JUDGMENT OF THE COURT (Grand Chamber)

3 October 2006 *

In Case C-17/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 11 January 2005, received at the Court on 19 January 2005, in the proceedings

B.F. Cadman

v

Health & Safety Executive,

intervener:

Equal Opportunities Commission,

* Language of the case: English.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and A. Rosas, Presidents of Chambers, R. Schintgen, N. Colneric (Rapporteur), S. von Bahr, J.N. Cunha Rodrigues, J. Klučka, U. Lõhmus, E. Levits, A. Ó Caoimh and L. Bay Larsen, Judges,

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2006,

after considering the observations submitted on behalf of:

— Mrs Cadman, by T. Gill, Barrister, and E. Hawksworth, Solicitor,

— the Equal Opportunities Commission, by R. Allen QC, R. Crasnow, Barrister, and J. Hardwick and M. Robison, Solicitors,

— the United Kingdom Government, by M. Bethell and E. O'Neill, acting as Agents, and N. Underhill QC, N. Paines QC and J. Eady, Barrister,

— the French Government, by G. de Bergues, acting as Agent,

— Ireland, by D. O'Hagan, acting as Agent, and N. Travers, BL,

— the Commission of the European Communities, by M.-J. Jonczy and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 141 EC.

2 The reference was made in the course of proceedings between Mrs Cadman and the Health & Safety Executive ('the HSE') concerning the alignment of her pay with that of her male colleagues.

Legal background

Community legislation

3 Article 141(1) and (2) EC provides:

'1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. 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.'

4 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 (OJ 1975 L 45, p. 19) provides:

'The principle of equal pay for men and women outlined in Article [141 EC], 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.'

5 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) is to apply, in accordance with Article 3(1) thereof, to the situations covered, inter alia, by Article 141 EC and by Directive 75/117.

6 Article 2(2) of Directive 97/80 states:

'For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex

unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.'

7 Under Article 4(1) of Directive 97/80, Member States 'shall take such measures as are necessary ... to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.

8 In accordance with Article 2 of Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80 to the United Kingdom of Great Britain and Northern Ireland (OJ 1998 L 205, p. 66), Directive 97/80 was to be transposed in the United Kingdom by 22 July 2001 at the latest.

9 Article 2(2) 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), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) ('Directive 76/207'), provides:

'For the purposes of this Directive, the following definitions shall apply:

...

— indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,

...'

10 Under Article 3(1) of Directive 76/207:

'Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC;

...'

11 In accordance with the first sentence of Article 2(1) of Directive 2002/73, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 5 October 2005 at the latest or were to

ensure, by that date at the latest, that management and labour introduced the requisite provisions by way of agreement.

National legislation

12 Section 1 of the Equal Pay Act 1970 ('the Equal Pay Act') provides:

'(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that —

...

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment:

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the

woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term;

...

(3) An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor:

(a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's

...

...'

The main proceedings and the questions referred for a preliminary ruling

13 Mrs Cadman is employed by the HSE. Since she has been working for that body the pay system has been altered several times. Before 1992 the system was incremental, that is to say that each employee received an annual increase until he reached the top of the pay scale for his grade. In 1992, the HSE introduced a performance-related element so that the amount of the annual increment was adjusted to reflect the employee's individual performance. Under this system high performing employees could reach the top of the scale more quickly. Following the introduction in 1995 of a Long Term Pay Agreement, annual pay increases were set in accordance with the award of points called 'equity shares' linked to the employee's performance. That change had the effect of decreasing the rate at which pay differentials narrowed between longer-serving and shorter-serving employees on the same grade. Finally, in 2000, the system was altered again to enable employees lower down the pay bands to be paid larger annual increases and, therefore, to progress more quickly through the pay band.

14 In June 2001, Mrs Cadman lodged an application before the Employment Tribunal based on the Equal Pay Act. At the date of her claim, she had been engaged as a band 2 inspector, a managerial post, for nearly five years. She took as comparators four male colleagues who were also band 2 inspectors.

15 Although they were in the same band as Mrs Cadman, those four persons were paid substantially more than her. In the financial year 2000/01 Mrs Cadman's annual

salary was GBP 35 129, while the corresponding figures paid to her comparators were GBP 39 125, GBP 43 345, GBP 43 119 and GBP 44 183.

16 It is common ground that at the date of the claim lodged at the Employment Tribunal the four male comparators had longer service than Mrs Cadman, acquired in part in more junior posts.

17 The Employment Tribunal held that under section 1 of the Equal Pay Act the term in Mrs Cadman's employment contract relating to pay should be modified so as not to be less favourable than that in the employment contracts of her four comparators.

18 The HSE appealed to the Employment Appeal Tribunal against that decision. That tribunal held, first, that in the light of the judgment in Case 109/88 *Danfoss* [1989] ECR 3199, paragraph 25, where unequal pay arose because of the use of length of service as a criterion, no special justification was required. It held, second, that even if such justification were required, the Employment Tribunal had erred in law when considering justification.

19 By notice of appeal of 4 November 2003, Mrs Cadman appealed against the decision of the Employment Appeal Tribunal to the Court of Appeal.

20 The Court of Appeal states that the differentials in pay relied on by Mrs Cadman in support of her action are explained by the structure of the pay system, as the HSE applies a system of pay increases which, in one way or another, reflects and rewards length of service.

21 Since women in pay band 2 and generally in the relevant part of the HSE's workforce have on average shorter service than men, the use of length of service as a determinant of pay has a disproportionate impact on women.

22 The Court of Appeal states that evidence submitted by the Equal Opportunities Commission, and accepted by all the parties to the dispute, shows that in the United Kingdom and throughout the European Union the length of service of female workers, taken as a whole, is less than that of male workers. The use of length of service as a determinant of pay plays an important part in the continuing, albeit slowly narrowing, gap between female and male workers.

23 In that regard, the Court of Appeal is uncertain whether the case-law of the Court has departed from the finding in *Danfoss* that 'the employer does not have to provide special justification for recourse to the criterion of length of service'. Recent cases, inter alia Case C-184/89 *Nimz* [1991] ECR I-297, Case C-1/95 *Gerster* [1997] ECR I-5253, and Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, arguably represent second thoughts on the part of the Court of Justice. The Court of Appeal notes, in that regard, that it is not convinced by the HSE's argument that the scope of the judgment in *Danfoss* has been modified by the subsequent case-law of the Court only in relation to part-time workers and that therefore the criterion of length of service never needs objective justification, except in relation to those workers.

24 Furthermore, the Court of Appeal agrees with the Employment Appeal Tribunal that if the issue relating to the scope of the judgment in *Danfoss* were to be resolved in a manner favourable to Mrs Cadman the case would have to be referred back to a differently constituted Employment Tribunal, so that the issue of justification could be re-examined.

25 In those circumstances, the Court of Appeal (England and Wales) (Civil Division) decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Where the use by an employer of the criterion of length of service as a determinant of pay has a disparate impact as between relevant male and female employees, does Article 141 EC require the employer to provide special justification for recourse to that criterion? If the answer depends on the circumstances, what are those circumstances?

(2) Would the answer to the preceding question be different if the employer applies the criterion of length of service on an individual basis to employees so that an assessment is made as to the extent to which greater length of service justifies a greater level of pay?

(3) Is there any relevant distinction to be drawn between the use of the criterion of length of service in the case of part-time workers and the use of that criterion in the case of full-time workers?'

The first and second questions referred for a preliminary ruling

26 By its first and second questions, which it is appropriate to examine together, the national court asks essentially whether, and if so in what circumstances, Article 141 EC requires an employer to provide justification for recourse to the criterion of length of service as a determinant of pay where use of that criterion leads to disparities in pay between the men and women to be included in the comparison.

The general scheme arising from Article 141(1) EC

27 Article 141(1) EC lays down the principle that equal work or work of equal value must be remunerated in the same way, whether it is performed by a man or a woman (Case C-320/00 *Lawrence and Others* [2002] ECR I-7325, paragraph 11).

28 As the Court held in Case 43/75 *Defrenne* [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 (see also Case C-381/99 *Brunnhofer* [2001] ECR I-4961, paragraph 28, and *Lawrence and Others*, paragraph 12).

29 Furthermore, it must be recalled that the general rule laid down in the first paragraph of Article 1 of Directive 75/117, which is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 141(1) EC, in no way alters the content or scope of that principle (see Case 96/80 *Jenkins* [1981] ECR 911, paragraph 22). That rule provides for the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration for the same work or for work to which equal value is attributed (Case 237/85 *Rummler* [1986] ECR 2101, paragraph 11).

30 The scope of Article 141(1) EC covers not only direct but also indirect discrimination (see, to that effect, *Jenkins*, paragraphs 14 and 15, and Case C-285/02 *Elsner-Lakeberg* [2004] ECR I-5861, paragraph 12).

31 It is apparent from settled case-law that Article 141 EC, like its predecessor Article 119 of the EEC Treaty (which became Article 119 of the EC Treaty — Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), must be interpreted as meaning that whenever there is evidence of discrimination, it is for the employer to prove that the practice at issue is justified by objective factors unrelated to any discrimination based on sex (see, to that effect, inter alia, *Danfoss*, paragraphs 22 and 23; Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 16; *Hill and Stapleton*, paragraph 43; and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 71).

32 The justification given must be based on a legitimate objective. The means chosen to achieve that objective must be appropriate and necessary for that purpose (see, to that effect, Case 170/84 *Bilka* [1986] ECR 1607, paragraph 37).

Recourse to the criterion of length of service

33 In paragraphs 24 and 25 of the judgment in *Danfoss*, the Court, after stating that it is not to be excluded that recourse to the criterion of length of service may involve less

advantageous treatment of women than of men, held that the employer does not have to provide special justification for recourse to that criterion.

34 By adopting that position, the Court acknowledged that rewarding, in particular, experience acquired which enables the worker to perform his duties better constitutes a legitimate objective of pay policy.

35 As a general rule, recourse to the criterion of length of service is appropriate to attain that objective. Length of service goes hand in hand with experience, and experience generally enables the worker to perform his duties better.

36 The employer is therefore free to reward length of service without having to establish the importance it has in the performance of specific tasks entrusted to the employee.

37 In the same judgment, the Court did not, however, exclude the possibility that there may be situations in which recourse to the criterion of length of service must be justified by the employer in detail.

38 That is so, in particular, where the worker provides evidence capable of giving rise to serious doubts as to whether recourse to the criterion of length of service is, in the circumstances, appropriate to attain the abovementioned objective. It is in such circumstances for the employer to prove that that which is true as a general rule, namely that length of service goes hand in hand with experience and that experience enables the worker to perform his duties better, is also true as regards the job in question.

39 It should be added that where a job classification system based on an evaluation of the work to be carried out is used in determining pay, it is not necessary for the justification for recourse to a certain criterion to relate on an individual basis to the situation of the workers concerned. Therefore, if the objective pursued by recourse to the criterion of length of service is to recognise experience acquired, there is no need to show in the context of such a system that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better. By contrast, the nature of the work to be carried out must be considered objectively (*Rummler*, paragraph 13).

40 It follows from all of the foregoing considerations, that the answer to the first and second questions referred must be that Article 141 EC is to be interpreted as meaning that, where recourse to the criterion of length of service as a determinant of pay leads to disparities in pay, in respect of equal work or work of equal value, between the men and women to be included in the comparison:

— since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard;

— where a job classification system based on an evaluation of the work to be carried out is used in determining pay, there is no need to show that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better.

The third question referred for a preliminary ruling

41 In the light of the answer given to the first and second questions, there is no need to answer the third question.

The temporal effects of this judgment

42 The United Kingdom Government and Ireland take the view that, if the Court were contemplating departing from the principles that it laid down in the judgment in *Danfoss*, considerations of legal certainty would require a limit on the temporal effects of the judgment to be given.

43 Since this judgment contains only a clarification of the case-law in this field, there is no need to limit its temporal effects.

Costs

44 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 141 EC is to be interpreted as meaning that, where recourse to the criterion of length of service as a determinant of pay leads to disparities in pay, in respect of equal work or work of equal value, between the men and women to be included in the comparison:

— **since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard;**

— **where a job classification system based on an evaluation of the work to be carried out is used in determining pay, there is no need to show that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better.**

[Signatures]