JUDGMENT OF THE COURT (Sixth Chamber)

26 June 2001 *

In Case C-381/99,

REFERENCE to the Court under Article 234 EC by the Oberlandesgericht Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Susanna Brunnhofer

and

Bank der österreichischen Postsparkasse AG,

on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the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 (OJ 1975 L 45, p. 19),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, R. Schintgen (Rapporteur), F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Ms Brunnhofer, by G. Jöchl, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by H. Michard and W. Bogensberger, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 March 2001,

gives the following

Judgment

1 By order of 15 June 1999, received at the Court on 8 October 1999, the Oberlandsgericht Wien referred to the Court for a preliminary ruling under Article 234 EC a number of questions on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the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 (OJ 1975 L 45, p. 19, 'the Directive').

2 The questions were raised in proceedings between Susanna Brunnhofer and the Bank der österreichischen Postsparkasse AG ('the Bank') concerning the difference between the remuneration paid by the Bank to Ms Brunnhofer and that paid to one of her male colleagues.

Legal background

3 Article 119 of the Treaty lays down the principle that men and women should receive equal pay for equal work.

4 The second and third paragraphs of Article 119 provide:

'For the purpose of this Article, "pay" means 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.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.'

5 Under Article 1 of the Directive:

'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.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.'

6 Article 3 of the Directive provides:

'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.'

7 Article 4 of the Directive states:

'Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.'

The main proceedings and the questions referred to the Court

8 According to the order for reference, Ms Brunnhofer, who was employed by the Bank from 1 July 1993 to 31 July 1997, considers that she has suffered discrimination based on sex, contrary to the principle of equal pay, on the ground that she received a monthly salary lower than that paid to a male colleague recruited by the Bank on 1 August 1994.

9 The national court found that, although their basic salary was identical, the difference in salary between the two employees arose from the fact that, under his employment contract, Ms Brunnhofer's male colleague received an individual supplement the monthly amount of which was approximately ATS 2 000 higher than the supplement which she received under her contract with the Bank.

10 It is common ground that, when they took up their duties, Ms Brunnhofer and her male colleague were classified in salary group V, which covers employees with training in banking who carry out skilled banking work on their own, as provided for by the collective agreement applicable to banking employees and bankers in Austria ('the collective agreement').

11 From this circumstance Ms Brunnhofer concludes that she was performing the same work as her male colleague or at any rate work of equal value.

12 It appears from the documents in the case that Ms Brunnhofer was posted to the 'Foreign' department of the Bank and that her job was to supervise loans. It was

expected that after a period of training she would be appointed to a management post in that department. As a result of professional and personal problems which arose before her male colleague was appointed, she did not, however, obtain such an appointment, but was posted to the legal service where, it seems, her work was not considered satisfactory either. She was dismissed on 31 July 1997.

13 Ms Brunnhofer took her case to the Equal Treatment Commission of the Federal Chancellor's Office, which concluded that discrimination within the meaning of the Austrian Law on Equal Treatment, which was intended to transpose the Directive, could not be ruled out in respect of the fixing of her salary.

14 Ms Brunnhofer then brought a legal action before the Arbeits- und Sozialgericht Wien (Austria) asking that the Bank be ordered to pay her more than ATS 160 000 as compensation for the salary discrimination on grounds of sex which she claimed to have suffered.

15 At first instance her action was dismissed by judgment of 16 December 1998. Ms Brunnhofer then appealed to the Oberlandesgericht Wien.

16 The Bank denies that Ms Brunnhofer suffered any discrimination contrary to the principal of equal pay.

17 First, it contends that the total salary of the two employees concerned was not in fact different, since, unlike her male colleague, Ms Brunnhofer was not required regularly to work the full overtime hours allotted to her.

18 Second, it contends that there were objective reasons for the difference in the individual supplement awarded to each of them.

19 According to the Bank, even though the two jobs in question were initially regarded as being of equal value, Ms Brunnhofer's male colleague in fact carried out more important functions in so far as he was responsible for important customers and was authorised to enter into binding commitments on behalf of the Bank. No such authority was given to Ms Brunnhofer, who had less client contact, which explains why she received a lower salary supplement than that given to her male colleague.

20 The quality of the work of the two employees in question was also different. After a promising start, Ms Brunnhofer's work deteriorated, in particular from the beginning of 1994, that is to say at a time when her male colleague had not yet been recruited.

21 Ms Brunnhofer's response is that work effectiveness is not relevant for the purposes of fixing pay on recruitment, since the value of work done can only be assessed as the employment contract is performed.

22 According to the national court, the decision in the case depends essentially on whether, as Ms Brunnhofer claims, it is possible to consider that work is the same

or of equal value where, under a collective agreement, the employees concerned are classified in the same job category, or whether, as the Bank contends, a difference in the individual work capacity of two employees, reflected in particular by the poor quality of the work of one of them, which obviously cannot emerge until some time after that person's appointment, is capable of justifying unequal pay.

23 The Oberlandesgericht Wien decided to stay proceedings and refer the following questions to the Court:

'1 (a) In assessing whether work is "equal work" or constitutes "the same job" within the meaning of Article 119 of the EC Treaty (now Article 141 EC) or is "the same work" or "work to which equal value is attributed" within the meaning of Directive 75/117/EEC, is it sufficient, where individual contracts of employment stipulate supplements to pay fixed by collective agreement, to ascertain whether the two workers being compared are classified in the same job, category under the collective agreement?

(b) If the reply to Question 1(a) is in the negative:

In the situation described in Question 1(a), is the same classification under the collective agreement evidence of the same work or work of equal value within the meaning of Article 119 (now Article 141) of the Treaty and of Directive 75/117/EEC, with the result that it is for the employer to prove that the work is different?

(c) Can the employer rely on circumstances not taken into account in the collective agreements in order to justify a difference in pay?

(d) If the reply to Question 1(a) or 1(b) is in the affirmative:

Does this also apply if the classification in the job category under the collective agreement is based on a job description couched in very general terms?

2 (a) Are Article 119 (now Article 141) of the Treaty and Directive 75/117/EEC based on a definition of "worker" which is uniform at least in so far as the worker's obligations under the contract of employment depend not only on generally defined standards but also on the individual capacity of the worker himself?

(b) Are Article 119 (now Article 141) of the Treaty and Article 1 of Directive 75/117/EEC to be interpreted as meaning that the fixing of different pay may be objectively justified by circumstances which can be established only *ex post facto*, such as in particular a specific employee's work performance?'

The questions referred for a preliminary ruling

Preliminary remarks

24 It is clear from the documents in the case that the national court has made a reference to the Court on the interpretation of Article 119 of the Treaty and Article 1 of the Directive in order to assess whether there is discrimination on grounds of sex prohibited by Community law in a case where the woman concerned receives the same basic pay, fixed by a collective agreement, as her male comparator, but from the start of her employment receives a monthly salary supplement, stipulated in her individual employment contract, which proves to be less than that paid to the man, although both employees are classified in the same grade of the same job category under the collective agreement governing their employment.

25 The questions raised by the national court, which can be examined together, essentially concern (i) the concepts of 'the same work', 'the same job' and 'work to which equal value is attributed' within the meaning of Article 119 of the Treaty and Article 1 of the Directive, (ii) the rules of evidence concerning the existence of unequal pay for men and women and of possible objective justification for any difference in treatment and (iii) the question whether certain specific factors, such as the personal capacity or work performance, may be relied on by an employer in order to justify paying an employee, such as the plaintiff in this case, remuneration lower than that paid to her male colleague.

26 Those questions therefore relate both to some of the conditions determining the actual application of the principle of equal pay for men and women and to the various circumstances relied on by the employer in this case to justify the

existence of a difference in the amount of the individual salary supplement paid to each of the employees concerned.

27 It should be recalled at the outset that Article 119 of the Treaty lays down the principle that the same work or work to which equal value is attributed must be remunerated in the same way, whether it is performed by a man or a woman (see, to that effect, *inter alia* Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 36).

28 As the Court has already held in Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 12, that principle, which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community.

29 The Court has also repeatedly held that the Directive is essentially designed to facilitate the practical application of the principle of equal pay laid down in Article 119 of the Treaty and in no way alters the scope or content of that principle as defined in Article 119 (see, in particular, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 11, and *JämO*, cited above, paragraph 37), so that the terms used in the Treaty article and in the Directive have the same meaning (see, as regards 'pay', Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 35, and as regards 'the same work', Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* [1999] ECR I-2865, paragraph 23).

30 So understood, the fundamental principle laid down in Article 119 of the Treaty and elaborated by the Directive precludes unequal pay as between men and women for the same job or work of equal value, whatever the mechanism which

produces such inequality (see *Barber*, cited above, paragraph 32), unless the difference in pay is justified by objective factors unrelated to any discrimination linked to the difference in sex (see, in particular, Case 129/79 *Macarthys* [1980] ECR 1275, paragraph 12, and Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, paragraph 34).

31 In order to help the national court, those various elements must be considered in turn.

Existence of unequal pay between men and women

32 It follows from the case-law of the Court that, since Article 119 of the Treaty has binding effect, the prohibition of discrimination between men and women applies not only to the action of the public authorities but also, as is indeed clear from the wording of Article 4 of the Directive, to all agreements which are intended to regulate paid labour collectively as well as to contracts between private individuals (see, to that effect, in particular *Defrenne II*, cited above, paragraph 39).

33 It is also settled case-law that the concept of pay in Article 119 of the Treaty and Article 1 of the Directive covers any other consideration, in cash or in kind, present or future, provided that the worker receives it, even indirectly, in respect of his employment from his employer (see, *inter alia*, *Barber*, paragraph 12, and *JämO*, paragraph 39, both cited above).

34 The monthly salary supplement in question in the present case incontestedly constitutes consideration stipulated in the individual employment contract and paid by the employer to the two employees concerned in respect of their employment with the Bank. That supplement must, therefore, be classified as pay for the purposes of Article 119 of the Treaty and Article 1 of the Directive.

35 As regards the method to be used for comparing the pay of the workers concerned in order to determine whether the principle of equal pay is being complied with, again according to the case-law, genuine transparency permitting an effective review is assured only if that principle applies to each aspect of remuneration granted to men and women, excluding any general overall assessment of all the consideration paid to workers (see *Barber,* paragraphs 34 and 35).

36 That interpretation is indeed borne out by the actual terms of Article 1 of the Directive, according to which the principle of granting men and women equal pay for the same work, as laid down in Article 119 of the Treaty and elaborated by the Directive, means eliminating, for the same work or work to which equal value is attributed, all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

37 In the circumstances, the national court identified quite rightly an inequality between the unequal amount of individual salary supplement paid monthly to the plaintiff and that paid to her male comparator, although it is undisputed that the two employees concerned receive the same basic pay and regardless of the Bank's contention that their overall salary is identical.

38 That finding is not, however, a sufficient basis for concluding that discrimination prohibited by Community law exists.

39 First, since the principle of equal pay as laid down in Article 119 of the Treaty and Article 1 of the Directive presupposes that the men and women to whom it applies are in identical or comparable situations (see, to that effect, Case C-132/92 *Roberts* [1993] ECR I-5579, paragraph 17), it must also be ascertained whether the employees concerned are performing the same work or work to which equal value may be attributed.

40 Second, the differences in treatment prohibited by Article 119 are exclusively those based on the difference in sex of the employees concerned (Case 96/80 *Jenkins* [1981] ECR 911, paragraph 10).

Determining whether work is the same or of equal value

41 The national court is asking essentially whether the fact that the female employee claiming discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is sufficient to reach the conclusion that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive.

42 In replying to this point raised by the reference, it must be borne in mind that it is clear from the Court's case-law that the terms 'the same work', 'the same job' and 'work of equal value' in Article 119 of the Treaty and Article 1 of the Directive

are entirely qualitative in character in that they are exclusively concerned with the nature of the work actually performed (see *Macarthys*, cited above, paragraph 11, and Case 237/85 *Rummler* [1986] ECR 2101, paragraphs 13 and 23).

43 The Court has repeatedly held that, in order to determine whether employees perform the same work or work to which equal value can be attributed, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation (see Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraphs 32 and 33, and *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, cited above, paragraph 17).

44 It follows that the fact that the employees concerned are classified in the same job category under the collective agreement applicable to their employment is not in itself sufficient for concluding that they perform the same work or work of equal value.

45 Such a classification does not exclude the existence of other evidence to support that conclusion.

46 That interpretation is not undermined by the fact, pointed out by the national court in Question 1(d), that the collective agreement defines the job covered by the relevant job category in very general terms.

47 As a matter of evidence, the general indications provided in the collective agreement must in any event be corroborated by precise and concrete factors based on the activities actually performed by the employees concerned.

48 It is therefore necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question in the case, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work.

49 It is for the national court, which alone has jurisdiction to find and assess the facts, to determine whether, in the light of the actual nature of the activities carried out by those concerned, equal value can be attributed to them (*JämO*, cited above, paragraph 48).

50 More particularly, in the present case, the national court must determine whether the plaintiff and the male comparator perform comparable work, even though, as is clear from the order for reference, the male colleague is responsible for dealing with important customers and has authority to enter into binding commitments, whereas Ms Brunnhofer, who supervises loans, has less contact with clients and cannot enter into commitments that directly bind her employer.

The burden of proof

51 By this part of the reference, the national court is asking essentially which party to the main proceedings bears the burden of proving the existence of an inequality

in pay between men and women and any circumstances capable of objectively justifying such a difference in treatment.

52 As to that point, it should be observed that it is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination in the matter of pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to having the discrimination removed (see Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 13).

53 However, it is clear from the case-law of the Court that the burden of proof 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 (see *Enderby*, cited above, paragraph 14).

54 In particular, where an undertaking applies a system of pay with a mechanism for applying individual supplements to the basic salary, which is wholly 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 (Case 109/88 *Danfoss* [1989] ECR 3199, paragraph 16).

55 Under such a system, female employees are unable to compare the different components of their salary with those of the pay of their male colleagues belonging to the same salary group and can establish differences only in average pay, so that in practice they would be deprived of any possibility of effectively

examining whether the principle of equal pay was being complied with if the employer did not have to indicate how he applied the criteria concerning supplements (see *Danfoss*, cited above, paragraphs 10, 13 and 15).

56 However, there are no such special circumstances in the present case, which concerns the inequality, which is not denied, of a precise component of the overall remuneration granted by the employer to two particular employees of different sex, so that the case-law set out in paragraphs 53 to 55 above is not applicable to this case.

57 In accordance with the normal rules of evidence, it is therefore for the plaintiff in the main proceedings to establish before the national court that the conditions giving rise to a presumption that there is unequal pay prohibited by Article 119 of the Treaty and by the Directive are fulfilled.

58 It is accordingly for the plaintiff to prove by any form of allowable evidence that the pay she receives from the Bank is less than that of her chosen comparator, and that she does the same work or work of equal value, comparable to that performed by him, so that prima facie she is the victim of discrimination which can be explained only by the difference in sex.

59 Contrary to what the national court seems to accept, the employer is not therefore bound to show that the activities of the two employees concerned are different.

60 If the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a prima facie case of discrimination would exist and it would then be for the employer to prove that there was no breach of the principle of equal pay.

61 To do this, the employer could deny that the conditions for the application of the principle were met, by establishing by any legal means *inter alia* that the activities actually performed by the two employees were not in fact comparable.

62 The employer could also justify the difference in pay by objective factors unrelated to any discrimination based on sex, by proving that there was a difference, unrelated to sex, to explain the payment of a higher monthly supplement to the chosen comparator.

Objective justifications for unequal pay

63 The national court is essentially asking whether a difference between a woman's and a man's pay for the same work or work of equal value is capable of being objectively justified, first, by circumstances not taken into consideration under the collective agreement applicable to the employees concerned and, second, by factors which are known only after the employees have taken up their duties and which can be assessed only while the employment contract is being performed, such as a difference in the individual work capacity of the employees concerned or in the effectiveness of an employee's work in relation to that of a colleague.

64 The national court is thereby seeking to determine legal criteria which would enable the existence of an objective justification for unequal treatment prima facie based on sex to be established.

65 In preliminary ruling proceedings, although it is ultimately for the national court, which alone is competent to assess the facts, to establish whether, in the particular case before it, there are objective grounds unrelated to any discrimination based on sex to justify such inequality, the Court of Justice, which is called on to provide answers of use to the national court, may nevertheless provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see *Seymour-Smith and Perez*, cited above, paragraphs 67 and 68).

66 It is appropriate to recall here the case-law according to which a difference in the remuneration paid to women in relation to that paid to men for the same work or work of equal value must, in principle, be considered contrary to Article 119 of the Treaty and, consequently, to the Directive. It would be otherwise only if the difference in treatment were justified by objective factors unrelated to any discrimination based on sex (see, *inter alia*, *Macarthys*, paragraph 12, and *Hill and Stapleton*, paragraph 34).

67 Furthermore, the grounds put forward by the employer to explain the inequality must correspond to a real need of the undertaking, be appropriate to achieving the objectives pursued and necessary to that end (Case 170/84 *Bilka* [1986] ECR 1607, paragraph 36).

68 As regards the first part of that latter aspect of the reference, as reformulated, concerning possible justifications for unequal treatment, it need merely be stated that it follows from the foregoing that the employer may validly explain the difference in pay, in particular by circumstances not taken into consideration

under the collective agreement applicable to the employees concerned, in so far as they constitute objectively justified reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality.

69 It is for the national court to make such an assessment of the facts in each case before it, in the light of all the evidence.

70 With regard to the second part of this aspect of the reference, as reformulated, it must be pointed out that the third paragraph of Article 119 makes a distinction between work paid at piece rates and work paid at time rates.

71 In the first case, that provision states that pay is to be calculated on the basis of the same unit of measurement, without giving further details.

72 In the case of work paid at time rates, it is essential for the employer to be able to take employees' productivity into account and therefore their individual work capacity.

73 In that context, the Court has, moreover, held that, where the unit of measurement is the same for two groups of workers carrying out the same work at piece rates, the principle of equal pay does not prohibit those workers from

receiving different pay if that is due to different individual output (see, to that effect, *Royal Copenhagen*, cited above, paragraph 21).

74 However, in the second case, the criterion used in the third paragraph of Article 119 is 'the same job', a term which is equivalent to 'the same work' used in the first paragraph of that provision and Article 1 of the Directive.

75 As was pointed out in paragraphs 42, 43 and 48 of this judgment, such a term is defined on the basis of objective criteria, which do not include the essentially subjective and variable factor of each employee's productivity taken in isolation.

76 In so far as the questions clearly concern work paid at time rates, as the national court has, moreover, stated in its order for reference, it follows from the foregoing that circumstances linked to the person of the employee which cannot be determined objectively at the time of that person's appointment but come to light only during the actual performance of the employee's activities, such as personal capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing identical or comparable work.

77 As the Commission has rightly pointed out in relation to work paid at time rates, an employer cannot therefore pay an unequal salary on the basis of the effectiveness or quality of the work done in the actual performance of the tasks initially conferred except by conferring different duties on the employees

concerned, for example by moving the employee whose work has not met expectations to another post. In circumstances such as those described in the previous paragraph, there is nothing to stop individual work capacity from being taken into account and from having an effect on the employee's career development as compared with that of her colleague, and hence on the subsequent posting and pay of the persons concerned, even though they might, at the beginning of the employment relationship, have been regarded as performing the same work or work of equal value.

78 It should also be pointed out in this connection that, contrary to what the national court appears to accept, it is not possible to treat in the same way all the factors directly concerning the person of the employee and therefore, in particular, to assimilate the professional training necessary to perform the activity in question to its concrete results. Although professional training is a valid criterion not only for ascertaining whether or not employees are doing the same work, but also as an objective justification for a difference in pay granted to employees doing comparable work (see, to that effect, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, cited above, paragraph 19), that is because it is a factor which is objectively known at the time when the employee is appointed, whereas work performance can be assessed only subsequently and cannot therefore constitute a proper ground for unequal treatment right from the start of the employment of the employees concerned.

79 In those circumstances, the employer cannot, at the time when the employees concerned are appointed, pay to a specific employee remuneration lower than that paid to a colleague of the other sex and later justify that difference on the ground that the latter's work is superior, or on the ground that the quality of the former's work steadily deteriorated after that employee's recruitment, where it is established that the employees concerned are actually performing the same work or at any rate work of equal value. If that latter condition is met, a justification

for unequal treatment based on future assessment of the work of each employee concerned still cannot exclude the existence of considerations based on the different sex of the employees concerned. As is already clear from paragraphs 30 and 66 of this judgment, the difference in pay between a woman and a man occupying the same job can be justified only by objective factors unrelated to any discrimination linked to the difference in sex.

80 In the light of all the foregoing considerations, the reply to be given to the questions referred must be that the principle of equal pay for men and women laid down in Article 119 of the Treaty and elaborated by the Directive must be interpreted as follows:

— a monthly salary supplement to which the employees concerned are entitled under their individual employment contracts, paid by the employer in respect of their employment, constitutes pay within the scope of Article 119 of the Treaty and the Directive; equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees but also in the light of each aspect of pay taken in isolation;

— the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is not in itself sufficient for concluding that the two employees concerned are performing the same work or work to which equal value is attributed within

the meaning of Article 119 of the Treaty and Article 1 of the Directive, since this fact is only one indication amongst others that this criterion is met;

— as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay;

— a difference in pay is capable of being justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality;

— in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the

effectiveness of the work of a specific employee compared with that of a colleague.

Costs

81 The costs incurred by the Austrian 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Oberlandesgericht Wien by order of 15 June 1999, hereby rules:

The principle of equal pay for men and women laid down in 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 elaborated by 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 must be interpreted as follows:

— a monthly salary supplement to which the employees concerned are entitled under their individual employment contracts, paid by the employer in respect of their employment, constitutes pay within the scope of Article 119 of the Treaty and the Directive; equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees but also in the light of each aspect of pay taken in isolation;

— the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is not in itself sufficient for concluding that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive, since this fact is only one indication amongst others that this criterion is met;

— as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward

objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay;

— a difference in pay is capable of being justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality;

— in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of a colleague.

Gulmann Skouris Schintgen

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 26 June 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber