JUDGMENT OF THE COURT (First Chamber)

10 March 2005 *

In Case C-196/02,

REFERENCE for a preliminary ruling under Article 234 EC from the Irinodikio Athinon (Greece), made by decision of 13 May 2002, received at the Court on 27 May 2002, in the proceedings

Vasiliki Nikoloudi

v

Organismos Tilepikinonion Ellados AE,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas (Rapporteur), A. La Pergola, S. von Bahr and K. Schiemann, Judges,

* Language of the case: Greek.

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Ms Nikoloudi, by N. Zelios, dikigoros,

— Organismos Tilepikinonion Ellados AE, by P. Vallis and A. Margariti, dikigori,

— the Greek Government, by S.A. Spyropoulos and E.-M. Mamouna, acting as Agents,

— the Commission of the European Communities, by M. Patakia and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2004,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19) and 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).

2 The reference was submitted in proceedings between Ms Nikoloudi and her employer, Organismos Tilepikinonion Ellados AE (Hellenic Telecommunications Organisation; 'OTE'), a company incorporated under Greek law, for which she worked part-time as a cleaner, concerning her being denied the possibility, envisaged by relevant collective agreements, of appointment as an established member of the OTE staff.

Legal context

Community rules

3 Article 119 of the Treaty lays down the principle of equal pay for male and female workers for equal work or work of equal value.

4 In accordance with the first paragraph of Article 1 of Directive 75/117, this principle means 'the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration'.

5 Directive 76/207 is designed to eliminate all discrimination on grounds of sex as regards working conditions and conditions for access to jobs or posts.

6 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6) had to be transposed by the Member States by 1 January 2001. It applies to the situations covered by inter alia Article 119 of the Treaty and Directives 75/117 and 76/207.

7 Under Article 4 of Directive 97/80, the Member States are to 'take such measures as are necessary ... to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish,

before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.

National rules

8 Article 2(1) of the General Staff Regulations of OTE provides that OTE's staff is composed of established staff and temporary staff. According to the case file, OTE's established staff comprises full-time employees only.

9 The temporary staff is composed of workers taken on under fixed-term contracts or, in accordance with Article 24a(2) of the General Staff Regulations and by way of exception, under contracts of indefinite duration in the case of, first, the post of part-time (female) cleaner (Article 24a(2)(a)) and, second, the taking on of dependants of a deceased employee because of family financial problems resulting from the death (Article 24a(2)(c)).

10 Article 3(v)(d) of the General Staff Regulations of OTE limits the post of cleaner to women.

11 Article 5(9) of the General Staff Regulations of OTE, in the version applicable until 1 January 1996, disregarded periods of part-time work entirely for the purposes of calculating length of service, while an amendment from that date provides that periods of part-time work are to be included pro rata in the calculation. This amendment specifies in relation to female cleaners on the temporary staff that the three hours of work per day carried out by those working part-time are to be taken as equivalent to half of a full-time job.

12 The specific collective agreements of 2 November 1987 and 10 May 1991 ('the agreements at issue'), concluded between OTE and the Omospondia Ergazomenon OTE (OTE Workers' Federation), govern the appointment, under certain conditions, of temporary OTE staff as established staff. According to the case file, these agreements are founded on Article 66(1) of the General Staff Regulations of OTE, which provides for the 'definitive' engagement of temporary staff working full-time under a contract of indefinite duration.

13 According to the order for reference, the first of the agreements at issue envisaged applications to become established only from temporary staff who had completed at least two years' continuous full-time employment. The second of those agreements, which did not require any period of prior service, was however interpreted and applied by OTE as concerning only full-time staff.

The main proceedings and the questions referred for a preliminary ruling

14 On 1 September 1978 Ms Nikoloudi was taken on by OTE as a temporary member of staff under an employment contract of indefinite duration. She was employed as a part-time cleaner until 27 November 1996. On 28 November 1996 her contract was converted into a full-time contract. She was pensioned off on 17 August 1998, having reached the age-limit.

15 According to the case file, neither of the agreements at issue was applied to Ms Nikoloudi up to her retirement on the ground that she was working part-time.

