JUDGMENT OF THE COURT
17 October 1995 *

In Case C-450/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesarbeitsgericht for a preliminary ruling in the proceedings pending before that court between

Eckhard Kalanke

and

Freie Hansestadt Bremen,

supported by

Heike Glißmann,

intervener,

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

* Language of the case: German.

and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn (Rapporteur), C. Gulmann and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Eckhard Kalanke, by Rüdiger Haubrock, Rechtsanwalt, Bremen,

— Freie Hansestadt Bremen, by Hartmuth Sager, Rechtsanwalt, Hamburg,

— Heike Glißmann, by Klaus Richter, Rechtsanwalt, Bremen,

— the United Kingdom, by S. Lucinda Hudson, Assistant Treasury Solicitor, acting as Agent, and Eleanor Sharpston, Barrister, and

— the Commission of the European Communities, by Marie Wolfcarius and Angela Bardenhewer, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Eckhard Kalanke, represented by Rüdiger Haubrock and by Karsten Kühne, Rechtsanwalt, Berlin, of Freie Hansestadt Bremen, represented by Gerhard Lohfeld, Rechtsanwalt, Bremen, of Heike Glißmann, of the United Kingdom and of the Commission at the hearing on 13 December 1994,

after hearing the Opinion of the Advocate General at the sitting on 6 April 1995,

gives the following

Judgment

1 By order of 22 June 1993, received at the Court on 23 November 1993, the Bundesarbeitsgericht (Federal Labour Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two 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 between Mr Kalanke and Freie Hansestadt Bremen (City of Bremen).

3 Paragraph 4 of the Landesgleichstellungsgesetz of 20 November 1990 (Bremen Law on Equal Treatment for Men and Women in the Public Service, *Bremisches Gesetzblatt*, p. 433, hereinafter 'the LGG') provides:

'Appointment, assignment to an official post and promotion

(1) In the case of an appointment (including establishment as a civil servant or judge) which is not made for training purposes, women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented.

(2) In the case of an assignment to a position in a higher pay, remuneration and salary bracket, women who have the same qualifications as men applying for the same post are to be given priority if they are under-represented. This also applies in the case of assignment to a different official post and promotion.

(3) ...

(4) Qualifications are to be evaluated exclusively in accordance with the requirements of the occupation, post to be filled or career bracket. Specific experience and capabilities, such as those acquired as a result of family work, social commitment or unpaid activity, are part of the qualifications within the meaning of subparagraphs (1) and (2) if they are of use in performing the duties of the position in question.

(5) There is under-representation if women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department. This also applies to the function levels provided for in the organization chart.'

4 It appears from the order for reference that, at the final stage of recruitment to a post of Section Manager in the Bremen Parks Department, two candidates, both in BAT pay bracket III, were shortlisted:

— Mr Kalanke, the plaintiff in the main proceedings, holder of a diploma in horticulture and landscape gardening, who had worked since 1973 as a horticultural employee in the Parks Department and acted as permanent assistant to the Section Manager; and

— Ms Glißmann, holder of a diploma in landscape gardening since 1983 and also employed, since 1975, as a horticultural employee in the Parks Department.

5 The Staff Committee refused to give its consent to Mr Kalanke's promotion, proposed by the Parks Department management. Reference to arbitration resulted in a recommendation in favour of Mr Kalanke. The Staff Committee then stated that the arbitration had failed and appealed to the conciliation board which, in a decision binding on the employer, considered that the two candidates were equally qualified and that priority should therefore be given, in accordance with the LGG, to the woman.

6 Before the Arbeitsgericht (Labour Court), Mr Kalanke claimed that he was better qualified than Ms Glißmann, a fact which the conciliation board had failed to

recognize. He argued that, by reason of its quota system, the LGG was incompatible with the Bremen Constitution, with the Grundgesetz (German Basic Law) and with Paragraph 611a of the BGB (German Civil Code). His application was dismissed, however, by the Arbeitsgericht and again, on appeal, by the Landesarbeitsgericht (Regional Labour Court).

7 The First Chamber of the Bundesarbeitsgericht, hearing the plaintiff's application for review on a point of law, considers that resolution of the dispute depends essentially on the applicability of the LGG. It points out that if the conciliation board was wrong in applying that Law, its decision would be unlawful because it gave an advantage, solely on the ground of sex, to an equally qualified female candidate. The Bundesarbeitsgericht accepts the Landesarbeitsgericht's finding that the two applicants were equally qualified for the post. Considering itself bound also by that court's finding that women are under-represented in the Parks Department, it holds that the conciliation board was obliged, under Paragraph 4(2) of the LGG, to refuse to agree to the plaintiff's appointment to the vacant post.

8 The Bundesarbeitsgericht points out that the case does not involve a system of strict quotas reserving a certain proportion of posts for women, regardless of their qualifications, but rather a system of quotas dependent on candidates' abilities. Women enjoy no priority unless the candidates of both sexes are equally qualified.

9 The national court considers that the quota system is compatible with the German constitutional and statutory provisions referred to in paragraph 6 above. More specifically, it points out that Paragraph 4 of the LGG must be interpreted in accordance with the Grundgesetz with the effect that, even if priority for promotion is to be given in principle to women, exceptions must be made in appropriate cases.

10 It notes a number of factors suggesting that such a system is not incompatible with the Directive.

11 Considering, however, that doubts remain in that regard, the Bundesarbeitsgericht has stayed the proceedings and sought a preliminary ruling from the Court on the following questions:

'1. Must Article 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, be interpreted as also covering statutory provisions under which, when a position in a higher pay bracket is being assigned, women with the same qualifications as men applying for the same position are to be given priority if women are under-represented, there being deemed to be under-representation if women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group within a department, which also applies to the function levels provided for in the organization chart?

2. If Question 1 is answered in the negative:

Must Article 2(1) of Council Directive 76/207/EEC be interpreted, having regard to the principle of proportionality, as meaning that it is not permissible to apply statutory provisions under which, when a position in a higher pay bracket is being assigned, women with the same qualifications as men applying for the same position are to be given priority if women are under-represented, there being deemed to be under-representation if women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group within a department, which also applies to the function levels provided for in the organization chart?'

12 Both questions seek to clarify the scope of the derogation from the principle of equal treatment allowed by Article 2(4) of the Directive and should therefore be examined together.

13 The national court asks, essentially, whether Article 2(1) and (4) of the Directive precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.

14 In its order for reference, the national court points out that a quota system such as that in issue may help to overcome in the future the disadvantages which women currently face and which perpetuate past inequalities, inasmuch as it accustoms people to seeing women also filling certain more senior posts. The traditional assignment of certain tasks to women and the concentration of women at the lower end of the scale are contrary to the equal rights criteria applicable today. In that connection, the national court cites figures illustrating the low proportion of women in the higher career brackets among city employees in Bremen, particularly if sectors, such as education, where the presence of women in higher posts is now established are excluded.

15 The purpose of the Directive is, as stated in Article 1(1), to put into effect in the Member States the principle of equal treatment for men and women as regards, *inter alia,* access to employment, including promotion. Article 2(1) states that the principle of equal treatment means that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly'.

16 A national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented, involves discrimination on grounds of sex.

17 It must, however, be considered whether such a national rule is permissible under Article 2(4), which provides that the 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'.

18 That provision is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life (see Case 312/86 *Commission* v *France* [1988] ECR 6315, paragraph 15).

19 It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men.

20 As the Council considered in the third recital in the preamble to 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'.

21 Nevertheless, as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly (see Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 36).

22 National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive.

23 Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.

24 The answer to the national court's questions must therefore be that Article 2(1) and (4) of the Directive precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.

Costs

25 The costs incurred by the United Kingdom and the Commission of the European Communities, which have 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,

in answer to the questions referred to it by the Bundesarbeitsgericht by order of 22 June 1993, hereby rules:

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 precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are underrepresented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.

Rodríguez Iglesias Kakouris Edward

Puissochet Hirsch Mancini

Schockweiler Moitinho de Almeida Kapteyn

Gulmann Murray

Delivered in open court in Luxembourg on 17 October 1995.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President