REPORT FOR THE HEARING
delivered in Case 171/88 *

I — The facts

1. *Legal procedure*

The first sentence of Paragraph 1(1) of the Lohnfortzahlungsgesetz (German Law of 27 July 1969 on the continued payment of wages during illness, *Bundesgesetzblatt* I, p. 946) obliges an employer to continue to pay wages for up to six weeks to any worker who, after the commencement of his employment and through no fault of his own, is incapable of working. Paragraph 1(3)(2) of the Lohnfortzahlungsgesetz provides that workers whose contract of employment provides for a normal period of work of not more than 10 hours a week or not more than 45 hours a month are not entitled to receive their wages during illness, as provided for by the first sentence of Paragraph 1(1) of the law. Paragraph 10(1) of that law provides that employers who do not normally employ more than 20 employees may obtain reimbursement of 80% of the cost of continuing the payment of wages from the sickness insurance funds.

Article 1 of 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 (Official Journal L 45, p. 19) provides as follows:

'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.'

Article 3 of that directive provides as follows:

'Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.'

2. *Background to the main proceedings*

The plaintiff in the main proceedings, Mrs Rinner-Kühn, has been employed since 1985 as an office-cleaner by the defendant which operates an office-cleaning business. Her net hourly wage is DM 8.77 and her normal working week is 10 hours. From 11 to 16 December 1987 the plaintiff was unable to work because of illness. She immediately forwarded to the defendant a

* Language of the case: German.

medical certificate attesting that she was unable to work for that period. By letter of 16 January 1988 she claimed from the defendant the continued payment of eight hours' wages during illness amounting to DM 70.16. By a letter dated 19 January 1988 the defendant refused payment, referring to the fact that the plaintiff only worked a small number of hours. It considered that under Paragraph 1(3)(2) of the Lohnfortzahlungsgesetz the plaintiff was not entitled to the continued payment of her wages.

In her application to the Arbeitsgericht Oldenburg, which was lodged on 28 January 1988, the plaintiff is seeking the continued payment of her wages during illness, amounting to DM 70.16 net, plus interest at 4%. In her view, the fact that the obligation to continue the payment of wages is excluded in the case of short-time workers constitutes discrimination against women since the proportion of women employed on a part-time basis is extremely high. In her view, this discrimination is prohibited by Article 119 of the EEC Treaty.

By order of 5 May 1988 the Arbeitsgericht Oldenburg referred the following question to the Court under Article 177 of the Treaty:

'Are legislative provisions which derogate from the principle that an employer must continue to pay an employee during illness in the case of employed workers whose regular period of work does not exceed 10 hours a week of 45 hours a month compatible with Article 119 of the EEC Treaty and with 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, even though the proportion of women adversely affected by that derogation is considerably greater than that of men?'

3. *Observations of the national court*

In the view of the court making the reference there is much to support the argument that the statutory exclusion of persons in part-time employment from the continued payment of their wages during illness constitutes indirect discrimination against women. Part-time employment is a form of gainful activity pursued mainly by married women who see in this form of work a chance to reconcile job and family. There is thus a close link between part-time work and the tasks which are traditionally entrusted to the female sex.

The court making the reference does not consider that there are any relevant reasons justifying the discrimination in question. In particular, the saving of the costs of continuing to pay wages cannot serve as an argument and neither may it be related to the criterion of whether or not part-time work is subject to social security.

II — Procedure

The order making the reference was registered at the Court on 22 June 1988.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted by the Danish Government, represented by Mrs Wermuth, Legal Adviser, and by the Commission of the European Communities, represented by Mr Grunwald, a member of its Legal Department, acting as Agent.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. In its decision of 23 November 1988 the Court assigned the case to the Sixth Chamber.

III — Questions asked by the Court

The Court asked the following questions:

(1) The German Government is requested to supply the Court with the reasons which led the German legislature to fix the work period below which an employer is not obliged to continue to pay wages during an employee's illness at 10 hours per week and 45 hours per month.

(2) The Commission is requested to supply the Court with the figures concerning the number of men and women whose normal working week does not exceed 10 hours, including the percentages of all male and female employees, for every Member State apart from Germany.

On 5 January 1989 the Commission replied to the question asked by the Court. The Commission sent the Court statistical tables Nos 37, 38 and 51 from the *1987 Eurostat labour force survey*. It states that in seven Member States the category of employees whose normal working week is not more than 10 hours is made up of significantly more women than men:

89% women in the Federal Republic of Germany

88% women in France

86% women in Spain

85% women in the United Kingdom

83% women in the Netherlands

62% women in Italy.

To those countries should be added a further four whose data are unreliable because of the smallness of the samples

taken due to the relatively small number of male workers concerned (Greece, Ireland, Luxembourg and Portugal). Only in Denmark, where 54% of this category of workers are women, is there any appreciable convergence of the respective proportions.

On 9 January 1985 the German Government replied to the question asked by the Court. It stated that the workers covered by the legislation in question were not as integrated in, or as dependent on, the undertaking employing them as other workers and that consequently the conditions for obliging their employer to furnish them with assistance, including the continuation of their salary, were not met. Furthermore, the fact that part-time workers had no entitlement to continue to receive their wages corresponded with the provisions which were formerly in force.

IV — Summary of the written observations submitted to the Court

1. First, the Commission stresses that the continued payment of wages during illness is a consideration in respect of employment paid by the employer to the worker, within the meaning of the second paragraph of Article 119. Payment is made 'in respect of his employment' since the conditions for entitlement and the sum to which he is entitled are determined by the terms of his employment. Unlike a statutory retirement pension scheme whose purpose is external to the employment relationship the national provision in question concerns the regulation of the actual terms of employment and on that basis creates rights and obligations for the contracting parties. It should also be stressed that the Court has repeatedly recognized that Article 119 is applicable to the public service (see the judgment of 8 April 1976 in Case 43/75 *Defrenne No 2* [1986] ECR 455; the judgment of 9 June 1982 in Case 51/81 *Commission* v *Luxembourg* [1982] ECR 2175 and the judgment of 21 May 1985 in Case 248/83 *Commission* v *Germany* [1985] ECR 1459) and that in the public service all of the terms of employment may be regulated by law.

Secondly, the Commission stresses that in this case there can only be indirect discrimination against women workers since the exclusion in question is applicable without distinction to men and women workers. Referring to the statistics published in the *1986 Eurostat labour force survey* the Commission concludes that the category of workers whose normal working week does not exceed 10 hours consists almost entirely of women.

This inequality cannot be explained by any objectively justified factors unrelated to any discrimination on grounds of sex. The Commission cannot understand why it should be economically defensible and socially necessary to allow full-time workers to continue to receive their salary for six weeks whereas this right is refused to part-time workers who are socially less favoured. Such a rule removes protection precisely in the situation where it is most needed. Similarly, the argument that the employer's obligation to continue to pay salary during illness is connected with his welfare obligations which do not apply to part-time workers, is also unconvincing since, when deciding whether or not a

welfare obligation exists, the legislature must be guided not only by the employer's willingness to lend assistance but also by the workers need for assistance.

Finally, the Commission considers that a reply to the preliminary question is possible on the basis of Article 119 so that it is unnecessary to interpret Council Directive 75/117. The Commission therefore proposes that the Court should reply as follows to the preliminary question:

'A legislative provision which obliges an employer to continue to pay wages while a worker is ill but which excludes workers whose normal working period is not more than 10 hours weekly or 45 hours monthly is incompatible with Article 119 of the EEC Treaty if that exclusion affects a significantly higher proportion of women than men.'

2. On the other hand, the Danish Government stresses the requirement that a measure which is allegedly indirectly discriminatory must affect a significantly greater proportion of one sex. It is also necessary that the measure should have that effect in every branch of the economy and that the alleged discrimination should continue to exist for a number of years to approximately the same extent. From the point of view of legal certainty, it would be unthinkable for a clear general statutory limitation inserted in a provision of social security and labour law to be regarded as illegal in one sector but legal in another. The same would apply if such a measure were illegal one year and legal the next. By way of example the Danish Government points out that in Denmark before 1985 5% of female workers and 2% of male workers worked fewer than 10 hours per week. In 1986 the figures were 4% for women and 3% for men, thereby reducing the discrepancy.

The Danish Government consequently suggests that an affirmative reply should be given to the preliminary question.

T. F. O'Higgins
Judge-Rapporteur