16 Since the possibility, envisaged by those agreements, of appointment as an established member of staff had not been open to her, Ms Nikoloudi brought an action before the national court, maintaining that her exclusion constituted discrimination on grounds of sex, prohibited by Community law.

17 She also contended that Article 5(9) of the General Staff Regulations of OTE, both as originally drafted and in its amended version of 1 January 1996, is contrary to Community law and, therefore, inapplicable.

18 Finally, Ms Nikoloudi submitted that if the entire period of part-time employment had been taken into account when calculating her length of service, there would have arisen to her advantage a difference in pay amounting to EUR 5 834.43 for the period from 28 November 1996 to 17 August 1998.

19 By her action, Ms Nikoloudi sought judgment against OTE for that amount, together with interest.

20 OTE contended that Ms Nikoloudi did not become an established member of staff because, in accordance with the requirement applied, in its submission, without discrimination and irrespective of the staff's specialism or sex, a full-time job is a

prerequisite in order for temporary staff to become established. In addition, by virtue of Article 5(9) of the General Staff Regulations of OTE, part-time employment could not be taken into account in calculating Ms Nikoloudi's length of service until 1 January 1996.

21 In those circumstances, the Irinodikio Athinon took the view that interpretation of Community provisions was required in the case brought before it and therefore decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the existence and operation of a rule, such as, in the present case, Article 24a(2)(a) of the General Staff Regulations of [OTE], under which it is laid down that (only) women are taken on as cleaners on employment contracts of indefinite duration for part-time or intermittent employment, consistent with the requirements which arise from [Article 119 of the Treaty] and Directives 75/117 and 76/207?

Under the case-law of the Court of Justice, given that reduced working hours are tied to reduced pay can the rule at issue be interpreted as automatically constituting direct discrimination on grounds of sex, since it immediately and directly ties part-time employment to the sex of the (female) employees and thus places only women at a disadvantage?

(2) Does the exclusion of temporary part-time cleaners employed for an indefinite duration from the benefits of the specific collective agreement of 2 November 1987 between OTE and the Omospondia Ergazomenon OTE (OTE Workers' Federation) with regard to their appointment as established members of staff

(and indeed irrespective of the duration of the part-time employment contract), as in the present case, on the ground that that specific collective agreement required at least two years' full-time service infringe [Article 119 of the Treaty] and the abovementioned directives or another rule of Community law, as indirect discrimination on grounds of sex, on the assumption that those rules (notwithstanding their ostensibly neutral character since no link is made to the employees' sex) excepted exclusively female cleaners, because no men worked part-time under a contract of indefinite duration either in the General Services Sector (to which cleaners belong) or in any other OTE staff sector?

(3) When applying the specific collective agreement of 10 May 1991 between OTE and the OTE Workers' Federation, OTE required temporary staff who were to become (probationary) members of the established staff to have a contract of indefinite duration and to be employed full-time.

Does the exclusion of part-time cleaners (irrespective of the duration of their contract), as in the present case, constitute impermissible indirect discrimination on grounds of sex falling within provisions of Community law (Article 119 [of the Treaty] and Directives 75/117 and 76/207), given that the specific collective agreement excepted exclusively female cleaners because no men worked part-time for an indefinite duration in any OTE staff sector?

(4) Under Article 5(9) of the General Staff Regulations of OTE, as in force until 1 January 1996, part-time employment was not included at all when calculating length of service for the purpose of determining better conditions of pay. Thereafter, from 1 January 1996, that provision was amended by a specific

collective agreement and it was laid down that part-time employment is regarded as equivalent to half of an equal period of full-time employment.

On the basis that part-time employment exclusively or mainly concerned women, can the provisions under which part-time employment is entirely excluded (until 1 January 1996) or taken into account in proportion to full-time employment (from 1 January 1996) be interpreted, in the light also of the case-law of the Court of Justice, as introducing indirect discrimination on grounds of sex prohibited under the rules of Community law and, consequently, should the entire period of part-time employment be added to their length of service?

(5) If the Court of Justice answers Questions 1 to 4 in the affirmative, in the sense that the contested rules and provisions of collective agreements in fact contravene Community law, who bears the burden of proof when employees plead that the principle of equal treatment has been infringed to their detriment?'

Findings of the Court

Introductory observations

22 Two preliminary points should be made regarding the questions asked by the national court. First, the main proceedings concern the possibility, granted under a collective agreement, for temporary OTE staff who have entered into a contract of indefinite duration to become established members of staff. In the context of

establishment, it is clear that a fixed-term contract is fundamentally different in nature from a contract of indefinite duration or from an established post. Consequently, workers who have entered into a fixed-term contract are not in a situation which is comparable, with regard to establishment, to that of workers occupying a post under a contract of indefinite duration. Accordingly, the examination of the questions referred for a preliminary ruling will relate to the latter workers only.

23 Second, notwithstanding national rules which appear to provide that the only temporary members of staff working part-time are female cleaners, OTE claims to have repeatedly taken on men for part-time work on contracts of indefinite duration.

24 Accordingly, the second and third questions, which relate to indirect discrimination, should be understood as concerning the situation where OTE's assertions prove correct and, therefore, the possibility of becoming established offered by the agreements at issue has been denied to those men too. On the other hand, the first question, relating to direct discrimination, is based on the premiss that the possibility of becoming established has been denied to female cleaners only. Since these two situations are mutually exclusive, the national court has the task of determining within which of the two frameworks the main proceedings fall.

Question 1

25 By its first question, the national court essentially asks whether Community law precludes a provision such as Article 24a(2)(a) of the General Staff Regulations of OTE under which only female cleaners, and therefore only women, can be taken on for an indefinite period for part-time work and, in particular, whether such a

provision constitutes, in itself, direct discrimination on grounds of sex, given that it ties part-time employment to females, placing them at a financial disadvantage.

26 It must be considered first of all whether equal work, or work of equal value, exists in order to identify situations comparable to that of Ms Nikoloudi and, thus, to be able to apply the principle of equal treatment to the case in point.

27 Contrary to the submissions of the Commission and the Greek Government, the fact that at OTE there is no man carrying out the same work as that performed by Ms Nikoloudi does not preclude application of that principle.

28 So far as concerns equal pay, in light of the very wording of Article 119 of the Treaty and of the case-law the work which may serve as a comparision need not be the same as that carried out by the person who invokes that principle of equality in his favour (see, inter alia, Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 49, and Case C-320/00 *Lawrence and Others* [2002] ECR I-7325, paragraph 4). The fact that a comparison is drawn in the context of Directive 76/207 would not in any way alter that conclusion.

29 It is for the national court, which alone has jurisdiction to assess the facts, to determine whether, in the light of facts relating to the nature of the work done and the conditions in which it is carried out, work of equal value to that performed by Ms Nikoloudi exists within OTE, without necessarily taking account of the working schedule on the basis of which the work is performed (see, to this effect, Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraph 43, and *JämO*, cited above, paragraphs 20 and 49).

30 If that is the case and, therefore, situations comparable to that of Ms Nikoloudi exist, the alleged difference in treatment must then be considered in order to determine whether it is directly based on sex.

31 The present case concerns temporary staff taken on for an indefinite period. It appears from the case file that, by virtue of Article 24a(2) of the General Staff Regulations of OTE, a contract of that kind is permitted only in the two situations referred to in paragraph 9 of this judgment, namely, first, for the post of part-time (female) cleaner and, second, where dependants of deceased employees are taken on. Accordingly, the difference in treatment in the main proceedings originates in the fact that the work of a female cleaner that is governed by a contract under Article 24a(2)(a) of the General Staff Regulations of OTE is carried out part-time, whereas contracts concluded under Article 24a(2)(c), which are furthermore neutral as to the worker's sex, do not contain this element.

32 It appears from the order for reference that under Article 3(v)(d) of the General Staff Regulations of OTE, a provision which has the force of law, only women can be taken on, pursuant to Article 24a(2)(a) thereof, as part-time cleaners and that therefore they alone can have entered into a contract of indefinite duration for part-time work.

33 OTE submits in the present case that the post of part-time cleaner, which is justified by the existence of premises having a small area for cleaning, was reserved for women in order to assist them and meet their specific needs.

34 While it is true that categories of workers composed of persons of a single sex are permitted, in particular by Article 2(2) and (4) of Directive 76/207, and that the creation of a category of exclusively female workers therefore does not constitute in itself direct discrimination against women, the subsequent introduction of unfavourable treatment by reference to that category, whether relating to equal treatment or to equal pay, could, however, amount to such discrimination.

35 So far as concerns, first, equal treatment, in the main proceedings every worker having a contract of indefinite duration with the exception of those working part-time, namely female cleaners, was appointed as an established member of staff.

36 It follows that while the criterion of a full-time job, as a precondition for appointment as an established member of staff, is ostensibly neutral as to the worker's sex, it effectively excludes a category of workers which, by virtue of Article 3(v)(d) of the General Staff Regulations of OTE read in conjunction with Article 24a (2) thereof, can only be composed of women. Where such a criterion does not render incomparable, with regard to establishment, two situations which as for the rest are comparable, it constitutes direct discrimination on grounds of sex.

37 So far as concerns, next, equal pay, it must be stated first that there is nothing in the case file to suggest that the rate of pay of part-time workers differs from the rate of those working full-time.

38 In any event, as the Advocate General has noted in point 33 of her Opinion, the fact that part-time work is remunerated at a lower hourly rate than full-time work does not systematically lead to the conclusion that there is discrimination in so far as the

difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are unrelated to any discrimination on grounds of sex (see, to this effect, Case 96/80 *Jenkins* [1981] ECR 911, paragraphs 10 and 11). In the present case the Court does not have the information necessary for such an examination.

39 Second, and in answer to the point added by the national court to its question, it appears that there is nothing to prevent women from working full-time. Indeed Ms Nikoloudi did so from 28 November 1996 until she retired. Accordingly, the mere fact that women who have taken up the option of part-time work are paid less than their full-time colleagues in that they work less than the latter does not constitute in itself direct discrimination even where only women work part-time.

40 In view of the foregoing considerations, the answer to the first question must be that Community law, in particular Article 119 of the Treaty and Directive 76/207, is to be interpreted as meaning that the existence and application of a provision such as Article 24a(2)(a) of the General Staff Regulations of OTE, under which only female cleaners, and therefore only women, can be taken on under a contract of indefinite duration for part-time work, do not constitute, in themselves, direct discrimination on grounds of sex against women. However, the subsequent exclusion of a possibility of appointment as an established member of staff by reference, ostensibly neutral as to the worker's sex, to a category of workers which, under national rules having the force of law, is composed exclusively of women constitutes direct discrimination on grounds of sex within the meaning of Directive 76/207. In order for there to be no direct discrimination on grounds of sex, the factor characterising the category to which the excluded worker belongs must be such as to place that worker in a situation that is objectively different, with regard to appointment as an established member of staff, from the situation of those who are eligible to become established.

Questions 2 and 3

41 By its second and third questions, which it is appropriate to consider together, the national court essentially asks whether the exclusion, brought about by the agreements at issue, of the possibility of part-time temporary staff being appointed as established staff constitutes indirect discrimination on grounds of sex.

42 In asking these questions, the national court proceeds on the basis that that exclusion affects only female staff since, according to it, no male worker is employed by OTE part-time for an indefinite period. If that is the case, and in light of the answer given to the first question, there is no need to answer the second and third questions.

43 However, according to the case file OTE claims to have repeatedly taken on men under such contracts for part-time work. Furthermore, the national court indicates by the wording of its fourth question that part-time work might concern women only mainly, instead of exclusively. It therefore remains expedient to answer these two questions inasmuch as the group of workers who were precluded from being appointed as established members of staff could be composed of men as well as women.

44 It is settled case-law that a national measure involves indirect discrimination where, although worded in neutral terms, it works to the disadvantage of a much higher percentage of women than men (see Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 30, Case C-100/95 *Kording* [1997] ECR I-5289, paragraph 16, and Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 43).

45 In the present case, it is clear from the case file that, within the category of temporary staff who have entered into a contract of indefinite duration, the agreements at issue place part-time workers at a disadvantage compared with full-time workers inasmuch as only the latter may benefit from the possibility offered by the agreements of appointment as an established member of staff.

46 It is for the national court to ascertain whether OTE has in fact taken men on under such contracts for part-time work and, as the case may be, to determine whether, within the disadvantaged category of workers employed for an indefinite period on a part-time basis, a much higher percentage of women than men has been denied that possibility of becoming established pursuant to the agreements at issue.

47 In such a case, provisions such as those at issue in the main proceedings result as a matter of fact in discrimination against female workers by comparison with male workers and must in principle be regarded as contrary to Article 3 of Directive 76/207 in that they concern access to established posts for the purposes of that article. It would be otherwise only if the difference of treatment between the two categories of worker were justified by factors unrelated to any discrimination on grounds of sex (see, to this effect, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 12, and Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 57).

48 It is for the national court, which alone has jurisdiction to assess the facts and to interpret the national legislation, to determine whether such a justification exists. It is necessary in that regard to ascertain, in light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, whether those aims appear to be unrelated to any discrimination on grounds of sex and whether those provisions, as a means to the achievement of certain aims, are capable of advancing those aims (see, to this effect, *Rinner-Kühn*, cited above, paragraph 15, and *Steinicke*, cited above, paragraph 58).

49 However, although in preliminary ruling proceedings it is for the national court to establish whether such objective reasons exist in the particular case before it, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file and on the written and, as the case may be, oral observations which have been submitted to it, in order to enable the national court to give judgment (see Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 13, and *Steinicke*, paragraph 59).

50 In this connection, although only part-time workers, as a group, have been denied the possibility of appointment as an established member of staff, no justification regarding this choice has been brought to the Court's notice.

51 So far as concerns the observations submitted by OTE, the justification according to which the factor of part-time work constitutes a sufficient reason, unrelated to sex, to explain the difference in treatment at issue cannot be upheld. That must also be so in the case of the justification that the difference in treatment is founded on objective reasons of general public and social interest in that the national public-utility undertaking should not bear excessive burdens.

52 Even supposing that this last argument put forward by OTE seeks to assert a legitimate aim falling within policy on economic development and job creation, it nevertheless constitutes a mere generalisation insufficient to show that the aim of the measures at issue is unrelated to any discrimination on grounds of sex (see, to this effect, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 76).

53 Furthermore, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection

measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes (see Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 35, and *Steinicke*, paragraph 66).

54 Accordingly, if the national court holds that there is no justification for the provisions at issue in the main proceedings, it remains to be determined whether the first of the agreements at issue, which required two years' full-time service, or the second should have been applied to Ms Nikoloudi.

55 As regards length of service, which is the subject of specific appraisal when the fourth question is answered (see, in particular, paragraphs 61 to 65 of this judgment), it need only be pointed out here that although, as the Advocate General observes in point 50 of her Opinion, length of service goes hand in hand with experience and generally enables workers to perform their tasks better, the objectivity of such a criterion depends on all the circumstances in each individual case (see, to this effect, Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 14, *Gerster*, cited above, paragraph 39, and *Kording*, cited above, paragraph 23).

56 It follows that the national court must reflect on the aim pursued by the first of the agreements at issue inasmuch as it made the possibility of appointment as an established member of staff subject to the requirement of two years' full-time work. It is for the national court to determine whether, in light of that aim, this requirement should have been applied also to part-time workers, or whether the circumstances of the main proceedings justified the requirement being applied proportionally to working time. Thus, in the case of a part-time job, such as Ms Nikoloudi's, the length of service requirement would have been four years. It appears that in both cases Ms Nikoloudi would have met the requirement. In any event the second of the agreements at issue provided for appointment as an established member of staff without a requirement as to length of service and, therefore, should have been applied also to part-time workers.

57 In view of the foregoing considerations, the answer to the second and third questions must be that, should the premiss that only part-time female cleaners have been denied the possibility of appointment as an established member of staff prove incorrect, and if a much higher percentage of women than men has been affected by the provisions of the agreements at issue, the exclusion, brought about by those agreements, of the appointment of part-time temporary staff as established staff constitutes indirect discrimination. Such a situation is contrary to Article 3 of Directive 76/207 unless the difference of treatment between these workers and those working full-time is justified by factors unrelated to any discrimination on grounds of sex. It is for the national court to determine whether that is the case.

Question 4

58 By its fourth question, the national court essentially asks whether the total or proportional exclusion of part-time employment when calculating the length of service of staff constitutes indirect discrimination on grounds of sex, given that it exclusively or mainly affects female staff. Should the entire period of part-time employment therefore be taken into account in that calculation?

59 A preliminary point to note is that this question falls within the scope of Directive 76/207 and, more specifically, Article 5 thereof. It follows from all of the foregoing that the main proceedings relate to the conditions under which periods of work must be completed in order to enable a worker to have a certain length of service recognised. The worker may consequently take advantage, inter alia, of the possibility of establishment offered by the agreements at issue, and, as the national court points out, of better conditions of pay.

60 So far as concerns, first, the total exclusion of part-time employment when calculating length of service, as provided for in Article 5(9) of the General Staff Regulations of OTE in the version prior to 1 January 1996, it should be noted that, as pointed out in paragraphs 44 and 47 of this judgment, there is indirect discrimination where a national measure, although worded in neutral terms, works to the disadvantage of a much higher percentage of women than men. The very wording of the present question states that 'part-time employment exclusively or mainly [concerns] women'. Therefore the exclusion, when calculating length of service, of any period of part-time employment appears to be contrary to Directive 76/207, unless OTE is able to establish that the provision in question is attributable to factors which are objectively justified and are unrelated to any discrimination on grounds of sex.

61 So far as concerns, next, the proportional counting of part-time work when calculating length of service, provided for by the amendment of that article on 1 January 1996, it should be pointed out, as has been done in paragraph 55 of the present judgment (and the case-law cited), that although length of service goes hand in hand with experience and generally enables workers to perform their tasks better, the objectivity of such a criterion depends on all the circumstances in each individual case and, in particular, on the relationship between the nature of the duties carried out and the experience which performance of those duties brings after a certain number of hours of work have been completed.

62 In the main proceedings, the taking into account of length of service is, in OTE's submission, founded on a need on the part of the management to assess workers' professional experience. It must be stated that this aim does not in any way preclude also assessing workers who perform their duties part-time. The only question, as identified in paragraph 56 of the present judgment, is whether the period during which that assessment is made should be extended, in proportion to the reduction in the time worked.

63 As the Advocate General observes in point 62 of her Opinion, the appropriateness of this approach depends on the purpose for which length of service is taken into account. The purpose may be to reward company loyalty or to recognise experience acquired.

64 However, as has already been recalled, the national court alone has jurisdiction to assess the facts and it is for that court to determine in the light of all the circumstances whether and to what extent the provision at issue is justified by objective reasons unrelated to any discrimination on grounds of sex.

65 If that court finds that the proportional taking into account of cleaners' working hours performed on a part-time basis is justified by such reasons, the mere fact that the national provisions affect a much higher percentage of female workers than male workers cannot be regarded as a breach of Article 5 of Directive 76/207 (see, to this effect, *Rinner-Kühn*, cited above, paragraph 14, and *Seymour-Smith and Perez*, cited above, paragraph 69).

66 The answer to the fourth question must therefore be that, where the total exclusion of part-time employment when calculating length of service affects a much higher percentage of female workers than male workers, it constitutes indirect discrimination on grounds of sex contrary to Directive 76/207, unless that exclusion is attributable to factors which are objectively justified and are unrelated to any discrimination on grounds of sex. It is for the national court to determine whether that is the case. The proportional counting of part-time employment when making that calculation is also contrary to Directive 76/207, unless the employer establishes that it is justified by factors whose objectivity depends in particular on the aim pursued by taking length of service into account and, should it be a question of

recognition of experience acquired, on the relationship between the nature of the duties carried out and the experience which performance of those duties brings after a certain number of hours of work have been completed.

Question 5

67 By its fifth question, the national court essentially asks who bears the burden of proof when employees plead that the principle of equal treatment has been infringed to their detriment.

68 Directive 97/80, which applies to the situations covered by Article 119 of the Treaty and by Directives 75/117 and 76/207, provides in Article 4 that the Member States are to take such measures as are necessary to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of that principle.

69 This directive thus codified and expressly extended to the principle of equal treatment within the meaning of Directive 76/207 previous case-law according to which the burden of proof, which in principle lies with the worker, may shift when this is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on a substantially greater percentage of members of one or other sex, it is for the employer to show that there

are objective reasons which justify the difference in pay that has been found (see Case C-127/92 *Enderby* [1993] ECR I-5535, paragraphs 13, 14 and 18, and Case C-381/99 *Brunnhofer* [2001] ECR I-4961, paragraphs 52, 53 and 60).

70 The national court has the task of verifying whether the Greek rules are consistent with Directive 97/80. If this examination reveals a doubt as to whether they are, it should be remembered, first, that in accordance with settled case-law, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by individuals before the national court as against the State, including organisations or bodies, whatever their legal form, which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals (see, to this effect, Case C-188/99 *Foster and Others* [1990] ECR I-3313, paragraphs 16, 18 and 20, and Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 69).

71 However, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, inter alia, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108).

72 The national court therefore has the task of considering the legal nature of OTE and the circumstances regarding its internal organisation in order to ensure that Directive 97/80 is not relied upon against an individual.

73 Second, it should be remembered that, in any event and in accordance with settled case-law, when a situation falls within the scope of a directive, the national court is bound, when applying national law, to interpret it, so far as possible, in the light of

the wording and the purpose of the directive concerned in order to achieve the result sought by the directive (see, inter alia, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, *Faccini Dori*, cited above, paragraph 26, and *Pfeiffer and Others*, cited above, paragraph 113).

74 In light of the 17th and 18th recitals in the preamble to Directive 97/80, the result sought by that directive is, in particular, to ensure that the principle of equal treatment is applied more effectively inasmuch as, if there is a prima facie case of discrimination, it is for the employer to prove that that principle has not been infringed.

75 The answer to the fifth question must therefore be that, where employees plead that the principle of equal treatment has been infringed to their detriment and establish facts from which it may be presumed that there has been direct or indirect discrimination, Community law, in particular Directive 97/80, is to be interpreted as meaning that it shall be for the respondent to prove that there has been no breach of that principle.

Costs

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

On those grounds, the Court (First Chamber) rules as follows:

1. **Community law, in particular Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and 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, is to be interpreted as meaning that the existence and application of a provision such as Article 24a(2)(a) of the General Staff Regulations of Organismos Tilepikinonion Ellados, under which only female cleaners, and therefore only women, can be taken on under a contract of indefinite duration for part-time work, do not constitute, in themselves, direct discrimination on grounds of sex against women. However, the subsequent exclusion of a possibility of appointment as an established member of staff by reference, ostensibly neutral as to the worker's sex, to a category of workers which, under national rules having the force of law, is composed exclusively of women constitutes direct discrimination on grounds of sex within the meaning of Directive 76/207. In order for there to be no direct discrimination on grounds of sex, the factor characterising the category to which the excluded worker belongs must be such as to place that worker in a situation that is objectively different, with regard to appointment as an established member of staff, from the situation of those who are eligible to become established.**

2. **Should the premiss that only part-time female cleaners have been denied the possibility of appointment as an established member of staff prove incorrect, and if a much higher percentage of women than men has been affected by the provisions of the specific collective agreements of 27 November 1987 and 10 May 1991, the exclusion, brought about by those agreements, of the appointment of part-time temporary staff as established**

staff constitutes indirect discrimination. Such a situation is contrary to Article 3 of Directive 76/207 unless the difference of treatment between these workers and those working full-time is justified by factors unrelated to any discrimination on grounds of sex. It is for the national court to determine whether that is the case.

3. **Where the total exclusion of part-time employment when calculating length of service affects a much higher percentage of female workers than male workers, it constitutes indirect discrimination on grounds of sex contrary to Directive 76/207, unless that exclusion is attributable to factors which are objectively justified and are unrelated to any discrimination on grounds of sex. It is for the national court to determine whether that is the case. The proportional counting of part-time employment when making that calculation is also contrary to Directive 76/207, unless the employer establishes that it is justified by factors whose objectivity depends in particular on the aim pursued by taking length of service into account and, should it be a question of recognition of experience acquired, on the relationship between the nature of the duties carried out and the experience which performance of those duties brings after a certain number of hours of work have been completed.**

4. **Where employees plead that the principle of equal treatment has been infringed to their detriment and establish facts from which it may be presumed that there has been direct or indirect discrimination, Community law, in particular Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, is to be interpreted as meaning that it shall be for the respondent to prove that there has been no breach of that principle.**

[Signatures]