OPINION OF ADVOCATE GENERAL JACOBS

delivered on 16 December 1999 *

1. In this case, the Arbetsdomstol (Labour Court), Sweden, has referred the question essentially whether, in comparing the pay of a man and a woman doing work of equal value for the purposes of Article 119 of the EC Treaty (now, after amendment, Article 141 EC) and the Equal Pay Directive, [1] account should be taken of the fact that those required to work inconvenient hours receive a pay supplement and work fewer hours.

The facts and the main proceedings

2. In the main proceedings, the Jämställdhetsombudsman (the Equal Opportunities Ombudsman) seeks an order for damages against Örebro Läns Landsting (Örebro County Council) in favour of two midwives, Kristina Ellmén and Kia Wetterberg, arguing that the County Council discriminates against the midwives by paying them during a certain period a lower basic monthly salary than a clinical technician although they perform work of equal value.

3. The basic monthly salary of the midwives is SEK 17 400 in one case and SEK 16 600 in the other, whereas the basic monthly salary of the technician is SEK 19 650. Both the midwives and the technician work at the Örebro regional hospital and are employed by the County Council. All midwives working at that hospital are female; approximately 90% of clinical technicians working there are male.

4. The midwives in question generally work on a three-shift system, there being three overlapping shifts in a 24-hour day, although it appears that they sometimes work on different bases, namely a two-shift (day/evening) system, night work or day work. During the relevant period the midwives worked for the most part under the

* Original language: English.

1 — 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.

three-shift or two-shift system; there was also some night work.

5. The midwives and the technician are covered by the same collective agreement. [2] That agreement provides that a full-time working week is on average 40 hours except (a) where Sundays and/or bank holidays are worked, in which case it is on average 38 hours and 15 minutes (the 38-hour week) and (b) in the case of arrangements such as the above shift system, in which case it is 34 hours and 20 minutes (the 34-hour week). [3]

6. Basic monthly remuneration does not vary for a given person depending on whether they work a 40-hour week, a 38-hour week or a 34-hour week. Thus the midwives receive the same basic monthly pay whether they work the 38-hour week or the 34-hour week (or, as may also be the case, a 40-hour week).

7. The collective agreement covering the midwives and the technician further provides that employees working inconvenient hours (on weekends, bank holidays, nights or the three-shift system) other than by way of overtime are entitled to a supplement for inconvenient working hours. [4] The supplement is a fixed hourly amount; it is independent of the employee's other remuneration but varies according to the time of day the hours were worked (being for example higher for night work than evening work) and whether the employee worked on a weekend or bank holiday. The applicable collective agreement determines the rate and the hours regarded as inconvenient; [5]

8. The collective agreement provides that remuneration comprises salary as defined in Articles 14 to 18 thereof, various elements of holiday pay, and a number of payments including the inconvenient-hours supplement. [6] It appears from the national court's questions that the agreement further provides that that supplement and certain other payments are to be taken into account in determining sick pay, pensions, damages claims [7] and other earnings-related payments.

9. The technician works a normal full-time Monday to Friday working week of 40 hours with no inconvenient hours. If, however, his terms of employment required him to work a three-shift system, he would

2 — Allmänna Bestämmelser 95 (General Provisions 95).

3 — Article 8.

4 — Article 32.

5 — Annex A.

6 — Article 13.

7 — Presumably in the context of dismissal or redundancy.

be eligible for the inconvenient-hours supplement on the same basis as the midwives and his full-time hours would be only 34 hours and 20 minutes whereas his basic monthly salary would remain the same. The collective agreement requires employees in case of need to alter their working schedule, adjust their working time, work over and above normal working hours and be on call. [8]

10. While accepting that the midwives receive a lower basic monthly salary than the technician, the County Council argues that the inconvenient-hours supplement and the value of the reduced working time must be included in the basis for the pay comparison and that on that basis there is no discrimination against the midwives.

11. It appears from the order for reference that the parties are in addition at odds over whether the work performed by the clinical technician is of equal value to that performed by the midwives and whether, if so, any difference in pay has any direct or indirect connection with the employees' sex. The Ombudsman, however, has sought an interim order determining that the County Council has applied lower pay in the case of the midwives than in the case of the technician, and it appears that, with the parties' consent, the Labour Court has decided to concentrate first on the discrete issue whether there is a pay differential. In order to make that finding, it is clearly essential for the Labour Court to determine the remuneration to be compared. It accordingly seeks guidance from the Court on the following questions:

'1. Under Article 119 of the Treaty of Rome and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, must a supplement for inconvenient working hours be included in the basis for a pay comparison in relation to a pay discrimination claim? What difference does it make that the supplement for inconvenient working hours varies from month to month depending on the working schedule?

2. In answering Question 1 should significance be attached to the fact that as part of their tasks the midwives must regularly work hours which entitle them to the supplement for inconvenient working hours, whereas the clinical technician does not regularly perform work during times which afford entitlement to such a supplement?

3. In determining the question whether the supplement for inconvenient working hours is to be included in the basis

8 — Article 6.

for a pay comparison in relation to a pay discrimination claim, must significance be attached to the fact that, under national law, that supplement is included in basic pay for the purpose of determining pensions, sick pay, damages and other earnings-related payments?

4. Must a reduction in working time, representing the difference in standard working time for daytime work and work under a continuous three-shift regime, be taken into account when a pay comparison is made in relation to a pay discrimination claim, in accordance with Article 119 of the Treaty of Rome and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women? If the answer is in the affirmative: what significance does it have that under the collective agreement the lower standard working time applying under a continuous three-shift regime constitutes full-time working? If reduced working hours are to be given a particular value, is that value to be regarded as being comprised in the fixed monthly pay or as constituting special compensation which is to be included in the pay comparison?

5. In answering Question 4, is significance to be attached to the fact that the midwives, but not the clinical technician, perform shift work which, under the terms of the collective agreement, affords entitlement to reduced working hours?'

12. Those questions can be pared down to the question whether and if so how the inconvenient-hours supplement and the reduction in hours worked are to be taken into account in comparing the pay.

13. Written observations have been submitted by the Ombudsman, the County Council, the Commission and the Finnish Government, all of whom were represented at the hearing.

The relevant Community law

14. Article 119 of the EC Treaty imposes the principle that men and women should receive equal pay for equal work. The second paragraph defines 'pay' as '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 employment from his employer'.

15. The first paragraph of Article 1 of the Equal Pay Directive provides:

'The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.'

16. A woman employee (to take the usual case) seeking to establish infringement of the principle of equal pay for work to which equal value is attributed will have to address two distinct issues and may have to deal with a third. In the case, as here, of alleged indirect discrimination these may be expressed as follows. First, she must be part of a group of predominantly female employees performing work of equal value to that performed by a group of predominantly male employees. Secondly, the first group must receive lower remuneration than the comparator group. If both those elements are shown by the employee, a *prima facie* case of discrimination arises. Thirdly, however, the employer may displace that presumption by showing that the difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex. [9]

17. Although it will normally in my view be appropriate to answer those three issues in the order set out above, there may be cases in which for one reason or another it is expedient to consider them in a different order. In such circumstances the national court may wish to have guidance from the Court on, for example, the second or third issue before establishing the first. That was the case in *Enderby*, [10] where the Court of Appeal of England and Wales referred three questions essentially concerned with the third issue set out above, namely the scope for justification, on the explicit assumption for the purpose of the proceedings that the two jobs whose salaries were being compared were of equal value. The German Government contended in that case that the Court could not rule on those questions without first establishing that the jobs in consideration were equivalent. The Court stated that it was solely for the national court to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order for it to be able to deliver judgment and the relevance of the question which it submitted to the court. Where, as in that case, the Court receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings, it must reply to that request and is not required to

9 — See Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607, paragraph 36 of the judgment; Case C-127/92 *Enderby* v *Frenchay Health Authority* [1993] ECR I-5535, paragraph 19; and see now 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.

10 — Cited in note 9.

consider the validity of a hypothesis which it is for the referring court to verify subsequently if that should prove to be necessary. [11]

18. Advocate General Lenz noted that the reservations of the German Government regarding the assumption that the jobs were of equal value were probably due to the fact that a major part of the burden of making out a case and the burden of proof incumbent on a plaintiff alleging pay discrimination related to the work being the same or of equal value. However, the Advocate General explained that the fact that the Court of Appeal, like the lower courts hearing the case, had assumed the equal value of the jobs to be compared was a result of the possibilities afforded by the procedural rules in the legal system of the Member State concerned. Examination whether two jobs were of equal value could sometimes entail an extensive and costly study. Under national procedural law the hearing of evidence could be postponed pending the consideration of the points of law. [12]

19. In the present case the written and oral observations of the County Council focus principally on the issue whether the midwives and the clinical technician perform work of equal value for the purpose of the principle of equal pay; the County Council is clearly of the view that the work performed by midwives on the one hand and clinical technicians on the other is not of equal value. Although the Finnish Government and the Commission also express doubts as to the equal value of the work, they both accept that the national court is entitled to refer questions on the issue of equal pay on the assumption of equal value. Since, as indicated above, it is clear from the order for reference (and indeed implicit in the questions) that equal value is assumed by the national court for the purposes of the reference for a preliminary ruling, and since it is clear from the Court's judgment in *Enderby* that that is an acceptable approach, I do not propose to deal with the issue of equal value.

20. The assumption made for the purpose of this case that the work of the two groups in this case is of 'equal value' must be taken to mean that 40 hours of the midwives' work is of equal value to 40 hours of the technician's work, rather than that, for example, 34 hours of the one is of equal value to 40 hours of the other. It is only on the basis of that assumption that the question can be raised whether the shorter working week of the midwives can be taken into account. (We should therefore disregard the fact that the collective agreement seems to attribute 'equal value' to the different lengths of working week.)

11 — Paragraphs 10 and 12 of the judgment.
12 — Paragraphs 6 and 7 of the Opinion.

The relevance of the collective bargaining framework

21. At the hearing, the Ombudsman suggested that in Sweden collective bargaining agreements are regarded as immune from Community law, in the sense, presumably, that it is considered to be a defence to a claim of unequal pay that the salary was agreed by collective bargaining. Such a view is manifestly not in conformity with Community law: the Court has made it clear that the principle of equal pay for men and women applies where the elements of the pay are determined by collective bargaining or by negotiation at local level, although the national court may take that fact into account in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex. [13]

The inconvenient-hours supplement

The scope of 'pay'

22. I would note first that the supplement is clearly pay within the meaning of Article 119, and hence there would be discrimination if, for example, a group of predominantly male employees doing work of equal value to that of the midwives were denied the supplement if they worked inconvenient hours. That does not, however, assist with the question now confronting the Court: should the supplement be taken into account to give effect to the principle of equal pay in the circumstances of the present case?

23. In the light of the above, I do not propose to address a number of arguments put forward by the County Council which are designed to show that, since it is 'pay', the inconvenient-hours supplement must be regarded as forming part of the midwives' basic monthly salary for the purpose of the comparison.

The scope of the statement in Barber

24. The Court in *Barber* [14] stated as follows:

'... the [national court] wishes to ascertain, in substance, whether equal pay must be

13 — See for example Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraph 47 of the judgment.

14 — Case C-262/88 [1990] ECR I-1889.

ensured at the level of each element of remuneration or only on the basis of a comprehensive assessment of the consideration paid to workers.

...

With regard to the means of verifying compliance with the principle of equal pay, it must be stated that if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of Article 119 would be diminished as a result. It follows that genuine transparency, permitting an effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men and women.' [15]

25. The Ombudsman and the Commission rely principally on that statement in support of their view that equality must be ensured for the basic monthly salary without taking account of the inconvenient-hours supplement.

26. The Ombudsman considers that the principle of transparency would be infringed if the national court were required to undertake a complex analysis of the allowance granted to each employee. The midwives work inconvenient hours and receive a supplement for that reason; the technician does not work inconvenient hours and hence receives no supplement. Common sense and logic support the view that the fair comparison is of monthly basic salaries alone.

27. The Commission considers that the supplement can be compared only with the supplement to which the technician would have been entitled had his hours of work been the same as the midwives', and that accordingly the proper comparison is between the monthly basic salaries alone.

28. The County Council on the other hand considers that the statement of the Court in *Barber* is irrelevant to this case. *Barber* essentially concerned transparency and pay to which men and women were both entitled, albeit at different ages; the Court ruled in effect that the fact that Mr Barber, made redundant at 52, was entitled to a greater redundancy payment than a woman made redundant at the same age did not cure the discrimination inherent in the fact that a woman of his age would in addition have been entitled to an immediate pension whereas he was entitled only to a deferred

15 — Paragraphs 31 and 34 of the judgment.

pension. In this case in contrast the midwives, working the three-shift system, are entitled to the inconvenient-hours supplement whereas the technician, working a normal week, is not.

29. The Finnish Government also refers to the statement in *Barber*. It notes that, where the two employees in question (the one alleging discrimination and the other being the comparator) do the same or similar work in the same conditions and with similar hours, it is easy to compare each element of their salaries on the basis of that statement. The principle of equal pay must also, however, be guaranteed where the work is not the same but of equal value. The more different the jobs, however, the more difficult it is not only to compare the various elements of pay but also to assess equivalence of work. Where work is found to be of equal value by assessing how demanding or difficult it is, it is impossible when comparing pay to ignore the elements underlying such assessment. Thus where conditions of employment (such as the obligation to work inconvenient hours) have been taken into account in determining whether the work is of equal value to the comparator's, pay which compensates for such conditions must be included in the pay comparison. It must therefore be decided case by case which elements of pay are to be compared for the purpose of ensuring respect for the principle of equality.

30. I concur with the Finnish Government's view that it is not possible to lay down an unvarying rule that different elements of pay either should or should not be taken into account in making a pay comparison. However, whereas the Finnish Government submits that the rule will vary depending on factors arising out of the assessment of equal value, I consider that it is rather the nature of the pay structure at issue which will determine how equal pay is to be assessed.

31. Treating each element of remuneration independently for the purpose of an equal pay comparison will in general be the only proper way to ensure equality. It is moreover the only way to achieve transparency and ensure effective judicial review: as the Court confirmed in *Danfoss* [16] and repeated in *Barber*, [17] a lack of transparency would prevent any form of supervision by the national courts. Thus as a general proposition I consider that, in accordance with the statement of the Court in *Barber*, the principle of equal pay should apply to each of the elements of remuneration granted to men and women.

32. Where, however, for historical or other reasons the pay structures are complex, so

16 — Case 109/88 *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199, paragraph 12 of the judgment.

17 — Paragraph 34 of the judgment, cited in paragraph 24 above.

that individual elements or the bases on which they are granted are difficult or impossible to disentangle, it may be both unrealistic and unprofitable to look at individual components of the pay package in isolation. Moreover, to do so may lead to discrimination against the other sex. In such cases a global assessment may be the only valid — or even feasible — method, pending a re-structuring of the system. It is doubtless such circumstances which the Court had in mind when it stated in *Royal Copenhagen* [18] that some pay systems were so structured that only a 'global assessment' could be made in considering whether there was a breach of Article 119. [19]

33. That does not mean, however, that one element in the overall package can necessarily be set off against another. Thus in *Barber* itself, in which men who had been made redundant were entitled to an immediate pension if they had attained the age of 55 whereas women who had been made redundant were entitled to an immediate pension if they had attained the age of 50, it is understandable that the Court regarded it as inappropriate to seek to offset discriminatory pension rights by taking into account possible differences in redundancy payments.

34. What then is the position here? It will be recalled [20] that a woman employee establishes a *prima facie* case of infringement of the principle of equal pay for work of equal value by showing, first, that she is part of a group of predominantly female employees performing work of equal value to that performed by a group of predominantly male employees and, secondly, that the first group receives lower remuneration than the comparator group. It is then, however, open to the employer to displace that presumption by showing that the difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex.

35. In this case it is possible to separate the midwives' basic salary from the supplement and hence to compare the basic salary with that of the comparator. In my view, the correct approach to this and similar cases is to accept that the group receiving lower basic pay, in the present case the midwives, is paid less, so that the second question set out above, namely whether the pay of the two groups is unequal, is regarded as receiving an affirmative answer. I would add that that approach would in this and similar cases ensure greater transparency: the fact that the supplement varies from month to month depending on the time and the day the relevant shifts were worked

18 — Cited in note 13, paragraph 43 of the judgment.

19 — Paragraph 18 of the judgment.

20 — See paragraph 16 above.

would make it difficult to make a sensible comparison of, on the one hand, a midwife's aggregate salary and supplement and, on the other hand, the comparator's basic salary.

36. I accordingly consider that employees such as the midwives in the present case will be able to make out a *prima facie* case of infringement of the principle of equal pay. I do not, however, consider that that necessarily resolves the matter: as indicated above, once an employee has made out a *prima facie* case of unequal pay, it is open to the employer to show under the third stage that the difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex. If the employer can show such justification, there will be no finding of infringement of the principle of equal pay.

37. The approach I have suggested is consistent with *Royal Copenhagen*,[21] in which the Court had been asked what significance should be attached, when ascertaining whether the principle of equal pay had been observed, to, *inter alia*, differences between the work of the two groups with regard to paid breaks, freedom to organise their own work and work-related inconveniences[22] including noise, temperature and intensive, repetitive or monotonous work[23] (the case involved machine operators and ceramics painters working in a ceramics factory). The Court stated that the national court must ascertain whether, in the light of the facts relating to the conditions in which the work was carried out, equal value could be attributed to it or whether those facts could be considered to be objective factors unrelated to any discrimination on grounds of sex such as to justify any pay differentials.[24]

38. In the present case it seems doubtful whether the employer can rely on the inconvenient-hours supplement to justify the inequality in basic pay, since the supplement seems to be intended to compensate for the inconvenience and disruption to family and social life and to sleep patterns flowing from the various shifts carrying entitlement to the supplement. The County Council has stated in its written observations that the level of salary negotiated for nurses and midwives was set taking account of the fact that those sectors worked on a shift basis so that they received the inconvenient-hours supplement. If that were so, it would negate the compensatory effect of the supplement. If however that is the case, the County Council may be able to displace the presumption of infringement of the principle of equal pay which arises from the inequal-

21 — Cited in note 13.

22 — Paragraph 39 of the judgment.

23 — See question 4(i), set out in paragraph 10 of the judgment.

24 — Paragraph 42 of the judgment.

ity in the basic salary. It is for the national court to determine whether and, if relevant, to what extent the allowance fulfils such a compensatory role.

39. It is accordingly my view that where the pay structure is such that it is in principle possible to extract and compare individual strands, that is what should be done, with the employer preserving the possibility of disproving that inequality on that basis is due to sex. Where however the pay structure is less penetrable, a global assessment will be all that is possible. It is for the national court to determine whether it is possible in a given case to make an item-for-item comparison or whether a global assessment is all that is feasible.

40. In the latter type of case, the mere fact that the structure is (*ex hypothesi*) not transparent means that the employer retains the burden of proof of disproving alleged discrimination. That conclusion follows from the decision of the Court in *Danfoss* [25] in which it was held that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men. I consider that principle to be applicable also where an employee alleges discrimination arising out of a non-transparent system of supplements or other pay components even if a differential in average pay cannot be shown.

25 — Cited in note 16. See also Case 318/86 *Commission* v *France* [1988] ECR 3559.

The effect of the reduced working hours

41. The national court asks in addition whether the reduced number of hours required to be worked by the midwives working the three-shift system in order to constitute a full-time working week for the purposes of salary must be taken into account when a pay comparison is made. The effect of that would of course be that, for the purposes of comparison with a comparator working a normal 40-hour week, the monthly basic salary of the midwives would be multiplied by 40 / 34.33 and hence increased. The same effect would be had by comparing, not the basic monthly salary, but the pay per hour actually worked.

42. The County Council submits that the pay comparison must be carried out on the basis of pay for each hour actually worked. It suggests that if, as the Court found in

Garland,[26] free transport granted by an employer constitutes 'pay' for the purposes of Article 119, the grant of a reduction in working time should logically also be so regarded. The value of the reduced working hours must accordingly be quantified and included in the monthly pay package for the purposes of the comparison. In my view however cases such as *Garland* are not to the point: the issue in that case was whether the travel concession was pay, in which case it was clearly discriminatory to give it to men and not to women, whereas the issue here is obviously different.

43. The Ombudsman refers to certain cases apparently relied on by the County Council at an earlier stage in the proceedings before the national court:[27] the cases suggest that whether there is equal pay must be assessed by reference to the pay received per hour worked each week. The Ombudsman responds that the cases cited, all of which concern alleged discrimination between full-time and part-time employees, are irrelevant to this case, in the circumstances of which a comparison of hourly rates would be inequitable. That is because a midwife who worked a normal 40 hour week would receive the same salary as a midwife working a 34-hour week. A reduction of working hours may in principle be an objective factor justifying different pay, although in this case it would not justify the difference.

44. In my view, the general rule must be that the number of hours worked by two employees whose pay is being compared will naturally be taken into account and a difference will justify a difference in pay, so that, to take extreme examples, it would obviously not be discriminatory to pay a man working full-time twice as much as a woman doing the same job half-time, or indeed a man working overtime more than a woman not working overtime. The cases referred to by the Ombudsman, which clearly support that proposition, do not however otherwise seem relevant to the issue confronting the Court, since they concern in general the question of different rates of pay or benefits in kind paid to part-time and full-time employees. In this case however it cannot to my mind seriously be argued that the midwives, who are clearly treated by their employer as working a full-time week, should not be regarded as working a full-time week. The documents before the Court suggest, and the presumption should consequently be, that the reduction in working hours compensates

26 — Case 12/81 *Garland* v *British Rail Engineering* [1982] ECR 359.

27 — See Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraphs 19 to 20 of the judgment, Case 170/84 *Bilka*, cited in note 9, paragraph 27, and Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig and Others* [1994] ECR I-5727, paragraphs 26 and 27.

for working the three-shift system; in my view it should accordingly not be taken into account when a pay comparison is made. The correct approach is accordingly to compare the basic salary received by the midwives with that received by the comparator without adjusting the midwives' salary to reflect the reduced working hours.

45. The Commission considers that the reduction in working hours is a condition of work within the meaning of the Equal Treatment Directive. [28] That view seems to me to be correct: see for example *Stoeckel*, [29] in which it was accepted that a continuous shift-work system involving nightwork was a condition of work for that purpose.

46. The Commission adds that the fact that the reduction in working hours may have pecuniary consequences is not sufficient to bring it within the scope of the equal pay legislation. [30] While that is correct, it means simply that Article 119 cannot be interpreted as prescribing, in addition to equal pay, equality in respect of other working conditions; [31] it does not mean that working conditions can in no circumstances be relevant to the general issue of equal pay.

47. In particular, it is clear from *Royal Copenhagen* [32] that working conditions may be relevant both to whether work is of equal value and to whether there is objective justification for any inequality of pay for work of equal value. [33]

48. It will accordingly, as with the inconvenient-hours supplement, be open in principle to the employer to show, if it is indeed the case, that the reduction in hours is not correctly regarded as compensating for the inconvenience and disruption of the three-shift system but that the resulting difference in hourly pay was based on objectively justified factors unrelated to any discrimination on grounds of sex.

28 — 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.

29 — Case C-345/89 [1991] ECR I-4047.

30 — Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365, paragraph 21 of the judgment.

31 — See paragraph 24 of the judgment in *Defrenne*.

32 — Cited in note 13.

33 — See paragraph 42 of the judgment and paragraph 39 above.

Conclusions

49. Accordingly the questions referred by the Arbetsdomstol should in my opinion be answered as follows:

(1) Where remuneration consists of several elements, for example basic salary and a supplement for inconvenient working hours, each element must in principle be treated independently for the purpose of an equal pay comparison. Where such a comparison shows a *prima facie* case of infringement of the principle of equal pay, there will be no infringement if the employer shows that the difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex.

(2) Where it is difficult or impossible to distinguish different elements of remuneration, it will be necessary to carry out a global assessment for the purpose of an equal pay comparison. In that case, the mere fact that the structure is not transparent means that the employer retains the burden of proof of disproving alleged discrimination.

(3) Where the employee alleging discrimination works fewer hours per week than the comparator but those hours are treated by the employer as an equivalent working week, the correct approach for the purpose of the principle of equal pay is to compare the basic salary of the two employees without adjusting the first employee's salary to reflect the reduced working hours. Where such a comparison shows a *prima facie* case of infringement of the principle of equal pay, there will be no infringement if the employer shows that the difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex.