JUDGMENT OF THE COURT
13 May 1986 *

In Case 170/84

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the Bundesarbeitsgericht [Federal Labour Court] for a preliminary ruling in the proceedings pending before that court between

Bilka-Kaufhaus GmbH

and

Karin Weber von Hartz

on the interpretation of Article 119 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Bilka-Kaufhaus GmbH, the appellant in the main proceedings, by K. H. Koch, J. Burkardt and G. Haberer, Rechtsanwälte, Frankfurt am Main,

Mrs Weber von Hartz, the respondent in the main proceedings, by H. Thon, Rechtsanwalt, Frankfurt am Main,

the United Kingdom, by S. H. Hay, of the Treasury Solicitor's Department, acting as Agent,

* Language of the Case: German.

the Commission of the European Communities, by J. Pipkorn and M. Beschel, members of its Legal Department, acting as Agents,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 October 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 5 June 1984, which was received at the Court on 2 July 1984, the Bundesarbeitsgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 119 of that Treaty.

2 Those questions arose in the course of proceedings between Bilka-Kaufhaus GmbH and its former employee Karin Weber von Hartz concerning the payment to Mrs Weber von Hartz of a retirement pension from a supplementary pension scheme established by Bilka for its employees.

3 It appears from the documents before the Court that for several years Bilka, which belongs to a group of department stores in the Federal Republic of Germany employing several thousand persons, has had a supplementary (occupational) pension scheme for its employees. This scheme, which has been modified on several occasions, is regarded as an integral part of the contracts of employment between Bilka and its employees.

4 According to the version in force since 26 October 1973, part-time employees may obtain pensions under the scheme only if they have worked full time for at least 15 years over a total period of 20 years.

5 Mrs Weber was employed by Bilka as a sales assistant from 1961 to 1976. After initially working full time, she chose to work part time from 1 October 1972 until her employment came to an end. Since she had not worked full time for the minimum period of 15 years, Bilka refused to pay her an occupational pension under its scheme.

6 Mrs Weber brought proceedings before the German labour courts challenging the legality of Bilka's refusal to pay her a pension. She argued *inter alia* that the occupational pension scheme was contrary to the principle of equal pay for men and women laid down in Article 119 of the EEC Treaty. She asserted that the requirement of a minimum period of full-time employment for the payment of an occupational pension placed women workers at a disadvantage, since they were more likely than their male colleagues to take part-time work so as to be able to care for their family and children.

7 Bilka, on the other hand, argued that it was not guilty of any breach of the principle of equal pay since there were objectively justified economic grounds for its decision to exclude part-time employees from the occupational pension scheme. It emphasized in that regard that in comparison with the employment of part-time workers the employment of full-time workers entails lower ancillary costs and permits the use of staff throughout opening hours. Relying on statistics concerning the group to which it belongs, Bilka stated that up to 1980 81.3% of all occupational pensions were paid to women, although only 72% of employees were women. Those figures, it said, showed that the scheme in question does not entail discrimination on the basis of sex.

8 On appeal the proceedings between Mrs Weber and Bilka came before the Bundesarbeitsgericht; that court decided to stay the proceedings and refer the following questions to the Court:

(1) May there be an infringement of Article 119 of the EEC Treaty in the form of 'indirect discrimination' where a department store which employs predominantly women excludes part-time employees from benefits under its occupational pension scheme although such exclusion affects disproportionately more women than men?

(2) If so:

(a) Can the undertaking justify that disadvantage on the ground that its objective is to employ as few part-time workers as possible even though in the department store sector there are no reasons of commercial expediency which necessitate such a staff policy?

(b) Is the undertaking under a duty to structure its pension scheme in such a way that appropriate account is taken of the special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension?

9 In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Bilka, Mrs Weber von Hartz, the United Kingdom and the Commission of the European Communities.

The applicability of Article 119

10 The United Kingdom puts forward the preliminary argument that the conditions placed by an employer on the admission of its employees to an occupational pension scheme such as that described by the national court do not fall within the scope of Article 119 of the Treaty.

11 In support of that argument it refers to the judgment of 15 June 1978 (Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365), in which the Court held that Article 119 concerns only pay discrimination between men and women workers and its scope cannot be extended to other elements of the employment relationship, even where such elements may have financial consequences for the persons concerned.

12 The United Kingdom cites further the judgment of 16 February 1982 (Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555) where the Court held that alleged discrimination resulting from a difference in the ages of eligibility set for men and women for payment under a voluntary redundancy scheme was covered not by Article 119 but by Council Directive 76/207 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 (Official Journal 1976, L 39, p. 40).

13 At the hearing the United Kingdom also referred to the proposal for a Council directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes submitted by the Commission on 5 May 1983 (Official Journal 1983, C 134, p. 7). According to the United Kingdom, the fact that the Commission considered it necessary to submit such a proposal shows that occupational pension schemes such as that described by the national court are covered not by Article 119 but by Articles 117 and 118, so that the application of the principle of equal treatment for men and women in that area requires the adoption of special provisions by the Community institutions.

14 The Commission, on the other hand, has argued that the occupational pension scheme described by the national court falls within the concept of pay for the purposes of the second paragraph of Article 119. In support of its view it refers to the judgment of 11 March 1981 (Case 69/80 *Worringham and Humphreys* v *Lloyds Bank* [1981] ECR 767).

15 In order to resolve the problem of interpretation raised by the United Kingdom it must be recalled that under the first paragraph of Article 119 the Member States must ensure the application of the principle that men and women should receive equal pay for equal work. The second paragraph of Article 119 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'.

16 In its judgment of 25 May 1971 (Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445), the Court examined the question whether a retirement pension paid under a statutory social security scheme constitutes consideration received by the worker indirectly from the employer in respect of his employment, within the meaning of the second paragraph of Article 119.

17 The Court replied in the negative, taking the view that, although pay within the meaning of Article 119 could in principle include social security benefits, it did not include social security schemes or benefits, in particular retirement pensions, directly governed by legislation which do not involve any element of agreement within the undertaking or trade concerned and are compulsory for general categories of workers.

18 In that regard the Court pointed out that social security schemes guarantee workers the benefit of a statutory scheme to which workers, employers and in some cases the authorities contribute financially to an extent determined less by the employment relationship between the employer and the worker than by considerations of social policy, so that the employer's contribution cannot be regarded as a direct or indirect payment to the worker for the purposes of the second paragraph of Article 119.

19 The question therefore arises whether the conclusion reached by the Court in that judgment is also applicable to the case before the national court.

20 It should be noted that according to the documents before the Court the occupational pension scheme at issue in the main proceedings, although adopted in accordance with the provisions laid down by German legislation for such schemes, is based on an agreement between Bilka and the staff committee representing its employees and has the effect of supplementing the social benefits paid under national legislation of general application with benefits financed entirely by the employer.

21 The contractual rather than statutory nature of the scheme in question is confirmed by the fact that, as has been pointed out above, the scheme and the rules governing it are regarded as an integral part of the contracts of employment between Bilka and its employees.

22 It must therefore be concluded that the scheme does not constitute a social security scheme governed directly by statute and thus outside the scope of Article 119. Benefits paid to employees under the scheme therefore constitute consideration received by the worker from the employer in respect of his employment, as referred to in the second paragraph of Article 119.

23 The case before the national court therefore falls within the scope of Article 119.

The first question

24 In the first of its questions the national court asks whether a staff policy pursued by a department store company excluding part-time employees from an occupational pension scheme constitutes discrimination contrary to Article 119 where that exclusion affects a far greater number of women than men.

25 In order to reply to that question reference must be made to the judgment of 31 March 1981 (Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911).

26 In that judgment the Court considered the question whether the payment of a lower hourly rate for part-time work than for full-time work was compatible with Article 119.

27 Such a practice is comparable to that at issue before the national court in this case: Bilka does not pay different hourly rates to part-time and full-time workers, but it grants only full-time workers an occupational pension. Since, as was stated above, such a pension falls within the concept of pay for the purposes of the second paragraph of Article 119 it follows that, hour for hour, the total remuneration paid by Bilka to full-time workers is higher than that paid to part-time workers.

28 The conclusion reached by the Court in its judgment of 31 March 1981 is therefore equally valid in the context of this case.

29 If, therefore, it should be found that a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex.

30 However, if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex there is no breach of Article 119.

31 The answer to the first question referred by the national court must therefore be that Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

Question 2 (a)

32 In its second question the national court seeks in essence to know whether the reasons put forward by Bilka to explain its pay policy may be regarded as 'objectively justified economic grounds', as referred to in the judgment of 31 March 1981, where the interests of undertakings in the department store sector do not require such a policy.

33 In its observations Bilka argues that the exclusion of part-time workers from the occupational pension scheme is intended solely to discourage part-time work, since in general part-time workers refuse to work in the late afternoon and on Saturdays. In order to ensure the presence of an adequate workforce during those

periods it was therefore necessary to make full-time work more attractive than part-time work, by making the occupational pension scheme open only to full-time workers. Bilka concludes that on the basis of the judgment of 31 March 1981 it cannot be accused of having infringed Article 119.

34 In reply to the reasons put forward to justify the exclusion of part-time workers Mrs Weber von Hartz points out that Bilka is in no way obliged to employ part-time workers and that if it decides to do so it may not subsequently restrict the pension rights of such workers, which are already reduced by reason of the fact that they work fewer hours.

35 According to the Commission, in order to establish that there has been no breach of Article 119 it is not sufficient to show that in adopting a pay practice which in fact discriminates against women workers the employer sought to achieve objectives other than discrimination against women. The Commission considers that in order to justify such a pay practice from the point of view of Article 119 the employer must, as the Court held in its judgment of 31 March 1981, put forward objective economic grounds relating to the management of the undertaking. It is also necessary to ascertain whether the pay practice in question is necessary and in proportion to the objectives pursued by the employer.

36 It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds. If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.

37 The answer to question 2 (a) must therefore be that under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is

found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.

Question 2 (b)

38 Finally, in Question 2 (b), the national court asks whether an employer is obliged under Article 119 of the Treaty to organize its occupational pension scheme in such a manner as to take into account the fact that family responsibilities prevent women workers from fulfilling the requirements for such a pension.

39 In her observations Mrs Weber von Hartz argues that the answer to that question should be in the affirmative. She argues that the disadvantages suffered by women because of the exclusion of part-time workers from the occupational pension scheme must at least be mitigated by requiring the employer to regard periods during which women workers have had to meet family responsibilities as periods of full-time work.

40 According to the Commission, on the other hand, the principle laid down in Article 119 does not require employers, in establishing occupational pension schemes, to take into account their employees' family responsibilities. In the Commission's view, that objective must be pursued by means of measures adopted under Article 117. It refers in that regard to its proposal for a Council directive on voluntary part-time work submitted on 4 January 1982 (Official Journal 1982, C 62, p. 7) and amended on 5 January 1983 (Official Journal 1983, C 18, p. 5), which has not yet been adopted.

41 It must be pointed out that, as was stated in the judgment of 15 June 1978, the scope of Article 119 is restricted to the question of pay discrimination between men and women workers. Problems related to other conditions of work and employment, on the other hand, are covered generally by other provisions of Community law, in particular Articles 117 and 118 of the Treaty, with a view to the harmonization of the social systems of Member States and the approximation of their legislation in that area.

42 The imposition of an obligation such as that envisaged by the national court in its question goes beyond the scope of Article 119 and has no other basis in Community law as it now stands.

43 The answer to Question 2 (b) must therefore be that Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension.

Costs

44 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings 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 submitted to it by the Bundesarbeitsgericht by order of 5 June 1984, hereby rules:

(1) Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

(2) Under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.

(3) Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension.

Mackenzie Stuart Koopmans Everling Bahlmann

Joliet Bosco Due Galmot Kakouris

Delivered in open court in Luxembourg on 13 May 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President