JUDGMENT OF THE COURT (Fifth Chamber)

26 September 2000 *

In Case C-322/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landesarbeitsgericht Hamburg, Germany, for a preliminary ruling in the proceedings pending before that court between

Bärbel Kachelmann

and

Bankhaus Hermann Lampe KG,

on the interpretation of Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for

* Language of the case: German.

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

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P.J.G. Kapteyn (Rapporteur), H. Ragnemalm and M. Wathelet, Judges,

Advocate General: A. Saggio,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Ms Kachelmann, by K. Bertelsmann, Rechtsanwalt, Hamburg,

— Bankhaus Hermann Lampe KG, by I. Heydasch, Rechtsanwalt, Hamburg,

— the German Government, by W.-D. Plessing, Ministerialrat in the Federal Ministry for Financial Affairs, and C.-D. Quassowski, Regierungsdirektor in the same ministry, acting as Agents,

— the Commission of the European Communities, by P. Hillenkamp, Legal Advisor, and A. Aresu, of its Legal Service, acting as Agents, assisted by C. Jacobs and R. Karpenstein, Rechtsanwälte, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Kachelmann, of Bankhaus Hermann Lampe KG and of the Commission at the hearing on 20 January 2000,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2000,

gives the following

Judgment

1 By order of 24 July 1998, lodged at the Registry of the Court on 20 August 1998, the Landesarbeitsgericht Hamburg (Higher Labour Court, Hamburg) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40, hereinafter 'the Directive').

2 That question has been raised in proceedings between Ms Kachelmann and Bankhaus Hermann Lampe KG (hereinafter 'Bankhaus'), her former employer, concerning her dismissal on economic grounds.

Legal background

Community law

3 Article 2(1) of the Directive provides that, for the purposes of the Directive, the principle of equal treatment is to mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

4 Article 5 of the Directive provides as follows:-

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment,

internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.'

National law

5 Article 1(1) to (3) of the Kündigungsschutzgesetz (Law on Employment Protection, BGBl. 1969 I, p. 1317), in the version applicable in the main proceedings (hereinafter 'the KSchG'), provides:

'1. The dismissal of an employee whose contract has continued for more than six consecutive months with the same company shall be legally ineffective where it lacks social justification.

2. A dismissal lacks social justification where it is not based on reasons connected with the person or conduct of the employee or with serious constraints affecting the company which make it impossible to retain the employee's post in that company...

3. If an employee is dismissed due to serious constraints affecting the company within the meaning of Article 1(2), the dismissal shall nevertheless lack social justification if, in selecting the worker, the employer did not take social factors into account, or did not do so sufficiently. Where the worker so requests, the employer shall tell the worker the reasons that led to the social choice concerning him. The first sentence shall not apply where operational, economical or other justified requirements make it necessary for the company to retain one or more particular workers and thus preclude selection on the basis of social criteria. It is for the employee to prove that there has been a socially unjustified dismissal within the meaning of the first sentence.'

6 Article 611a of the Bürgerliches Gesetzbuch (German Civil Code) provides that the employer may not place an employee at a disadvantage by reason of his or her sex when entering into a contract or when adopting a measure, in particular when dismissing an employee.

7 Article 2(1) of the Beschäftigungsförderungsgesetz (Law on the Promotion of Employment) prohibits employers from treating part-time workers differently from full-time workers unless there are objective reasons justifying different treatment.

The main proceedings

8 Ms Kachelmann was employed by Bankhaus from 1 April 1991 as a qualified banker with certified German/English bilingual drafting skills. She was responsible for managing cases in the 'recovery' department of the documentary transactions section of the Hamburg branch. She was employed on a part-time basis for 30 hours a week (76.92%); the number of working hours fixed by the collective agreement for full-time work was 38 hours per week.

