authorities, priority must be given to abilities if no particular reason justifies another course of action. It is clear from the drafting history of that provision that the objective of equality may constitute a particular reason of that kind.

12 The Förordningen (1995:936) om vissa anställningar som professor och forskarassistent vilka inrättas i jämställdhetssyfte (Swedish Regulation concerning certain professors' and research assistants' posts created with a view to promoting equality, hereinafter 'Regulation 1995:936') entered into force on 1 July 1995.

13 The legislative history of that regulation (draft 1994/95:164) shows that, according to the Swedish Government, progress towards a fairer allocation of teaching posts as between the sexes has been particularly slow, so that an extraordinary effort is needed in order to ensure, in the short term, a significant increase in the number of female professors. Regulation 1995:936 reflects that specific effort, the aim of which is to apply, if necessary and where possible, so-called positive discrimination measures. Following a decision of the Swedish Government of 14 March 1996 (dnr U 96/91), that effort involved 30 posts of professor.

14 Articles 1 to 3 of Regulation 1995:936 provide:

'Article 1

This regulation concerns the posts of professor and research assistant created and filled under special appropriations during the budgetary year 1995/96 in certain

universities and higher educational institutions of the State in the context of efforts to promote equality in professional life.

Article 2

The universities and higher educational institutions which are granted such appropriations must create and fill such posts in accordance with [Regulation 1993:100], taking account of the derogations provided for in Articles 3 to 5 of this regulation. Those derogations shall apply, however, only to the first appointments to such posts.

Article 3

When appointments are made, the provisions of Article 15a of Chapter 4 of [Regulation 1993:100] shall be replaced by the following provisions.

A candidate belonging to an under-represented sex who possesses sufficient qualifications in accordance with the first paragraph of Article 15 of Chapter 4 of [Regulation 1993:100] must be granted preference over a candidate of the opposite sex who would otherwise have been chosen ("positive discrimination") where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed.

Positive discrimination must, however, not be applied where the difference between the candidates' qualifications is so great that such application would give rise to a breach of the requirement of objectivity in the making of appointments.'

15 It appears from draft 1994/95:164 that the limitation contained in the third paragraph of Article 3 of Regulation 1995:936 was included in deference to Article 9 of Chapter 11 of the Swedish Constitution, according to which, for the purpose of appointments to State posts, only objective criteria are to be taken into account, such as merits (length of previous periods of service) and abilities (aptitude for the post, evidenced by theoretical and practical training and previous experience). It is also stated in draft 1994/95:164 that 'although the aim of promoting equality is an objective reason within the meaning of the Swedish Constitution, it is clear from that provision that the difference in the level of merits allowed in cases of positive discrimination is subject to certain limits.'

The main proceedings and the questions referred to the Court

16 On 3 June 1996 the University of Göteborg announced a vacancy for the chair of Professor of Hydrospheric Sciences. The vacancy notice indicated that the appointment to that post should contribute to promotion of equality of the sexes in professional life and that positive discrimination might be applied in accordance with Regulation 1995:936.

17 Eight candidates applied, including Ms Abrahamsson, Ms Destouni and Ms Fogelqvist, and Mr Anderson.

18 The appointments committee of the Faculty of Sciences (hereinafter 'the selection board') voted twice, on the first occasion in relation to the candidates' scientific qualifications. In that vote Mr Anderson came first with five votes and Ms Destouni received three votes. On the second vote, taking account both of scientific merits and of Regulation 1995:936, Ms Destouni came first with six votes as compared with two for Mr Anderson. The selection board proposed to the Rector of the University of Göteborg that Ms Destouni be appointed, expressly stating that the appointment of that candidate instead of Mr Anderson did not constitute a breach of the requirement of objectivity within the meaning

of the third paragraph of Article 3 of Regulation 1995:936. Referring, in both cases, to experts' reports, the selection board placed Mr Anderson second and Ms Fogelqvist third.

19 After Ms Destouni withdrew her application, the Rector of the University decided on 27 June 1997 to refer the matter back to the selection board for it to decide on the remaining applications in the light of equality between men and women and, more particularly, having regard to Regulation 1995:936 and the university's plan for equality between men and women. On 6 November 1997 the selection board stated that it could not re-examine the case having regard to those factors since the question of equality had already been taken into account in its first decision. Furthermore, it declared that, while a majority of its members considered the difference between Mr Anderson and Ms Fogelqvist to be considerable, it had found it difficult to interpret the scope of the third paragraph of Article 3 of Regulation 1995:936.

20 On 18 November 1997 the Rector of the University of Göteborg decided to appoint Ms Fogelqvist to the professorial chair. In his decision, the Rector referred to Regulation 1995:936 and to the University's plan for equality between men and women and stated that the difference between the respective merits of Mr Anderson and Ms Fogelqvist was not so considerable that positive discrimination in favour of the latter constituted a breach of the requirement of objectivity in the making of appointments.

21 Mr Anderson and Ms Abrahamsson appealed to the Överklagandenämnden för Högskolan. Mr Anderson contended that the appointment was contrary both to Article 3 of Regulation 1995:936 and to the judgment of the Court of Justice in Case C-450/93 *Kalanke* v *Bremen* [1995] ECR I-3051. Ms Abrahamsson contended that the selection board's assessment of the candidates had not been balanced and that her scientific output was better than that of Ms Fogelqvist. She nevertheless recognised that Mr Anderson's merits were superior to her own.

22 On 13 March 1998 the selection board, meeting again, stated that it had no reason to revise its earlier views. On 26 June 1998, the Rector also declined to uphold the appeals.

23 The Överklagandenämnden considered that Mr Anderson and Ms Fogelqvist were the best qualified candidates and that it was evident from the inquiries undertaken that Mr Anderson was clearly more competent in the scientific field than Ms Fogelqvist. As regards teaching skills, neither of the two candidates could, in the view of the Överklagandenämnden, be regarded as clearly better qualified than the other. Their administrative ability likewise did not appear to be a decisive factor, although it was considered that Ms Fogelqvist had a certain, albeit limited, advantage in that respect.

24 The Överklagandenämnden also stated that, as a matter of tradition and in accordance with the relevant case-law, particular importance attached, in the overall assessment, to scientific merits. In the present case, Ms Fogelqvist's slight superiority in the administrative area could not outweigh Mr Anderson's superiority from the scientific point of view. Consequently, the question of principle which arose was whether, in carrying out an assessment in accordance with Regulation 1995:936 on positive discrimination, Ms Fogelqvist's membership of the under-represented sex could outweigh Mr Anderson's advantage and whether, in addition, the application of Regulation 1995:936 was in conformity with Community law and, in particular, Article 2(4) of the Directive.

25 As regards application of Regulation 1995:936, the Överklagandenämnden considered that the scope of the limitation in the third paragraph of Article 3 (observance of the requirement of objectivity in the making of appointments) applicable to positive discrimination measures was not clarified by other sources of law. It nevertheless took the view that that limitation could be presumed to imply that the objective of equality had to be balanced against the concern to ensure that functions important to society, such as research and higher education, should be performed in the most proficient manner possible. In that regard, the Överklagandenämnden was of the opinion that the requirement of objectivity implied that a positive discrimination measure could not be applied when it was

clearly liable to reduce the level of performance within those functions in the event of the best-qualified candidate not being chosen. The Överklagandenämnden considered that, if the circumstances at issue in the case before it were examined in the light of that criterion, the appointment of Ms Fogelqvist did not involve a clear breach of the requirement of objectivity.

26 As regards the compatibility with Community law of the form of positive discrimination provided for in Article 3 of Regulation 1995:936, the Överklagandenämnden considered that the provisions of the Directive did not provide an unequivocal answer. Whilst observing that the significance of the exception to the principle of equal treatment provided for in Article 2(4) of the Directive had in some measure been examined by the Court in *Kalanke*, cited above, and in Case C-409/95 *Marschall* v *Land Nordrhein-Westfalen* [1997] ECR I-6363, the Överklagandenämnden considered that it was nevertheless not manifestly inappropriate to seek a ruling from the Court on the interpretation of the applicable Community law, under Article 177 of the Treaty.

27 In those circumstances, the Överklagandenämnden för Högskolan stayed proceedings pending a preliminary ruling from the Court on the following four questions:

'1. Do Articles 2(1) and 2(4) 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 preclude national legislation under which an applicant of the under-represented sex possessing sufficient qualifications for a public post is to be selected in priority over an applicant of the opposite sex who would otherwise have been selected ("positive special treatment") if there is a need for an applicant of the under-represented sex to be selected and under which positive special treatment is not to be applied only where the difference between the applicants' qualifications is so great that such treatment would be contrary to the requirement of objectivity in the making of appointments?

2. If the answer to Question 1 is in the affirmative, is positive special treatment impermissible in such a case even where application of the national legislation is restricted to appointments to *either* a number of posts limited in advance (as under Regulation 1995:936) *or* posts created as part of a special programme adopted by an individual university under which positive special treatment may be applied (as under Article 15a of Chapter 4 of Högskoleförordningen)?

3. If the answer to Question 2 means that treatment like positive special treatment is in some respect unlawful, can the rule, based on Swedish administrative practice and the second paragraph of Article 15 of Chapter 4 of Högskoleförordningen — approved by the Appeals Board — that an applicant belonging to the under-represented sex must be given priority over a fellow applicant of the opposite sex, provided that the applicants can be regarded as equal or nearly equal in terms of merit, be regarded as being in some respect contrary to Directive 76/207/EEC?

4. Does it make any difference in determining the questions set out above whether the legislation concerns lower-grade recruitment posts in an authority's sphere of activity or the highest posts in that sphere?'

Admissibility

28 Before replying to the questions submitted, it is necessary to consider whether the Överklagandenämnden för Högskolan is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty.

29 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33).

30 In this case, the Överklagandenämnden, which is a permanent body, was set up by the Högskolelagen (1992:1434) (Law on higher education), Article 1(1) of Chapter 5 of which provides that a special appeals committee is to examine appeals against certain decisions taken in relation to higher education.

31 It is clear from the Förordningen (1992:404) med instruktion för Överklagandenämnden för Högskolan (Regulation laying down instructions for the appeals committee on higher education) that, of the eight members of the Överklagandenämnden, the chairman and the vice-chairman must be or have been serving judges. Of the other members, at least three must be lawyers. All the members are appointed by the Government.

32 The Överklagandenämnden undertakes an independent examination of appeals lodged against decisions on appointments taken in universities and higher educational institutions. Pursuant to Article 9 of Chapter 1 of the Swedish Constitution, consideration must be given in that connection to the equality of everyone before the law and objectivity and impartiality must be ensured. Pursuant to Article 7 of Chapter 11 of the Swedish Constitution, no authority, not even the Parliament, may decide how the Överklagandenämnden is to decide any particular case referred to it. The only appeals considered are those in which the appellant personally seeks a declaration that he or she should have been appointed to a particular post.

33 The Överklagandenämnden is competent to give a decision where the chairman and at least three other members, of whom at least one must be a lawyer, are present. The rules governing procedure before the Överklagandenämnden are contained in the Förvaltningslagen (1986:223) (Law on administrative management, hereinafter 'Law 1986:223'). Cases are normally decided following a report prepared after the parties have been given an opportunity to submit observations and to examine the information provided by other parties. There is also provision for oral procedure.

34 The deliberations culminate in a binding decision, which is not subject to appeal (Article 1(2) of Chapter 5 of Law 1992:1434).

35 It is clear from the legislative provisions and regulations mentioned in paragraphs 30 to 34 of this judgment that the Överklagandenämnden was established by law and is a permanent body which, although an administrative authority, is vested with judicial functions, that it applies rules of law and that the procedure before it is *inter partes*, even though Law 1986:223 does not expressly so provide.

36 As regards independence, it is clear from the provisions of the Swedish Constitution mentioned in paragraph 32 of this judgment that the Överklagandenämnden gives judgment without receiving any instructions and in total impartiality on appeals against certain decisions adopted within universities and higher educational institutions.

37 Those safeguards confer on the Överklagandenämnden a status separate from the authorities which adopted the decisions under appeal and the necessary independence for it to be treated as a court or tribunal within the meaning of Article 177 of the Treaty.

38 It follows that the Överklagandenämnden för Högskolan must be treated as a court or tribunal within the meaning of Article 177 of the Treaty, and accordingly the questions submitted by it are admissible.

Substance

Preliminary observations

39 It is to be noted at the outset that, by its questions, the national court seeks to ascertain whether Article 2(1) and (4) of the Directive preclude national legislation, such as the Swedish legislation at issue in the main proceedings, which provides, in the sector of higher education, for positive discrimination in recruitment in favour of candidates of the under-represented sex.

40 Interpretation of Article 141(4) EC, which concerns measures of that kind, would not assist in determining the main proceedings unless the Court were to consider that Article 2 of the Directive precludes national legislation of the kind there at issue.

41 Next, Article 1(1) of the Directive is intended to put into effect in the Member States the principle of equal treatment for men and women as regards, in particular, access to employment, including promotion, and to vocational training. Under Article 2(1) of the Directive, that principle implies that all discrimination based directly or indirectly on sex must be abolished.

42 However, by virtue of Article 2(4), the Directive does not preclude measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).

43 Finally, in its judgment in Case C-158/97 *Badeck and Others* [2000] ECR I-1875, paragraph 23, the Court held that a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law

— where it does not automatically and unconditionally give priority to women when women and men are equally qualified, and

— where the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

The first question

44 The issue raised by the first question is whether Article 2(1) and (4) precludes national legislation, such as the Swedish legislation at issue in the main proceedings, under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate

of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.

45 In contrast to the national legislation on positive discrimination examined by the Court in its *Kalanke, Marschall* and *Badeck* judgments, the national legislation at issue in the main proceedings enables preference to be given to a candidate of the under-represented sex who, although sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex.

46 As a rule, a procedure for the selection of candidates for a post involves assessment of their qualifications by reference to the requirements of the vacant post or of the duties to be performed.

47 In paragraphs 31 and 32 of *Badeck*, cited above, the Court held that it is legitimate for the purposes of that assessment for certain positive and negative criteria to be taken into account which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. Thus, it may be decided that seniority, age and the date of last promotion are to be taken into account only in so far as they are of importance for the suitability, qualifications and professional capability of candidates. Similarly, it may be prescribed that the family status or income of the partner is immaterial and that part-time work, leave and delays in completing training as a result of looking after children or dependants in need of care must not have a negative effect.

48 The clear aim of such criteria is to achieve substantive, rather than formal, equality by reducing *de facto* inequalities which may arise in society and, thus, in

accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of persons belonging to the under-represented sex.

49 It is important to emphasise in that connection that the application of criteria such as those mentioned in paragraph 47 above must be transparent and amenable to review in order to obviate any arbitrary assessment of the qualifications of candidates.

50 As regards the selection procedure at issue in the main proceedings, it does not appear from the relevant Swedish legislation that assessment of the qualifications of candidates by reference to the requirements of the vacant post is based on clear and unambiguous criteria such as to prevent or compensate for disadvantages in the professional career of members of the under-represented sex.

51 On the contrary, under that legislation, a candidate for a public post belonging to the under-represented sex and possessing sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where that measure is necessary for a candidate belonging to the under-represented sex to be appointed.

52 It follows that the legislation at issue in the main proceedings automatically grants preference to candidates belonging to the under-represented sex, provided that they are sufficiently qualified, subject only to the proviso that the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirement of objectivity in making appointments.

53 The scope and effect of that condition cannot be precisely determined, with the result that the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and that this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Moreover, candidatures are not subjected to an objective assessment taking account of the specific personal situations of all the candidates. It follows that such a method of selection is not such as to be permitted by Article 2(4) of the Directive.

54 In those circumstances, it is necessary to determine whether legislation such as that at issue in the main proceedings is justified by Article 141(4) EC.

55 In that connection, it is enough to point out that, even though Article 141(4) EC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued.

56 The answer to the first question must therefore be that Article 2(1) and (4) of the Directive and Article 141(4) EC preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.

The second question

57 By its second question, the national court seeks to ascertain whether Article 2(1) and (4) of the Directive also precludes such national legislation where the latter applies only to procedures for the filling of a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures.

58 As to that, the mere fact of restricting the scope of a positive discrimination measure of the kind in point here is not capable of changing its absolute and disproportionate nature.

59 The answer to the second question must therefore be that Article 2(1) and (4) of the Directive and Article 141(4) EC also preclude national legislation of that kind where it applies only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures.

The third question

60 By its third question, the national court seeks to ascertain whether Article 2(1) and (4) of the Directive precludes a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex provided that the candidates possess equivalent or substantially equivalent merits.

61 On that point, it is enough to say that, as indicated in paragraph 43 above, such a rule must be regarded as compatible with Community law where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.

62 The answer to the third question must therefore be that Article 2(1) and (4) of the Directive does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.

The fourth question

63 By its fourth question, the national court seeks to ascertain whether the answer to the first, second and third questions would differ according to whether the national legislation concerns the selection of candidates for posts of a lower level or posts of a higher level.

64 As to that, Community law does not in any way make application of the principle of equal treatment for men and women concerning access to employment conditional upon the level of the posts to be filled.

65 The answer to the fourth question must therefore be that the question whether national rules providing for positive discrimination in the making of appointments in higher education are lawful cannot depend on the level of the post to be filled.

Costs

66 The costs incurred by the Swedish Government and by the Commission, which submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Överklagandenämnden för Högskolan by decision of 14 October 1998, hereby rules:

1. **Article 2(1) and (4) 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 and Article 141(4) EC preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.**

2. Article 2(1) and (4) of Directive 76/207 and Article 141(4) EC also preclude national legislation of that kind where it applies only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures.

3. Article 2(1) and (4) of Directive 76/207 does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.

4. The question whether national rules providing for positive discrimination in the making of appointments in higher education are lawful cannot depend on the level of the post to be filled.

Edward Sevón Kapteyn

Jann Ragnemalm

Delivered in open court in Luxembourg on 6 July 2000.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber