Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

29 July 2024*

(Reference for a preliminary ruling – Social policy – Article 157 TFEU – Equal treatment between men and women in matters of employment and occupation – Directive 2006/54/EC – Article 2(1)(b) and Article 4, first paragraph – Prohibition of indirect discrimination on grounds of sex – Part-time work – Directive 97/81/EC – Framework Agreement on part-time work – Clause 4 – Prohibition on treating part-time workers less favourably than comparable full-time workers – Payment of additional pay only for overtime worked by part-time workers in excess of the normal working hours set for full-time workers)

In Joined Cases C-184/22 and C-185/22,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decisions of 28 October 2021, received at the Court on 10 March 2022, in the proceedings

IK (C-184/22),

CM (C-185/22)

v

KfH Kuratorium für Dialyse und Nierentransplantation eV,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz, P.G. Xuereb, A. Kumin (Rapporteur) and I. Ziemele, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– IK, by J. Windhorst, Rechtsanwältin,

– KfH Kuratorium für Dialyse und Nierentransplantation eV, by K.M. Weber, Rechtsanwalt,

* Language of the case: German.

– the Danish Government, by J.F. Kronborg, C. Maertens and V. Pasternak Jørgensen, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Norwegian Government, by T. Hostvedt Aarthun and I. Thue, acting as Agents,

– the European Commission, by D. Recchia, E. Schmidt and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 November 2023,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 157 TFEU, Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), and Clause 4(1) and (2) of the Framework Agreement on part-time work, concluded on 6 June 1997 ('the Framework Agreement'), which is 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 (OJ 1998 L 14, p. 9).

2 The requests have been made in proceedings between IK (C-184/22) and CM (C-185/22) and their employer, KfH Kuratorium für Dialyse und Nierentransplantation eV, concerning the payment of additional pay for overtime worked in excess of the normal working hours agreed in their contracts of employment.

Legal context

European Union law

Directive 2006/54

3 Recital 30 of Directive 2006/54 states:

'… It is … necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. …'

4 Article 2(1)(b) and (e) of Directive 2006/54 provides:

'For the purposes of this Directive, the following definitions shall apply:

…

(b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

…

(e) "pay": the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer'.

5 Entitled 'Prohibition of discrimination', Article 4 of that directive provides, in the first paragraph thereof:

'For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.'

The Framework Agreement

6 Clause 1(a) of the Framework Agreement states that the purpose of that agreement is 'to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work'.

7 Clause 2(1) of the Framework Agreement provides:

'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.'

8 As set out in Clause 3 of the Framework Agreement:

'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.

…'

9 Headed 'Principle of non-discrimination', Clause 4 of the Framework Agreement provides, at points 1 and 2:

'1. 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.

2. Where appropriate, the principle *pro rata temporis* shall apply.'

German law

10 Under Paragraph 1 of the Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897), in the version applicable to the disputes in the main proceedings ('the AGG'), entitled 'Purpose of the Law':

'The purpose of this law is to prevent or stop any discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.'

11 Paragraph 7 of the AGG states that workers may not be discriminated against on any of the grounds set out in Paragraph 1 of that law, including gender.

12 Entitled 'Compensation and damages', Paragraph 15 of that law is worded as follows:

'(1) In the event of any infringement of the prohibition of discrimination, the employer shall compensate the damage arising therefrom. …

(2) In the case where the damage arising therefrom does not constitute economic loss, the worker may seek appropriate monetary compensation. …'

13 Paragraph 3 of the Gesetz zur Förderung der Entgelttransparenz zwischen Frauen und Männern (Entgelttransparenzgesetz) (Law on the promotion of pay transparency between women and men) of 30 June 2017 (BGBl. 2017 I, p. 2152), in the version applicable to the disputes in the main proceedings, entitled 'Prohibition of direct and indirect gender discrimination in pay', provides, in subparagraph 1:

'For the same work or for work of equal value, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of pay shall be prohibited.'

14 Entitled 'Equal pay requirement', Paragraph 7 of that law provides:

'In employment relationships, remuneration for the same work or for work of equal value may not be agreed or paid at a lower rate on account of the sex of the worker than that payable to a worker of the other sex.'

15 Paragraph 4 of the Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Law on part-time work and fixed-term work) of 21 December 2000 (BGBl. 2000 I, p. 1966), in the version applicable to the disputes in the main proceedings, entitled 'Prohibition of discrimination', provides, in subparagraph 1 thereof:

'A part-time worker shall not be treated on account of part-time work less favourably than a comparable full-time worker unless there are objective reasons justifying a difference in treatment. A part-time worker must receive divisible remuneration or other consideration the extent of which must correspond at least to the proportion of his or her working time as compared with that of a comparable full-time worker.'

16 Paragraph 10 of the Manteltarifvertrag (General Collective Agreement) ('the MTV'), concluded between Vereinte Dienstleistungsgewerkschaft eV (ver.di) (United Service Sector Union) and the defendant in the main proceedings, entitled 'Working time', provides:

'1. The normal weekly working time for a full-time employee shall be, excluding breaks, on average, 38.5 hours.

…

The normal daily working time for a full-time employee shall be 7 hours 42 minutes.

…

6. If the workload calls for overtime, this shall in principle be mandated. … Overtime shall be restricted to cases of urgency and shall be distributed as evenly as possible among all employees.

7. Overtime is defined as mandated hours worked, on a rostered or regular basis, in excess of those making up the normal working time … Additional pay in accordance with Paragraph 13, subparagraph 1, hereof, shall be paid for overtime worked in excess of a full-time employee's working hours in a calendar month and which cannot be offset in the calendar month concerned by time off in lieu.

…'

17 Entitled 'Overtime pay, supplements and compensation for work at unsocial hours', Paragraph 13 of the MTV states:

'1. The compensation for overtime in accordance with Paragraph 10(7) of the MTV amounts to 1/167th of the monthly rate per hour of overtime. The overtime pay pursuant to the second sentence of Paragraph 10(7) is 30%.

…'

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

18 The defendant in the main proceedings is a provider of out-patient dialysis services which operates throughout the Federal Republic of Germany.

19 IK and CM, who are employed by KfH Kuratorium für Dialyse und Nierentransplantation eV as part-time care assistants, are required, under their employment contracts, to perform 40% and 80% respectively of the normal weekly working hours of a full-time employee, which is set at 38.5 hours by Paragraph 10 of the MTV.

20 Taking the view that the defendant in the main proceedings is required to pay them additional pay in respect of overtime worked, in accordance with Paragraph 10(7) of the MTV, or to enter in their time-savings accounts time credit corresponding to the additional pay payable, the applicants in the main proceedings brought an action before the Arbeitsgericht (Labour Court, Germany) seeking to obtain time credit corresponding to the additional pay payable and compensation under Paragraph 15(2) of the AGG.

21 In support of their action, the applicants in the main proceedings claimed that, by not paying them any additional pay in respect of overtime worked in excess of the working hours agreed in their employment contract and by failing to enter in their time-savings accounts any time credit corresponding to the additional pay payable to them, the defendant in the main proceedings treated them less favourably than full-time employees on the ground that they worked part-time. In addition, they claim to have suffered indirect discrimination on grounds of sex in so far as the defendant in the main proceedings employs predominantly women on a part-time basis.

22 The Arbeitsgericht (Labour Court) having dismissed those actions, the applicants in the main proceedings appealed against the judgments of that court to the Landesarbeitsgericht Hessen (Higher Labour Court of Hesse, Germany), which ordered the defendant in the main proceedings to credit the applicants' time-savings accounts with time credits corresponding to the additional pay payable for the overtime worked by them, but rejected the applicants' claim for compensation under Paragraph 15(2) of the AGG.

23 The applicants in the main proceedings brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany), the referring court, seeking payment of that compensation. The defendant in the main proceedings brought a cross-appeal before that court against its being ordered to credit the applicants' time-savings accounts with time credits.

24 The referring court considers that, in order to rule on the right to damages, within the meaning of Paragraph 15 of the AGG, of the applicants in the main proceedings, it is necessary to ascertain whether they have been discriminated against on grounds of sex, in breach of Paragraph 7 of the AGG.

25 The referring court also considers that, in order to rule on the cross-appeal brought by the defendant in the main proceedings against its being ordered to credit the time-savings accounts of the applicants with time credits, the decisive factor is whether they have been discriminated against on the ground that they are employed on a part-time basis.

26 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions, which are worded identically in Joined Cases C-184/22 and C-185/22, to the Court of Justice for a preliminary ruling:

'(1) Must Article 157 TFEU and Article 2(1)(b) and [the first paragraph] of Article 4 of [Directive 2006/54] be interpreted as meaning that a provision in a national collective agreement[,] to the effect that the payment of overtime supplements is available only for hours worked in excess of the standard working time of a full-time employee[,] entails a difference in treatment as between full-time employees and part-time employees?

(2) In the event that the Court answers Question 1 in the affirmative:
(a) Must Article 157 TFEU and Article 2(1)(b) and [the first paragraph] of Article 4 of [Directive 2006/54] be interpreted as meaning that, in such a case, a finding that the difference in treatment affects considerably more women than men is not sustained by the fact alone that the part-time employees are made up of considerably more women than men, but requires in addition that the full-time employees be made up of considerably more men or a significantly higher proportion of men?

(b) Or does something different also follow, in the case of Article 157 TFEU and [Directive 2006/54], from the findings of the [Court] in paragraphs 25 to 36 of [its] judgment [of 26 January 2021,] *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zaktad Opieki Zdrowotnej w Krakowie* [(C-16/19, EU:C:2021:64)], according to which a difference in treatment even within a group of persons with disabilities may be covered by the concept of "discrimination" referred to in Article 2 of [Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [(OJ 2000 L 303, p. 16)]?

(3) In the event that the Court answers Question 1 in the affirmative and Questions 2(a) and 2(b) to the effect that, in a case such as that in the main proceedings, it may be found that the difference in treatment in respect of pay affects considerably more women than men, must Article 157 TFEU and Article 2(1)(b) and the [first paragraph] of Article 4 of [Directive 2006/54] be interpreted as meaning that it may be a legitimate aim for the parties to a collective agreement, by means of a provision such as that referred to in Question 1, on the one hand, to pursue the aim of deterring the employer from mandating overtime and rewarding recourse to employees to an extent in excess of that contracted by means of an overtime supplement, but, on the other hand, also to pursue the aim of preventing full-time employees from being treated less favourably than part-time employees and to provide for that reason that supplements are payable only for overtime worked in excess of a full-time employee's working hours in a calendar month?

(4) Must Clause 4(1) of [the Framework Agreement] annexed to [Directive 97/81] be interpreted as meaning that a provision in a national collective agreement to the effect that the payment of overtime supplements is available only for hours worked in excess of the normal working hours of a full-time employee entails a difference in treatment as between full-time employees and part-time employees?

(5) In the event that the Court answers Question 4 in the affirmative, must Clause 4(1) of [the Framework Agreement annexed to Directive 97/81] be interpreted as meaning that there may be an objective ground for the parties to a collective agreement, by means of a provision such as that referred to in Question 4, on the one hand, to pursue the aim of deterring the employer from mandating overtime and rewarding recourse to employees to an extent in excess of that contracted by means of an overtime supplement, but, on the other hand, also to pursue the aim of preventing full-time employees from being treated less favourably than part-time employees and to provide for that reason that supplements are payable only for overtime worked in excess of a full-time employee's working hours in a calendar month?'

27 By decision of the President of the Court of 19 April 2022, Cases C-184/22 and C-185/22 were joined for the purposes of the written and oral parts of the procedure and the judgment.

Consideration of the questions referred

The fourth and fifth questions

28 By its fourth and fifth questions, which it is appropriate to examine together and in the first place, the referring court asks, in essence, whether Clause 4(1) and (2) of the Framework Agreement must be interpreted as meaning that national legislation under which the payment of additional pay is provided for part-time workers only for hours worked in excess of the normal working

hours laid down for full-time workers in a comparable situation, constitutes 'less favourable' treatment of part-time workers, within the meaning of Clause 4(1), and whether such treatment is capable of being justified by the pursuit, first, of the objective of deterring the employer from requiring workers to work overtime in excess of the hours individually agreed in their employment contract and, secondly, of the objective of preventing full-time workers from being treated less favourably than part-time workers.

29 As a preliminary point, it should be noted that it is not disputed, in the present case, that the applicants in the main proceedings are part-time workers within the meaning of Clause 3 of the Framework Agreement. Nor is it disputed that the MTV applies to their employment contracts.

30 As regards the interpretation of Clause 4 of the Framework Agreement, it should be noted, first of all, that the agreement seeks both to promote part-time work and eliminate discrimination between part-time workers and full-time workers, as is expressly stated in Clause 1(a) of the Framework Agreement (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 36 and the case-law cited).

31 In the light of those objectives, Clause 4 of the Framework Agreement must be interpreted as articulating a principle of EU social law which cannot be interpreted restrictively (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 38 and the case-law cited).

32 Next, in accordance with the objective of eliminating discrimination between part-time workers and full-time workers, set out in Clause 1(a) of the Framework Agreement, Clause 4 of that Framework Agreement provides that, in respect of employment conditions, part-time workers are not to 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 (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 39 and the case-law cited).

33 Furthermore, the Court has held that that clause aims to apply the principle of non-discrimination to part-time workers in order to prevent an employer using an employment relationship of that nature to deny those workers rights which are recognised for full-time workers (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 40 and the case-law cited).

34 Thus, in the first place, as regards, in the present case, the question whether overtime pay falls within the concept of 'employment conditions' referred to in Clause 4(1) of the Framework Agreement, it must be noted that the Court has already ruled that that concept encompasses pay conditions (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 41 and the case-law cited).

35 In the second place, as for the comparability of the situations of persons working as full-time care assistants and of persons working as part-time care assistants, such as the applicants in the main proceedings, it must be borne in mind that, according to settled case-law, in order to assess whether persons are engaged in the same or similar work for the purposes of Clause 3(2) of the Framework Agreement, it must be determined whether, in the light of a number of factors, such as the nature of the work, training requirements and working conditions, those persons can be regarded as being in a comparable situation (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 44 and the case-law cited).

36 Where it is established that, when they were employed, part-time workers carried out the same duties as workers employed full-time by the same employer or held the same post as them, it is necessary, in principle, to regard the situations of those two categories of workers as being comparable (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 45 and the case-law cited).

37 In that regard, it is important to note that it is for the national court, which alone has jurisdiction to assess the facts, to determine whether, in the light of the actual nature of the activities carried out by the workers concerned, equal value can be attributed to them (judgment of 3 June 2021, *Tesco Stores*, C-624/19, EU:C:2021:429, paragraph 30 and the case-law cited).

38 In the present case, subject to verification by the referring court, it appears that the defendant in the main proceedings does not dispute that the services provided by the applicants in the main proceedings are comparable to those performed by the workers which it employs on a full-time basis.

39 In the third place, as regards the question whether there is a difference in treatment between persons working as part-time care assistants, such as the applicants in the main proceedings, and persons working as full-time care assistants, it is apparent from the orders for reference that a part-time care assistant receives a salary supplement for overtime only in respect of hours worked in excess of the normal weekly working time of a person working as a full-time care assistant, amounting, in the present case, to 38.5 hours under Paragraph 10(1) of the MTV.

40 Thus, a person working as part-time carer must work the same number of hours as a person working as a full-time care assistant in order to receive the additional pay for overtime, regardless of the normal working hours agreed individually in the employment contract of that person working as a part-time care assistant, with the result that he or she cannot reach the number of hours of work required, or that he or she has a significantly lower probability of doing so than a person working as a full-time care assistant, the number of hours of work required in order to receive that additional pay.

41 Although, as the referring court states, the remuneration for overtime appears to be equal for persons working as part-time care assistants and for persons working as full-time care assistants, in so far as the right to such an additional pay arises only beyond the threshold of 38.5 hours per week for all those persons, it should nevertheless be noted that the setting of that uniform threshold both for persons working as full-time care assistants and for persons working as part-time care assistants represents, for the latter, in view of the normal working time agreed in their contracts, a greater burden in so far as at least part of the hours worked in excess of that normal working time, although remunerated, does not give rise to entitlement to a supplement. Persons working as full-time care assistants receive an overtime supplement from the very first hour of work performed beyond the normal working hours applicable to them, that is to say, 38.5 hours per week, whereas persons working as part-time care assistants do not receive a supplement for working hours beyond the normal working hours agreed in their employment contracts but below the normal working hours fixed for persons working as full-time care assistants.

42 Thus, persons working as part-time care assistants who work hours in excess of the normal working time agreed in their contracts of employment without receiving additional pay are treated unequally as compared with persons working as full-time care assistants whose hours worked in excess of 38.5 hours per week give entitlement to additional pay (see, to that effect, judgment of 27 May 2004, *Elsner-Lakeberg*, C-285/02, EU:C:2004:320, paragraph 17).

43 It should be recalled that, according to settled case-law, the remuneration of part-time workers must be equivalent to that of full-time workers, subject to the application of the principle *pro rata temporis*, as provided for in Clause 4(2) of the Framework Agreement (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 53 and the case-law cited).

44 Consequently, subject to verification by the referring court, in so far as, for persons working as part-time care assistants, such as the applicants in the main proceedings, the number of hours of work in excess of which they receive additional pay is not reduced *pro rata temporis* in step with the duration of employment individually agreed in their employment contracts, it appears that they are treated 'less favourably' than persons working as full-time care assistants, which is prohibited by Clause 4(1) of the Framework Agreement, unless that difference in treatment is justified on 'objective grounds' within the meaning of that clause (see, to that effect, judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 49 and the case-law cited).

45 In that regard, it will be for the referring court to determine, having regard to all the relevant factors, whether the difference in treatment at issue in the main proceedings which it has established can be regarded as justified on 'objective grounds'.

46 From that point of view, it must be borne in mind that, although, in the context of Article 267 TFEU, the Court has no jurisdiction to assess the facts and apply the rules of EU law to a particular case, it is for the Court to provide the referring court with all necessary information with a view to offering guidance in that determination (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 55 and the case-law cited).

47 In that regard, it should be observed that the concept of 'objective grounds' within the meaning of Clause 4(1) of the Framework Agreement requires the difference in treatment found to exist to be justified by the presence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria, in order to ensure that that difference in treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such part-time contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from the pursuit of a legitimate social policy objective of a Member State (judgment of 19 October 2023, *Lufthansa CityLine*, C-660/20, EU:C:2023:789, paragraph 58 and the case-law cited).

48 In the present case, the referring court is uncertain whether, first, the objective of deterring employers from requiring workers to work overtime in excess of the individually agreed working hours for those workers and, secondly, the objective of preventing full-time workers from being treated less favourably than part-time workers may constitute 'objective grounds' within the meaning of Clause 4(1) of the Framework Agreement.

49 As regards the first of those objectives, it should be noted that the application of the national legislation at issue in the main proceedings has the consequence that the hours worked by part-time workers in excess of the normal working hours agreed in their employment contracts, without exceeding the normal working hours fixed for a full-time worker, that is to say, 38.5 hours per week, constitute a lesser financial burden for the employer than the same number of overtime hours worked by a full-time worker, given that those hours do not give rise to a supplement. For part-time workers, that legislation thus produces the opposite effect of that sought, since, as the referring court points out, it in reality encourages employers to impose overtime on part-time workers rather than on full-time workers.

50 It follows that the setting of a uniform threshold for part-time workers and full-time workers as regards the grant of overtime pay is not, in the case of part-time workers, capable of achieving the objective of deterring employers from requiring workers to work overtime.

51 As regards the second of the objectives referred to in paragraph 48 of the present judgment, it should be noted that that objective seeks to avoid allegedly unfavourable treatment of full-time workers in relation to part-time workers. The reasoning underlying that objective is based on the premiss that obliging an employer who requires a part-time worker to work overtime to pay that worker additional pay as from the first hour of work performed by that worker in excess of the working hours individually agreed in his or her employment contract, as it does for full-time workers, would give rise to less favourable treatment of the latter workers. That premiss is incorrect, given that, in that situation, full-time workers would, as regards overtime, be treated in the same way as part-time workers, subject to the application of the principle *pro rata temporis*.

52 It follows that that second objective is also incapable of justifying the difference in treatment at issue in the main proceedings.

53 In the light of all the foregoing considerations, the answer to the fourth and fifth questions is that Clause 4(1) and (2) of the Framework Agreement must be interpreted as meaning that national legislation under which the payment of overtime supplements is provided, for part-time workers, only for hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation, constitutes 'less favourable' treatment of part-time workers, within the meaning of Clause 4(1), which is not capable of being justified by the pursuit, first, of the objective of deterring the employer from requiring workers to work overtime in excess of the hours individually agreed in their employment contracts and, secondly, of the objective of preventing full-time workers from being treated less favourably than part-time workers.

The first, second and third questions

54 By its first to third questions, which it is appropriate to examine together and in the second place, the referring court asks, in essence, whether Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54 must be interpreted as meaning, first, that national legislation under which the payment of overtime supplements is provided, for part-time workers, only for hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation, constitutes indirect discrimination on grounds of sex, even where there is a significantly higher proportion of women than men among full-time workers and, secondly, that such discrimination can be justified by the pursuit of the objective of deterring the employer from requiring workers to work overtime in excess of the hours individually agreed in their employment contracts and of the objective of preventing full-time workers from being treated less favourably than part-time workers.

55 Under Article 157(1) TFEU, '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'. Furthermore, the first paragraph of Article 4 of Directive 2006/54 states that 'for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated'. Article 2(1)(b) of that directive defines the concept of 'indirect discrimination' as the situation in which 'an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'.

56 In that regard, it should be noted, first, as the Advocate General observed in point 33 of his Opinion, that national legislation such as that at issue in the main proceedings does not involve direct discrimination, since it applies without distinction to male and female workers.

57 Secondly, as regards the question whether that legislation gives rise to indirect discrimination, within the meaning of Article 157 TFEU and Directive 2006/54, it must be recalled, in the first place, that legislation such as the national legislation at issue in the main proceedings, as found in paragraph 44 of the present judgment, places part-time workers at a disadvantage as compared with full-time workers in that, for the hours which they work in excess of the working time agreed in their employment contracts without exceeding the normal working hours fixed for full-time workers, that is to say, 38.5 hours a week, they are not entitled to additional pay, whereas the latter workers receive additional pay from the first hour worked in excess of those 38.5 hours per week.

58 In the second place, in order for an apparently neutral measure to constitute indirect discrimination, within the meaning of those provisions, it must have the result, in practice, of placing persons of one sex at a particular disadvantage compared with persons of the other sex. In that regard, it follows from recital 30 of Directive 2006/54 and from the Court's case-law that the appreciation of the facts from which it may be presumed that there has been indirect discrimination is the task of the national judicial authority, in accordance with national law or national practices which may provide, in particular, that indirect discrimination may be established by any means, including on the basis of statistical evidence (judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 46 and the case-law cited).

59 As regards statistical evidence, it should be recalled, first of all, that it is for the national court to assess to what extent those statistics adduced before it concerning the situation of the workforce are valid and whether they can be taken into account, that is to say, whether, for example, they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant (judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 48 and the case-law cited).

60 Next, where the national court has such evidence, it is settled case-law, first, that it must take into consideration all the workers subject to the national legislation in which the difference in treatment has its origin and, secondly, that the best possible method of comparison is to compare the respective proportions of men in the workforce who are and who are not affected by the rule in question and the same proportions of women in the workforce who are and who are not affected (judgments of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, paragraph 41 and the case-law cited, and of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 47 and the case-law cited).

61 In the present case, it is apparent from the orders for reference, which refer to statistical evidence provided by the defendant in the main proceedings, that it employs more than 5 000 people on all its sites, 76.96% of whom are women. Of all those workers, 52.78% work part-time. Among part-time workers, 84.74% are female and 15.26% are male, and within the group of full-time workers, 68.20% are female and 31.80% are male. Consequently, female workers have a majority both in the group which is 'placed at an advantage' and in the group which is 'disadvantaged' by the national legislation at issue in the main proceedings.

62 In such a situation, the referring court asks whether indirect discrimination may be found even if the group of full-time workers who do not suffer that disadvantage does not consist of a considerably higher number of men than women.

63 In that regard, it should be recalled that, as the Advocate General states in points 36 to 40 of his Opinion, neither the definition of the concept of 'indirect discrimination', set out in Article 2(1)(b) of Directive 2006/54, which is moreover worded in the same terms as that contained in the second indent of Article 1(2) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 2002 L 269, p. 15), nor the other provisions of Directive 2006/54 make any reference to quantitative elements in the examination of indirect discrimination. That definition adopts a qualitative approach according to which it is important to ascertain whether the national measure at issue is liable, by its very nature, to put persons of one sex 'at a particular disadvantage' compared with persons of the other sex. It follows that the national court must examine all the relevant factors of a qualitative nature in order to determine whether such a disadvantage exists, taking into consideration all the workers subject to the national legislation on which the difference in treatment in question is based.

64 In that context, statistical evidence is only one factor among others to which the national court may have recourse and to which the Court refers, where it exists, in order to establish the existence of indirect discrimination in the context of the implementation of the principle of equal treatment between men and women. Thus, according to the Court's settled case-law, the existence of such a particular disadvantage can be established, for example, if it were proved that national legislation is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex (judgment of 5 May 2022, *BVAEB*, C-405/20, EU:C:2022:347, paragraph 49 and the case-law cited).

65 In that regard, it should be noted, first, that, according to the very wording of Article 2(1)(b) of Directive 2006/54, indirect discrimination refers only to a provision, criterion or practice which 'would put [persons of one sex] at a disadvantage' compared with persons of the other sex. Consequently, it follows from the terms of that provision that indirect discrimination may be characterised by the sole fact that persons of one sex are put at a particular disadvantage compared with persons of the other sex.

66 Secondly, as the European Commission has pointed out, it appears from the statistical evidence set out in the request for a preliminary ruling that only 35% of the male workers employed by the defendant in the main proceedings, subject to the national legislation at issue in the main proceedings, work part-time and are adversely affected by that legislation, while the proportion of female workers employed by it, who work part time and who are adversely affected by that legislation appears to be significantly higher, which it is for the referring court to ascertain.

67 It follows that, in order for indirect discrimination on grounds of sex to be established in circumstances such as those in the main proceedings, there is no need for there to be, among the full-time employees, considerably more men than women if the conditions arising from the case-law cited in paragraphs 60 and 64 of the present judgment are satisfied.

68 The referring court asks, in that context, whether the judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* (C-16/19, EU:C:2021:64, paragraphs 25 to 36), from which it is apparent that the principle of equal treatment, enshrined in Directive 2000/78, is intended to protect a worker with a disability, within the meaning of that directive, against any discrimination on the basis of that disability not only in relation to workers who do not have a disability, but also in relation to other workers with a disability, is relevant in the present case.

69 In that regard, it is sufficient to note that, in the case which gave rise to the judgment cited in the preceding paragraph, the difference in treatment concerned only members of the same protected group within the meaning of Directive 2000/78, namely workers with a disability, whereas, in the cases in the main proceedings, that difference concerns female workers as compared with male workers. That judgment is therefore not relevant to the answer to be given to the first to third questions.

70 Such an interpretation is supported by the case-law of the Court concerning Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24). The Court held that the concept of 'discrimination … on ground of sex' in Article 4(1) of that directive could apply only to cases of discrimination between male workers, on the one hand, and female workers, on the other, and that that provision could not be understood as constituting a provision of EU law guaranteeing equal treatment in the broad sense, that is to say, also between persons belonging to the same sex (judgment of 12 May 2021, *INSS (Pension supplement for mothers – II)*, C-130/20, EU:C:2021:381, paragraphs 21 and 22).

71 Thirdly, if the referring court, on the basis of statistical data produced by the defendant in the main proceedings and, as the case may be, other relevant facts, reaches the conclusion that the national legislation at issue in the main proceedings places female workers at a particular disadvantage compared with male workers, such legislation would be contrary to Article 2(1)(b) of Directive 2006/54 unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 49).

72 In that regard, it should be recalled that it is apparent from paragraphs 44 to 52 of the present judgment that a 'less favourable' treatment of part-time workers in relation to full-time workers, resulting from legislation such as the national legislation at issue in the main proceedings, cannot be justified by the pursuit, first, of the objective of deterring employers from requiring workers to work overtime in excess of the working time agreed individually in their employment contracts and, secondly, of the objective of preventing full-time workers from being treated less favourably than part-time workers. That interpretation applies, *mutatis mutandis*, as regards the justification of indirect discrimination on grounds of sex, referred to in Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54, which stems from that legislation.

73 It follows from the foregoing that the answer to the first to third questions is that Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54 must be interpreted as meaning, first, that national legislation under which the payment of additional pay is provided, for part-time workers, only for hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation, constitutes indirect discrimination on grounds of sex if it is established that that legislation disadvantages a significantly higher proportion of women than men without it also being necessary for the group of workers which is not placed at a disadvantage by that legislation, namely full-time workers, to be made up of a considerably higher number of men than women and, secondly, that such discrimination cannot be justified by the pursuit of the objective of deterring the employer from requiring workers to work overtime in excess of the hours individually agreed in their employment contracts and of the objective of preventing full-time workers from being treated less favourably than part-time workers.

Costs

74 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

1. **Clause 4(1) and (2) of the Framework Agreement on part-time work concluded on 6 June 1997 and 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**

   must be interpreted as meaning that national legislation under which the payment of overtime supplements is provided, for part-time workers, only for hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation, constitutes 'less favourable' treatment of part-time workers, within the meaning of Clause 4(1), which is not capable of being justified by the pursuit, first, of the objective of deterring the employer from requiring workers to work overtime in excess of the hours individually agreed in their employment contracts and, secondly, of the objective of preventing full-time workers from being treated less favourably than part-time workers.

2. **Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation**

   must be interpreted as meaning, first, that national legislation under which the payment of overtime supplements is provided, for part-time workers, only for hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation, constitutes indirect discrimination on grounds of sex if it is established that that legislation disadvantages a significantly higher proportion of women than men without it also being necessary for the group of workers which is not placed at a disadvantage by that legislation, namely full-time workers, to be made up of a

considerably higher number of men than women and, secondly, that such discrimination cannot be justified by the pursuit of the objective of deterring the employer from requiring workers to work overtime in excess of the hours individually agreed in their employment contracts and of the objective of preventing full-time workers from being treated less favourably than part-time workers.

[Signatures]