9 Owing to a reduction in the volume of its international activities, Bankhaus decided to merge its 'recovery' department, which until then had been separate, with the rest of the documentary transactions section. That involved a partial reallocation of duties. Taking the view that it had excess staff, Bankhaus, by letter of 21 June 1996, gave Ms Kachelmann notice of dismissal on economic grounds with effect from 30 September 1996.

10 Ms Kachelmann contested her dismissal before the Arbeitsgericht Hamburg (Labour Court, Hamburg). She claims that, during the process leading to her being given notice of dismissal on economic grounds, Bankhaus did not make a selection on the basis of social criteria from amongst all workers performing the same duties. It did not compare Ms Kachelmann, who was working 30 hours a week, with full-time workers working 38 hours a week, even though she had stated, before she was given notice of dismissal, that she would be willing to work on a full-time basis.

11 By judgment of 18 February 1997 the Arbeitsgericht dismissed Ms Kachelmann's claim. It found that she could not be transferred to a full-time post without amendment of her employment contract, so that her job and those of the full-time workers were not comparable. Nor was Bankhaus under a duty to increase Ms Kachelmann's hours of work by amending her employment contract so that they could employ her on a full-time basis for the sole purpose of avoiding her dismissal.

12 The applicant took the view that it was indirectly discriminatory and therefore contrary to the Directive to exclude part-time workers from the category of workers from whom the employer must make a selection on the basis of social criteria when making redundancies on economic grounds. She therefore appealed to the Landesarbeitsgericht Hamburg.

13 According to the order for reference, Bankhaus continues to employ on a full-time basis a female member of staff whose duties are comparable to those of Ms Kachelmann and, in view of her social situation, Ms Kachelmann must be considered as having priority in terms of job protection. The Landesarbeitsgericht also considers that if the other member of staff was not treated as comparable to Ms Kachelmann, because the one works full-time and the other part-time, Ms Kachelmann may have suffered indirect discrimination.

The question referred for a preliminary ruling

14 In those circumstances, the Landesarbeitsgericht Hamburg decided to refer the following question to the Court for a preliminary ruling:

'Is Article 5(1) of Directive 76/207/EEC to be interpreted as meaning that, upon application of Article 1(3) of the Kündigungsschutzgesetz — in this case the version in force until 30 September 1996 — part-time female employees are to be regarded as comparable to male and female full-time employees when selecting employees for dismissal according to social criteria if substantially more women than men are employed on a part-time basis in a particular sector?'

Admissibility

15 The German Government submits that the question referred for a preliminary ruling is inadmissible. It argues, first, that Article 5(1) of the Directive is irrelevant to resolution of the dispute since, in the present case, the selection according to social criteria provided for in Article 1(3) of the KSchG concerns

two workers of the same sex, namely two female workers. Secondly, it considers that the factual information provided by the Landesarbeitsgericht in the order for reference is insufficient to enable the Court to give a ruling.

16 As far as those arguments are concerned, it is settled case-law that it is solely for the national courts before which the case has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (see, *inter alia*, Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 15). Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

17 However, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case has been referred to it by the national court in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, *Bosman*, paragraph 61, and Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20).

18 That is not the case here. It is common ground that the purpose of the Directive, as is stated in Article 1, is to put into effect in the Member States the principle of equal treatment for men and women as regards working conditions, including conditions governing dismissal.

19 First of all, it is clear from the order for reference and the observations submitted to the Court that the question referred concerns possible discriminatory effects resulting in a general way from application of the KSchG to dismissals on economic grounds.

20 Secondly, although the order for reference is succinctly drafted, the Court does in this case have sufficient factual and legal material to give a useful answer to the question submitted.

21 It follows from the foregoing that the question referred must be declared admissible.

Substance

22 By its question, the national court is asking, in essence, whether Articles 2(1) and 5(1) of the Directive preclude interpretation of a national provision such as Article 1(3) of the KSchG in such a way that full-time workers are not to be compared with part-time workers where an employer has to proceed to selection on the basis of social criteria when abolishing a part-time job on economic grounds.

23 It should be remembered at the outset that it is well settled that where national rules, although worded in neutral terms, work to the disadvantage of a much higher percentage of women than men, they discriminate indirectly against

women, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex (see, in particular, Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29).

24 It is common ground that in Germany part-time workers are far more likely to be women than men.

25 In order to provide the national court with a useful reply, it is therefore necessary to assess whether application of a national rule such as that at issue in the main proceedings results in full-time workers being treated differently from part-time workers. If this proves to be the case, the next question to be examined is whether that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex.

26 It is important to note, first of all, that lack of comparability between full-time and part-time workers in the selection process based on social criteria under Article 1(3) of the KSchG does not entail any direct disadvantage for the latter category. Both full-time and part-time workers receive the same advantageous or disadvantageous treatment according to whether in each particular case it is a full-time post or a part-time post which is being abolished.

27 However, as the Commission observed, the number of workers employed full-time in Germany, and probably throughout the Community, is significantly higher in all sectors than the number of part-time workers. It follows that, where jobs are being cut, part-time workers are in general put at a greater disadvantage because they have less chance of finding another comparable job.

28 Consequently, lack of comparability between full-time and part-time workers in the selection process based on social criteria pursuant to Article 1(3) of the KSchG may give rise to a difference in treatment to the detriment of part-time workers and entail an indirect disadvantage for them.

29 That being so, it is necessary to determine whether such a difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex.

30 As Community law stands at present, social policy is a matter for the Member States, which enjoy a reasonable margin of discretion as regards the nature of social protection measures and the detailed arrangements for their implementation. If such measures meet a legitimate aim of social policy, are suitable and requisite for attaining that end and are therefore justified by reasons unrelated to discrimination on grounds of sex, they cannot be regarded as being contrary to the principle of equal treatment (*Jørgensen*, cited above, paragraph 41).

31 It appears from the case-file that the purpose of the German legislation in question is to protect workers facing dismissal whilst at the same time taking account of the undertaking's operational and economic needs.

32 In that regard, it is clear from the observations submitted to the Court that job comparability is determined according to the actual content of the respective employment contracts, by assessing whether the worker whose job is being abolished for reasons peculiar to the undertaking would be capable, having

regard to his professional qualifications and the activities he has hitherto been carrying out within the undertaking, of carrying out the different but equivalent work done by other workers.

33 Application of those criteria may well create an indirect disadvantage for part-time workers because their jobs cannot be compared with those of full-time workers. However, as the German Government has pointed out, if job comparability between full-time and part-time workers were to be introduced in the selection process on the basis of social criteria under Article 1(3) of the KSchG, that would have the effect of placing part-time workers at an advantage, while putting full-time workers at a disadvantage. In the event of their jobs being abolished, part-time workers would have to be offered a full-time job, even if their employment contract did not entitle them to one.

34 The question whether part-time workers should enjoy such an advantage is a matter for the national legislature, which alone must find a fair balance in employment law between the various interests concerned. In this case, that assessment has been based on considerations unrelated to the sex of the workers.

35 In those circumstances, the answer must be that Articles 2(1) and 5(1) of the Directive is to be interpreted as not precluding an interpretation of a national rule, such as that contained in Article 1(3) of the KSchG, which proceeds on the general basis that part-time workers are not to be compared with full-time workers when an employer has to proceed to selection on the basis of social criteria when abolishing a part-time job on economic grounds.

Costs

36 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Landesarbeitsgericht Hamburg by order of 24 July 1998, hereby rules:

Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working

conditions must be interpreted as not precluding an interpretation of a national rule, such as that contained in Article 1(3) of the Kündigungsschutzgesetz in the version in force until 30 September 1996, which proceeds on the general basis that part-time workers are not to be compared with full-time workers when an employer has to proceed to selection on the basis of social criteria when abolishing a part-time job on economic grounds.

Edward Sevón Kapteyn

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 26 September 2000.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber