Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

17 July 2014*

(Social policy — Article 141 EC — Equality of pay for female and male workers — Early retirement with immediate payment of pension — Service credit for the purposes of calculating the pension — Advantages benefiting mainly female civil servants — Indirect discrimination — Objective justification — Genuine concern about attaining the stated objective — Consistency in implementation — Article 141(4) EC — Measures aimed at compensating for career-related disadvantages for female workers — Not applicable)

In Case C-173/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour administrative d'appel de Lyon (France), made by decision of 3 April 2013, received at the Court on 9 April 2013, in the proceedings

Maurice Leone,

Blandine Leone

v

Garde des Sceaux, ministre de la Justice,

Caisse nationale de retraite des agents des collectivités locales,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan and J. Malenovský, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— Mr and Mrs Leone, by B. Madignier, avocat,

— the Caisse nationale de retraite des agents des collectivités locales, by J.-M. Bacquer, acting as Agent,

— the French Government, by M. Hours and by G. de Bergues and S. Menez, acting as Agents,

* Language of the case: French.

— the European Commission, by D. Martin, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 157 TFEU.

2 The request has been made in proceedings between Mr and Mrs Leone, on the one hand, and the Garde des Sceaux, ministre de la Justice (Minister for Justice) and the Caisse nationale de retraite des agents des collectivités locales (National pension fund for local community civil servants) (the 'CNRACL'), on the other, concerning a claim brought by Mr and Mrs Leone against the French State for compensation for the loss incurred by them as a result of the refusal by the CNRACL to grant Mr Leone early retirement with immediate payment of pension and a service credit for the purposes of calculating his pension.

Legal context

3 Article L. 1 of the French Civil and Military Retirement Pensions Code (the 'Pensions Code') provides:

'A pension is a personal monetary benefit for life granted to civil and military servants and, on their death, to their lawful heirs and successors, as remuneration for the services which they performed until their retirement from the service.

The amount of the pension, which takes account of the level, duration and nature of the services performed, guarantees to its recipient, at the end of his or her career, a standard of living commensurate with the dignity of his or her office.'

The provisions on early retirement with immediate payment of pension

4 The order for reference indicates that, subject to certain conditions, civil servants may opt for early retirement with immediate payment of pension.

5 Those conditions include those laid down in Article L. 24(I)(3) of the Pensions Code, in the version thereof resulting from Article 136 of the Finance (Amendment) Law for 2004 (Law No 2004-1485 of 30 December 2004) (French Official Gazette of 31 December 2004, p. 22522), which states:

'I. – The pension shall be awarded:

…

3. if the civil servant is a parent of three children, living, or deceased due to operations of war, or is a parent of one child, living, older than one year of age and suffering from a disability equal to or greater than 80%, on condition that, for each child, the civil servant has taken a career break in accordance with the conditions laid down by decree of the Conseil d'État (French Council of State).

Periods during which no compulsory contributions were made to a basic retirement scheme shall be treated as a career break for purposes of the foregoing paragraph in accordance with the conditions laid down by decree of the Conseil d'État.

The children listed in paragraph II of Article L. 18 which the person concerned has raised under the conditions of paragraph III of that Article shall be deemed equivalent to the children referred to in the first subparagraph above.'

6 The third to sixth subparagraphs of Article L. 18(II) of the Pensions Code lists the following:

'Children of the husband resulting from an earlier marriage, his children born out of wedlock whose filiation is established and his adopted children;

Children who are the subject of a delegation of parental authority in favour of the pension holder or her husband;

Children placed under the guardianship of the pension holder or his or her spouse, where this involves actual and permanent custody of the child;

Children fostered in the home of the pension holder or his or her spouse, who, under conditions laid down by decree of the Conseil d'État, evidences actual and permanent assumption of responsibility for the child in question.'

7 Article 18(III) of the Pensions Code contains the following clarifications:

'With the exception of children deceased due to operations of war, the children must have been brought up for at least nine years, either before their sixteenth birthday or before the age at which they ceased to be dependent within the meaning of Articles L. 512-3 and R. 512-2 to R. 512-3 of the Social Security Code.

In order to satisfy the abovementioned requirement of duration, account shall be taken of the time during which the children have been brought up by the spouse following the death of the pension holder.'

8 Article R. 37 of the Pensions Code, in the wording resulting from Decree No 2005-449 of 10 May 2005 implementing Article 136 of the Finance (Amendment) Law for 2004 (Law No 2004-1485 of 30 December 2004) and amending the Civil and Military Retirement Pensions Code (French Official Gazette of 11 May 2005, p. 8174), provides:

'I. – The career break referred to in the first subparagraph of Article L. 24(1)(3) must have been of a continuous duration of at least two months and have occurred when the civil servant was affiliated to a compulsory retirement scheme. In cases of multiple births or adoptions, the duration of the career break taken into account in respect of all of the children in question shall also be two months.

That career break must have taken place between the first day of the fourth week preceding the birth or adoption and the last day of the sixteenth week following the birth or adoption.

Notwithstanding the foregoing subparagraph, for the children listed in the third, fourth, fifth and sixth subparagraphs of Article L. 18(II) whom the person concerned has brought up in the circumstances envisaged in paragraph III of that Article, the career break must occur either before their sixteenth birthday or before the age at which they ceased to be dependent within the meaning of Articles L. 512-3 and R. 512-2 to R. 512-3 of the Social Security Code.

II. – For the purposes of calculating the duration of the career break, account shall be taken of periods corresponding to a suspension of performance of the employment contract or an interruption of actual service, occurring in the context of:

(a) maternity leave …;

(b) paternity leave …;

(c) adoption leave …;

(d) parental leave …;

(e) parental care leave …;

(f) availability to bring up a child of less than eight years of age

….

III. –
The periods referred to in the second subparagraph of Article L. 24(I)(3) are the periods during which the interested party did not make pension contributions and did not engage in any occupational activity.'

The provisions concerning service credit

9 Under Article 15 of Decree No 2003-1306 of 26 December 2003 relating to the retirement scheme for civil servants affiliated to the Caisse nationale de retraites des agents des collectivités locales ('the local community civil servants decree') (French Official Gazette of 30 December 2003, p. 22477):

'I. – Subject to the conditions laid down for State civil servants, the following service credits shall be added to the periods of actual service:

…

2. A service credit fixed at four trimesters shall be awarded, provided that the civil servant has taken a career break, for each legitimate child and each child born out of wedlock prior to 1 January 2004, for each child adopted prior to 1 January 2004 and, subject to the condition that they have been nurtured for at least nine years before reaching their 21st birthday, for each of the other children listed in paragraph II of Article 24 who were taken into the civil servant's care prior to 1 January 2004.

That career break must be for a continuous period of at least two months, in the form of maternity leave, adoption leave, parental leave or parental care leave …, or in order to be available to bring up a child of less than 8 years of age …

The provisions of subparagraph 2 shall apply to pensions awarded from 28 May 2003;

3. The service credit provided for in subparagraph 2 shall be payable to female civil servants who have given birth during their years of study prior to 1 January 2004 and before their recruitment into the civil service provided such recruitment occurred within two years of obtaining the necessary qualification in order to sit the recruitment examination, no career break being required;

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 From 1984 to 2005, Mr Leone, a civil servant in the hospital sector, worked as a nurse in the civilian care homes of Lyons.

11 On 4 April 2005, Mr Leone applied for early retirement with immediate payment of his pension as father of three children born on 9 October 1990, 31 August 1993 and 27 November 1996 respectively.

12 His application was refused by the CNRACL by decision of 18 April 2005 on the ground that Mr Leone had not taken a career break for each of his children as required by Article L. 24(I)(3) of the Pensions Code. Mr Leone’s appeal against that decision was dismissed by order of the Tribunal administratif de Lyon (Administrative Court, Lyons) of 18 May 2006.

13 On 31 December 2008, Mr and Mrs Leone began a dispute procedure with a view to obtaining compensation for the loss they consider they have incurred as a result of the indirect discrimination which they alleged Mr Leone had suffered, contrary to EU law. They argued that that discrimination results, first of all, from the combined provisions of Articles L. 24 and R. 37 of the Pensions Code on early retirement with immediate payment of pension and, secondly, from Article 15(2) of Decree No 2003/1306 on service credits for pension purposes.

14 That action was dismissed by a judgment of the Tribunal administratif de Lyon of 17 July 2012, whereupon Mr and Mrs Leone appealed against that judgment before the Cour administrative d’appel de Lyon (Administrative Appeal Court, Lyons).

15 Observing that State liability may be incurred when national legislation disregards the French Republic’s international commitments, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Do Article L. 24 and Article R. 37, read in conjunction, of the [Pensions Code] as amended by Law No 2004-1485 … and Decree No 2005-449 … indirectly discriminate between men and women within the meaning of Article 157 [TFEU]?

2. Does Article 15 of [Decree No 2003-1306] indirectly discriminate between men and women within the meaning of Article 157 [TFEU]?

3. In the event that one of the first two questions is answered in the affirmative, can such indirect discrimination be justified on the basis of Article 157(4) [TFEU]?’

Procedure before the Court

16 Following the Opinion of the Advocate General, on 25 March 2014 Mr and Mrs Leone lodged a document with the Court Registry, requesting that the present case be reassigned to the Grand Chamber of the Court and that the oral procedure in the case be reopened.

17 In support of those requests, they submit, in essence, in addition to the fact that they disagree with the Opinion, firstly, that a pension reform was adopted on 20 January 2014 which, although not amending the advantages at issue in the main proceedings, nevertheless provides for the future adoption of a governmental report which will recast the family benefits included in the pension schemes. This is a new fact warranting a reopening of the oral procedure.

18 Secondly, they submit that Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40), as amended by Council Directive 96/97/EC of 20 December 1996 (OJ 1997, L 46, p. 20) was not referred to by either the French Government in its observations or the Advocate General in his Opinion. There is, therefore, an argument which has not been debated between the parties, with the result that the oral phase of the proceedings must be reopened.

19 As regards, first of all, the request to have the case reassigned to the Grand Chamber of the Court, it should be observed at the outset that there is no provision in the Statute of the Court of Justice of the European Union or in its Rules of Procedure setting out how a request of this type might be dealt with in the context of a request for a preliminary ruling.

20 It is true that under Article 60(3) of the Rules of Procedure the formation to which a case has been assigned may, at any stage of the proceedings, refer the case back to the Court in order that it may be reassigned to a formation composed of a greater number of judges, but that constitutes a measure which the formation to which the case has been assigned in principle decides on freely and of its own motion (see, to that effect, *Spain* v *Council*, C-310/04, EU:C:2006:521, paragraph 22).

21 In the present case, the Fourth Chamber of the Court considers that there is no need to request the Court to reassign the case to the Grand Chamber.

22 Secondly, it should be borne in mind that, according to Article 83 of the Rules of Procedure, the Court may, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court.

23 In the present case, the Court notes, first of all, that, after having been put on notice to apprise themselves of the observations submitted, none of those parties nor any of the parties concerned sought to have a hearing held, as provided for under Article 76 of the Rules of Procedure of the Court.

24 Secondly, the Court, after hearing the Advocate General, considers that it has before it all the necessary evidence to give judgment.

25 As regards, in particular, the new fact alleged by Mr and Mrs Leone, it must be said that the legislation to which they refer, which entered into force after the facts of the present case, is not such as to have a decisive impact on the Court's judgment in the case.

26 Furthermore, the fact that the French Government did not refer to Directive 86/378 in its written observations or at a hearing which it might have applied to have held and the fact that nor did the Advocate General refer to it in his Opinion, whilst Mr and Mrs Leone did refer to it in their observations, do not in any way warrant reopening the oral phase of the proceedings on the ground that it was not debated between the parties.

27 In the light of the foregoing, the Court considers that there is no need to reopen the oral phase of the proceedings.

The questions referred

Admissibility

28 The French Government contends, by way of principal argument, that the request for a preliminary ruling is inadmissible on the ground that the referring court has not explained either the link between the national provisions at issue in the main proceedings and Article 157 TFEU or the reasons which have led it to doubt the compatibility of those national provisions with that treaty provision.

29 In the French Government's submission, the referring court ought to have explained which effects attach to those national provisions which, in the light of the criteria set out by the Court in its case-law, are such as to lead to a finding of indirect discrimination. Similarly, the referring court ought to have set out the reasons why it disagrees with the position of the French Conseil d'État which, in its case-law, has previously found that there was no such indirect discrimination, whilst finding that it was not necessary to refer questions to the Court of Justice for a preliminary ruling on the point.

30 It should be remembered, first of all, that according to settled case-law, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute 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 it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, inter alia, *Carmen Media Group*, C-46/08, EU:C:2010:505, paragraph 75 and the case-law cited).

31 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear that the interpretation of EU 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, *Carmen Media Group*, EU:C:2010:505, paragraph 76 and the case-law cited).

32 In the present case, the aspects of national law and the factual material contained in the order for reference are sufficient to enable the Court to give a useful answer to the questions submitted to it, and the connection to the subject-matter of the main proceedings is obvious. Moreover, the reasons which led the referring court to query the interpretation of the provisions of EU law referred to by it in its questions and the connection it deems to exist between those provisions and the national provisions at issue in the main proceedings may be inferred easily from the order for reference and, in particular, from the description of the assertions and arguments of the parties to the main proceedings as set out in that order.

33 Secondly, it is settled case-law that Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case. In particular, a court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (see, inter alia, *Elchinov*, C-173/09, EU:C:2010:581, paragraphs 26 and 27 and the case-law cited).

34 It follows from all the foregoing that the objections put forward by the French Government must be dismissed and the request for a preliminary ruling must be held to be admissible.

Substance

Preliminary observations

35 It should be borne in mind, first of all, that the main proceedings involve a claim for compensation based on the fact that, under the national provisions in force at the relevant time, in April 2005 the claimant in the main proceedings was not able to take early retirement with immediate payment of pension and a service credit following the rejection by the CNRACL, by decision of 18 April 2005, of his application for those benefits. In those circumstances, and given that the Treaty of Lisbon entered into force only on 1 December 2009, it is appropriate, as argued inter alia by the Commission and Mr and Mrs Leone, for the purposes of addressing the issues raised in the questions referred, to take into consideration Article 141 EC rather than Article 157 TFEU, cited by the referring court in its questions.

36 Secondly, it should be noted that the national provisions on service credits for the purposes of pension calculation at issue in the main proceedings, to which the second question relates, were adopted after the judgment in *Griesmar*, C-366/99, EU:C:2001:648, from which it follows that the national rules previously in force disregarded the principle of equal pay laid down in Article 141 EC.

37 In that judgment, the Court held that, for the purposes of the service credit for pension purposes provided for by the earlier national rules, the grant of which was contingent on a single criterion, namely bringing up children, female civil servants and male civil servants were in a comparable situation for the purposes of that criterion, with the result that, in reserving that service credit solely for female civil servants and in excluding male civil servants who were able to prove that they had assumed the task of bringing up their children, those rules had introduced direct discrimination on grounds of sex, contrary to Article 141 EC (see *Griesmar*, EU:C:2001:648, in particular, paragraphs 53 to 58 and 67).

The second question

38 By its second question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 141 EC must be interpreted as meaning that a service credit scheme for pension purposes, such as that at issue in the main proceedings, gives rise to indirect discrimination in terms of pay as between female workers and male workers, contrary to that article.

39 It should be borne in mind, as a preliminary point, that the Court has held that the pensions provided under a scheme having features such as those of the French pension scheme for civil servants at issue in the main proceedings come within the concept of pay within the meaning of Article 141 EC (see to that effect, *Griesmar*, EU:C:2001:648, paragraphs 26 to 38, and *Mouflin*, C-206/00, EU:C:2001:695, paragraphs 22 and 23).

40 According to settled case-law, the principle of equal pay laid down in Article 141 EC precludes not only the application of provisions leading to direct sex discrimination, but also the application of provisions which maintain different treatment between men and women at work as a result of the application of criteria not based on sex where those differences of treatment are not attributable to objective factors unrelated to sex discrimination (see, inter alia, *Seymour-Smith and Perez*, C-167/97, EU:C:1999:60, paragraph 52, and *Voß*, C-300/06, EU:C:2007:757, paragraph 25 and the case-law cited).

41 More specifically, the Court has consistently held that indirect discrimination on grounds of sex arises where a national measure, albeit formulated in neutral terms, puts considerably more workers of one sex at a disadvantage than the other (see, inter alia, *Z*, C-363/12, EU:C:2014:159, paragraph 53 and the case-law cited). Such a measure is compatible with the principle of equal pay only if the difference in treatment between the two categories of workers to which it gives rise is justified by objective factors

unrelated to any discrimination on grounds of sex (see, inter alia, *Rinner-Kühn*, 171/88, EU:C:1989:328, paragraph 12; Voß, EU:C:2007:757, paragraph 38; and *Brachner*, C-123/10, EU:C:2011:675, paragraph 70).

42 In the present case, under Article 15 of Decree No 2003-1306, a service credit fixed at four trimesters is awarded for the calculation of the pension of any civil servant, for each child born or adopted prior to 1 January 2004, or taken into care before that date and nurtured for at least nine years, provided that the civil servant can demonstrate that he or she has taken a career break for a continuous period of at least two months, in the form of maternity leave, adoption leave, parental leave, parental care leave or leave in order to be available to bring up a child of less than 8 years of age. Under that provision that service credit is also granted to female civil servants who have given birth during their years of study prior to 1 January 2004 and before their recruitment into the civil service provided such recruitment occurred within two years of obtaining the necessary qualification in order to sit the recruitment examination.

43 It is clear that, viewed thusly, a provision providing, as it does, that a service credit such as that at issue in the main proceedings is to benefit civil servants of both sexes provided that they have had a career break of at least two consecutive months in order to care for their children, appears to be neutral as to the sex of the beneficiary, since, inter alia, ostensibly under the rules at issue in the main proceedings it does not appear that the possibility of taking such a career break is legally open only to civil servants of one sex.

44 It is common ground in that regard that both male civil servants and female civil servants may take career breaks as part of adoption leave, parental leave, parental care leave or leave in order to be available to bring up a child of less than 8 years of age.

45 However, notwithstanding the appearance of neutrality, it is clear that the criterion used in Article 15 of Decree No 2003-1306 leads to a situation where many more women than men receive the benefit of the advantage concerned.

46 The fact that the service credit scheme for pension purposes at issue in the main proceedings includes maternity leave among the forms of career break allowed under the applicable rules and giving rise to entitlement to a service credit means, given the minimum duration and mandatory nature of that leave under French law, that female civil servants who are the biological parent of their child, are, in principle, the ones who are in a position to benefit from the service credit advantage.

47 As regards male civil servants, on the other hand, a number of factors combine to reduce significantly the number of them who will actually be able to benefit from that advantage.

48 It should be noted in that connection, first of all, that, unlike maternity leave, other types of leave or availability which may give rise to entitlement to the service credit for pension purposes are in fact optional for civil servants.

49 Secondly, it is apparent inter alia from the French Government's written observations that situations governed by the applicable rules such as parental leave, parental care leave or leave in order to be available to bring up a child entail a period involving no pay and no accumulation of pension rights. Moreover, parental care leave and leave in order to be available to bring up a child lead to civil servants' experiencing a partial or total loss of rights of advancement to a higher step in their careers.

50 The fact that a service credit scheme such as that at issue in the main proceedings by its nature benefits principally female civil servants has, moreover, been explicitly highlighted by the Conseil d'État in its judgment of 29 December 2004, *D'Amato and Others* (No 265097), produced by the French Government in support of its observations. A similar finding has been made by the Haute

Autorité de lutte contre les discriminations et pour l'égalité (High Authority on Anti-discrimination and Equality) in its Decision No 2005-32 of 26 September 2005, referred to by Mr and Mrs Leone in their written observations.

51 In the light of all the foregoing, the requirement of a career break of two months which the scheme at issue in the main proceedings imposes for the grant of the service credit, although ostensibly neutral as to the sex of the civil servants concerned, is, in reality, liable to be met by a much lower proportion of male civil servants than female civil servants, with the result that it places a much higher number of workers of one sex at a disadvantage as compared to workers of the other sex.

52 In those circumstances, it is appropriate to ascertain whether the resulting difference in treatment between female workers and male workers may be justified by objective factors unrelated to any discrimination on grounds of sex.

53 It is the Court's settled case-law that this is particularly the case where the means chosen reflect a legitimate social-policy objective of the legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so (see, inter alia, *Seymour-Smith and Perez*, EU:C:1999:60, paragraph 69 and the case-law cited, and *Brachner*, EU:C:2011:675, paragraph 70 and the case-law cited).

54 Moreover, such factors can be considered appropriate to achieve the stated aim only if they genuinely reflect a concern to attain that aim and are pursued in a consistent and systematic manner (*Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55; *Georgiev*, C-250/09 and C-268/09, EU:C:2010:699, paragraph 56; *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraph 85; and *Brachner*, EU:C:2011:675, paragraph 71).

55 It is for the Member State, as the author of the allegedly discriminatory rule, to show that that rule reflects a legitimate social policy aim, that that aim is unrelated to any discrimination based on sex, and that it could reasonably take the view that the means chosen were suitable for attaining that aim (*Brachner*, EU:C:2011:675, paragraph 74 and the case-law cited).

56 Moreover, it also follows from the Court's case-law that, while it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent the legislative provision in question is justified by such an objective reason, the Court of Justice, which is called on to provide answers of use to the national court in the context of a reference for a preliminary ruling, may provide guidance based on the documents in the file of the case in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see, inter alia, *Brachner*, EU:C:2011:675, paragraph 72 and the case-law cited).

57 Regarding the identification of the objectives pursued by the service credit scheme at issue in the main proceedings, the French Government which, as observed in paragraph 55 above, has the burden of proving that that scheme reflects a legitimate aim and that that aim is unrelated to any discrimination based on sex, stated in its observations that the purpose of the service credit in question is to compensate for the career-related disadvantages resulting from career breaks for reasons of birth, arrival in the home or bringing-up of children.

58 The concern to compensate for the disadvantages suffered in the course of their career by all workers, both female and male, who have taken a career break for a period of time in order to devote themselves to bringing up their children indeed constitutes a legitimate social policy aim.

59 However, mere generalisations are insufficient to show that the aim of the national rule at issue, such as that at issue in the main proceedings, is unrelated to any discrimination on grounds of sex or to furnish evidence enabling a reasonable conclusion that the means chosen were appropriate for achieving that aim (see, to that effect, inter alia, *Seymour-Smith and Perez*, EU:C:1999:60, paragraph 76, and *Nikoloudi*, C-196/02, EU:C:2005:141, paragraph 52).

60 In this case, it is necessary to be all the more attentive to actual compliance with the various requirements referred to in paragraphs 52 to 55 of this judgment since, as observed in paragraphs 36 and 37 above, the service credit scheme at issue in the main proceedings was adopted for the purpose of bringing the national law into line with the principle of equal pay for men and women following the Court's finding that the earlier national mechanism did not comply with that principle.

61 Yet the Commission and Mr and Mrs Leone have submitted on this point, inter alia, that the French Republic substituted a new mechanism for the earlier one which, under the guise of measures which are ostensibly neutral as to the sex of the persons to whom those measures apply, in reality have upheld the aims of the earlier mechanism and ensured that the actual effects of it will be maintained and perpetuated.

62 In Mr and Mrs Leone's submission, the new applicable mechanism retains the same purpose and cause as the old one, namely, in essence, to compensate for the career-related disadvantages suffered by civil servants in the course of their career resulting from the time spent in bringing up children. The French Republic thus had recourse to the artificial criterion based on career breaks, solely for the purpose of avoiding the financial consequences likely to result from a correct application of EU law. The French Republic has still not shown that the amendments introduced thereby pursue a legitimate aim which is unrelated to any discrimination on grounds of sex.

63 The French Government contends that the career break to care for children has a direct impact on the amount of the civil servant's pension, either because no account is taken of periods of career break for the purposes of calculating the pension, or because of the career slowdown they entail. The service credit at issue in the main proceedings is thus aimed at providing financial compensation for that impact at the time the pension is awarded.

64 In accordance with the case-law referred to in paragraph 56 of this judgment, it is for the Court, in the light of the evidence in the file in its possession and the observations submitted to it, to give the following guidance in order to enable the national court to give judgment.

65 Firstly, as indicated in the French Government's observations, maternity and adoption leave are accompanied by the maintenance of acquired pension and promotion rights, whereas parental leave and parental care leave are characterised by total and partial maintenance of promotion rights respectively. In those circumstances, it is legitimate to question whether and to what extent the service credit scheme at issue in the main proceedings is genuinely aimed at compensating for account not being taken of those career breaks for the purposes of calculating the pension or the disadvantages arising from the slowdown in the civil servant's career, as argued by the French Government.

66 The same would appear to hold true for the fact that the service credit is fixed, in a uniform manner, for an entire year, irrespective of the actual duration of the career break.

67 It is also noteworthy in that context that the amount of service credited has remained unchanged from the earlier service credit scheme, which was held to be contrary to Article 141 EC in *Griesmar*, EU:C:2001:648, although, as observed herein, under that scheme the service credit then in force pursued a different aim, namely to compensate for the career-related disadvantages suffered by women because they took time out to bring up their children in the course of their career.

68 It may be observed in that regard that although a service credit for pension purposes equivalent to one year per child brought up at home was no doubt designed with that aim in mind, the fact that it was maintained, unchanged, in the mechanism at issue in the main proceedings, as just mentioned, necessarily raises questions about its ability to pursue the aim referred to in paragraph 57 of this judgment.

69 Secondly, as regards the requirement, referred to in paragraph 54 of this judgment, that that aim be pursued in a consistent and systematic manner, the following remarks are apposite.

70 First of all, as evidenced by Article 15(3) of Decree No 2003-1306, the service credit at issue in the main proceedings is also payable to female civil servants who have given birth during their years of study prior to 1 January 2004 and before their recruitment into the civil service provided such recruitment occurred within two years of obtaining the necessary qualification in order to sit the recruitment examination, with no career break being required.

71 However, in so far as the exception introduced thereby involves the grant of a service credit to a civil servant who has not interrupted her career and who has accordingly not suffered the disadvantages which that service credit is intended to remedy, such a provision is, in principle, liable to undermine the abovementioned requirement that the aim be pursued in a consistent and systematic manner.

72 Secondly, under the service credit scheme at issue in the main proceedings, in the case of certain children, such as children who are the subject of a delegation of parental authority in favour of the pension holder or her husband, children placed under the guardianship of the pension holder or his or her spouse, where this involves actual and permanent custody of the child, or children fostered in the home of the pension holder or his or her spouse, the grant of the service credit concerned is subject not only to a career break of two months, but also to the requirement that the children must have been brought up for at least nine years.

73 Nor does an additional requirement such as this one appear, on the face of it, to be in accordance with the aim alleged by the French Government.

74 Lastly, it must be remembered that, in this case and as observed above, the adoption of the service credit scheme at issue in the main proceedings is a consequence of the need to remedy the non-compliance of the earlier service credit scheme with the principle of equal pay following the judgment in *Griesmar*, EU:C:2001:648.

75 As it is intended to apply to awards of pensions occurring as from 28 May 2003 and in consideration of children born, adopted or taken into the home before 1 January 2004, the purpose of the service credit scheme at issue in the main proceedings was to regulate what happened with service credits the award of which had hitherto come under the earlier scheme.

76 It will be recalled that in that judgment the Court held that the earlier scheme disregarded the principle of equal treatment in that it excluded male civil servants who were able to prove that they had assumed the task of bringing up their children (*Griesmar*, EU:C:2001:648, paragraph 67).

77 It must be emphasised that, although the detailed rules for the grant of the service credit provided for under the scheme at issue in the main proceedings are intended to apply solely to pensions which, in all essential respects, are awarded after the entry into force of that scheme, the fact remains that the latter scheme may have the effect of depriving in the future certain male civil servants of a right they have enjoyed by virtue of the direct effect of Article 141 EC. Although EU law does not preclude a Member State from doing so, any measures it does adopt must inter alia observe the principle of equal treatment of men and women (see to that effect, *Roks and Others*, C-343/92, EU:C:1994:71, paragraphs 29 and 30).

78 As evidenced by paragraphs 65 to 73 of this judgment, however, this does not appear to be the case with the service credit at issue in the main proceedings, subject to a final assessment of the point by the national courts.

79 In the light of all the foregoing considerations, the answer to the second question is that Article 141 EC must be interpreted as meaning that a service credit scheme for pension purposes such as the one at issue in the main proceedings gives rise to indirect discrimination in terms of pay as between female workers and male workers, contrary to that article, unless it can be justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim, and is appropriate to achieve that aim and necessary in order to do so, which requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof.

The first question

80 By its first question, the referring court asks, in essence, whether Article 141 EC must be interpreted as meaning that provisions on early retirement with immediate payment of pension, such as those at issue in the main proceedings, give rise to indirect discrimination in terms of pay as between female workers and male workers, contrary to that article.

81 It should be observed as a preliminary point that, like the provisions featured in the service credit scheme at issue in the main proceedings, Articles L. 24 and R. 37 of the Pensions Code, dealing with early retirement with immediate payment of pension, were adopted to take account of the guidance provided in *Griesmar* (EU:C:2001:648).

82 Under those provisions, for a civil servant who is a parent of three children or of one child older than one year of age and suffering from a disability equal to or greater than 80%, to be able to take early retirement, the civil servant concerned must be able to show that, for each child, he or she has taken a career break of a continuous duration of at least two months in the form of maternity leave, paternity leave, adoption leave, parental leave, parental care leave or leave in order to be available to bring up a child of less than 8 years of age. In cases of multiple births or adoptions, the duration of the career break taken into account in respect of all of the children in question is also two months.

83 In respect of biological or adopted children, that career break must have taken place between the first day of the fourth week preceding the birth or adoption and the last day of the sixteenth week following the birth or adoption.

84 Regarding children taken into care, the abovementioned provisions provide that those children must have been brought up for at least nine years by the civil servant concerned and the career break must have occurred either before their sixteenth birthday or before the age at which they ceased to be dependent.

85 Those provisions also indicate that those periods during which the interested party did not make pension contributions and did not engage in any occupational activity are to be equated with career breaks.

86 Moreover, for reasons which are, *mutatis mutandis*, identical to those set out in paragraphs 43 to 49 of this judgment, it is clear, first of all, that although such provisions are ostensibly neutral as to the sex of the civil servants concerned, the detailed rules governing the grant of the advantage at issue in the main proceedings are, in this case, liable to result in a much higher proportion of women than men receiving the benefit of it.

87 In those circumstances, it is appropriate, next, to determine, in the light of the principles laid down in the case-law referred to in paragraphs 52 to 55 of this judgment, whether the difference in treatment as between female workers and male workers thus caused can be justified by objective factors unrelated to any discrimination on grounds of sex.

88 On this point the French Government stated in its observations that the national provisions concerned pursue the same aim as the service credit at issue in the main proceedings, namely to compensate for the career-related disadvantages resulting from career breaks for reasons of birth, arrival in the home or bringing-up of children.

89 As observed in paragraph 56 of this judgment, it is ultimately for the national court to determine, in the light of all the relevant evidence, whether, given the detailed rules which characterise the scheme of early retirement with immediate payment of pension at issue in the main proceedings, as a means of achieving that aim, is able to contribute towards the achievement thereof, whether it genuinely reflects the concern to attain it and whether it is pursued in a consistent and systematic manner in the light of that aim. The Court does, however, have jurisdiction to provide guidance in order to enable the national court to give judgment.

90 As regards, in particular, the genuine concern about attaining the stated objective in this case and the requirement of consistency and systematic approach in the light thereof, it should be noted, first of all, that it does not at first glance seem that allowing civil servants to take early retirement with immediate payment of pension is liable to compensate for the career-related disadvantages resulting from taking a career break three times for reasons of birth, arrival in the home or bringing-up of children or a single career break of two months due to the birth or arrival in the home of a child suffering from a disability equal to or greater than 80%. Nor has the French Government established how that might be liable to compensate for those career-related disadvantages.

91 Next, it is clear that various aspects characterising the advantage at issue in the main proceedings do not at first glance appear to be capable of consistent justification in the light of the aim of compensating for the disadvantages thus alleged.

92 Firstly and as observed in relation to the service credit at issue in the main proceedings in paragraphs 72 and 73 of this judgment, this is illustrated by the fact that, in the case of certain children, the benefit of early retirement with immediate payment of the pension is subject not only to a career break of two months, but also to the requirement that the children must have been brought up for at least nine years by the civil servant concerned.

93 Secondly, the advantage at issue in the main proceedings is granted to all civil servants alike once they have had three, two-month career breaks for three individual children or a single two-month period for a child suffering from a disability equal to or greater than 80%. Yet there is, in principle, no reason why the career-related disadvantages which supposedly result from a two-month career break and which that advantage is precisely intended to remedy differ depending on whether or not the born or adopted child suffers from a handicap.

94 Thirdly, it is apparent from the provisions at issue in the main proceedings that, in cases of multiple births or adoptions, the resulting single, two-month career break is counted once for each of the children concerned. Yet there is, in principle, no reason why the career-related disadvantages which supposedly result from a two-month career break and which that advantage is precisely intended to remedy differ depending on whether that career break was the result of single or multiple births or adoptions.

95 Fourthly, it will be for the referring court to examine whether, according to their precise scope, the third subparagraph of Article L. 24(I)(3) and Article R. 37(III) of the Pensions Code, which provide that the advantage at issue in the main proceedings is granted in consideration of periods during which the interested party did not engage in any occupational activity, are, as the case may be, also liable to undermine the requirement that the aim be pursued in a consistent manner.

96 Furthermore, in the examination it must conduct in order to ensure that the scheme at issue in the main proceedings genuinely reflects a concern to attain the alleged aim and is pursued in a consistent and systematic manner in the light of that aim, the referring court may also be led to take account of potential links between the scheme involving early retirement with immediate payment of pension at issue in the main proceedings and the earlier national mechanism, which it replaced and about which the Court does not have sufficient information. The referring court may, in particular, be led to ascertain, as was observed in this judgment in relation to the service credit at issue in the main proceedings, whether and to what extent such links might influence that assessment.

97 In the present case, in the light of the observations made in paragraph 81 of this judgment, it should be noted, lastly, that the considerations expressed about the service credit scheme in paragraphs 74 to 78 herein, also apply, *mutatis mutandis*, with regard to the scheme involving early retirement with immediate payment of the pension at issue in the main proceedings.

98 In the light of all the foregoing considerations, the answer to the first question is that Article 141 EC must be interpreted as meaning that a scheme for early retirement with immediate payment of pension such as that at issue in the main proceedings gives rise to indirect discrimination in terms of pay as between female workers and male workers, contrary to that article, unless it can be justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim, and is appropriate to achieve that aim and necessary in order to do so, which requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof.

The third question

99 By its third question, the referring court asks, in essence, whether the indirect discrimination which may have been identified in the examination of the first and second questions may be justified under Article 141(4) EC.

100 That provision states that, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

101 In the present case, it should be remembered in that regard that the Court has held that a measure such as the service credit at issue in the main proceedings is not a measure covered by that provision of the EC Treaty, as it is limited to granting civil servants a service credit upon their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career, and does not appear to be of a nature such as to offset the disadvantages to which the careers of those workers are exposed by helping them in their professional life and thereby ensure full equality in practice between men and women in working life (see to that effect, *Griesmar*, EU:C:2001:648, paragraphs 63 to 65; see also *Commission* v *Italy*, C-46/07, EU:C:2008:618, paragraphs 57 and 58; and *Commission* v *Greece*, C-559/07, EU:C:2009:198, paragraphs 66 to 68).

102 The same is true of a measure such as early retirement with immediate payment of pension, since that measure, which is limited to favouring an early end to working life, is no more liable to provide a remedy for the problems which civil servants may encounter in the course of their professional life by helping them in their professional life and thereby ensure full equality in practice between men and women in working life.

103 In the light of the foregoing considerations, the answer to the third question is that Article 141(4) EC must be interpreted as meaning that the measures referred to in that provision do not cover national measures such as those at issue in the main proceedings which merely allow the workers concerned to take early retirement with immediate payment of pension and to grant them a service credit upon their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career.

Costs

104 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 (Fourth Chamber) hereby rules:

1. **Article 141 EC must be interpreted as meaning that a service credit scheme for pension purposes such as that at issue in the main proceedings gives rise to indirect discrimination in terms of pay as between female workers and male workers, contrary to that article, unless it can be justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim, and is appropriate to achieve that aim and necessary in order to do so, which requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof.**

2. **Article 141 EC must be interpreted as meaning that a scheme for early retirement with immediate payment of pension such as the one at issue in the main proceedings gives rise to indirect discrimination in terms of pay as between female workers and male workers, contrary to that article, unless it can be justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim, and is appropriate to achieve that aim and necessary in order to do so, which requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof.**

3. **Article 141(4) EC must be interpreted as meaning that the measures referred to in that provision do not cover national measures such as those at issue in the main proceedings which merely allow the workers concerned to take early retirement with immediate payment of pension and to grant them a service credit upon their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career.**

[Signatures]