Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 16 November 2023[1]

Joined Cases C-184/22 and C-185/22

IK (C-184/22),
CM (C-185/22)
v
KfH Kuratorium für Dialyse und Nierentransplantation e.V.

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – Social policy – Article 157 TFEU – Directive 2006/54/EC – Equal opportunities and equal treatment between men and women in matters of employment and occupation – Article 2(1)(b) and Article 4, first paragraph – Prohibition of discrimination on grounds of sex – Indirect discrimination – Collective agreement providing for the payment of overtime supplements for hours worked in excess of the standard working time of a full-time employee in a calendar month – Difference in treatment between full-time employees and part-time employees – Provision putting persons of one sex at a particular disadvantage compared with persons of the other sex – Indirect discrimination established on the basis of statistical evidence – Procedure for taking evidence into account)

I. Introduction

1. The present requests for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany) concern, in particular, the interpretation of Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54/EC.[2]

2. The requests have been made in proceedings between IK (Case C-184/22) and CM (Case C-185/22),[3] two part-time nurses ('the applicants'), and their employer, KfH Kuratorium für Dialyse und Nierentransplantation e.V. ('the defendant'), concerning their entitlement to the payment of pay supplements for overtime for hours worked in excess of the normal working hours agreed in their contracts of employment.

[1] Original language: French.

[2] Directive of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

[3] By decision of the President of the Court of Justice of 19 April 2022, the two cases were joined for the purposes of the written and oral parts of the procedure and the judgment.

3. As requested by the Court, this Opinion will focus on part (a) of the second question referred in those two cases, worded in identical terms. They relate to the establishment of indirect discrimination, within the meaning of Directive 2006/54, and, more particularly, to the procedure for taking into account statistical evidence in order to determine whether a provision puts persons of one sex at a particular disadvantage compared with persons of the other sex.

4. The present cases afford the Court the opportunity to further clarify the appropriate procedure, namely whether it is appropriate to examine only the statistical evidence concerning the group of persons put at a disadvantage by the national measure in question or whether it is also appropriate to refer to evidence concerning the group of persons who are not subject to that measure.

II. Legal framework

A. European Union law

5. According to recital 30 of Directive 2006/54:

'The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.'

6. Article 1 of that directive, entitled 'Purpose', states:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

…

(b) working conditions, including pay;

…

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.'

7. Article 2 of that directive, entitled 'Definitions', provides, in paragraph 1(a) and (b):

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

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) "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.'

8. Article 4 of that directive, entitled 'Prohibition of discrimination', provides:

'For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

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

9. Article 14 of Directive 2006/54, entitled 'Prohibition of discrimination', is worded as follows in paragraph 1(c) thereof:

'There shall be no direct or indirect discrimination on 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 Article 141 [EC]'.

B. German law

1. Law on part-time working and fixed-term employment

10. Paragraph 4 of the Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Teilzeit- und Befristungsgesetz) (Law on part-time working and fixed-term employment contracts), of 21 December 2000,[4] in the version applicable to the disputes in the main proceedings, entitled 'Prohibition of discrimination', provides in subparagraph 1:

'A part-time employee shall not, on account of part-time working, be treated less favourably than a comparable full-time employee, unless a difference in treatment is justified on objective grounds. A part-time employee shall receive remuneration or another pro rata benefit in kind at a level at least equal to that payable for his working time as a proportion of the working time of a comparable full-time employee.'

[4] BGBl. 2000 I, p. 1966.

2. The AGG

11. Paragraph 1 of the Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment) (‘the AGG’), of 14 August 2006,[5] in the version applicable to the disputes in the main proceedings, entitled ‘Purpose of the Law’, provides:

‘The purpose of this Law is to prevent or stop any discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.’

12. Paragraph 7 of that law, entitled ‘Prohibition of discrimination’, provides in Paragraph 1:

‘Employees shall not be the subject of discrimination on any of the grounds referred to in subparagraph 1 hereof; this shall also apply where the person committing the act of discrimination assumes only the existence of the grounds referred to under Paragraph 1.’

13. Paragraph 15 of that law, entitled ‘Compensation and damages’, is worded as follows in subparagraphs 1 and 2:

‘(1) In the event of any infringement of the prohibition of discrimination, the employer shall compensate the damage arising therefrom. This shall not apply where the employer is not responsible for the breach of duty.

(2) In the case where the damage arising therefrom does not constitute economic loss, the employee may seek appropriate monetary compensation. …’

3. Law on Gender Pay Transparency

14. Paragraph 3 of the Gesetz zur Förderung der Entgelttransparenz zwischen Frauen und Männern (Entgelttransparenzgesetz) (Law on Gender Pay Transparency), of 30 June 2017,[6] entitled ‘Prohibition of direct and indirect pay discrimination on grounds of sex’, states in subparagraph 1:

‘For the same work or for work of equal value, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of pay shall be prohibited.’

15. Paragraph 7 of that law, which is entitled ‘Equal pay requirement’, provides:

‘In employment relationships, remuneration for the same work or for work of equal value may not be agreed or paid at a lower rate on account of the sex of the employee than that payable to an employee of the other sex.’

[5] BGBl. 2006 I, p. 1897.

[6] BGBl. 2017 I, p. 2152.

4. The MTV

16. The Manteltarifvertrag (Framework Collective Agreement) (‘the MTV’) concluded between the trade union ver.di and the defendant on 8 March 2017, is worded as follows, in Paragraph 10 thereof, entitled ‘Working time’:

‘1. The normal weekly working time for a full-time employee shall be, excluding breaks, on average, 38.5 hours.

…

The normal daily working time for a full-time employee shall be 7 hours 42 minutes.

…

6. If the workload calls for overtime, this shall in principle be mandated. … Overtime shall be restricted to cases of urgency and shall be distributed as evenly as possible among all employees.

7. Overtime is defined as mandated hours worked, on a rostered or regular basis, in excess of those making up the normal working time provided for in the first and third sentences of point 1 [of this Paragraph]. An overtime supplement shall be payable, in accordance with Paragraph 13, point 1, hereof, in respect of hours which are worked in excess of a full-time employee’s working hours in a calendar month and which cannot be offset in the calendar month concerned by time off in lieu. …’

17. Paragraph 13 of the MTV, entitled ‘Overtime pay, supplements and compensation for work at unsocial hours’, states in subparagraph 1:

‘Compensation for overtime as provided for in Paragraph 10, point 7, hereof shall be equal to 1/167th of the collectively agreed monthly salary per hour of overtime. Overtime supplements as provided for in clause 2 of Paragraph 10, point 7, hereof shall be equal to 30%.’

III. The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

18. The defendant is an outpatient dialysis provider employing clinical and non-clinical staff that operates in various locations throughout Germany. The MTV is applicable at all of those locations and applies, in particular, to the applicants’ employment contracts. The applicants are employed as part-time nurses with IK (Case C-184/22) working 40% of the normal weekly working hours of a full-time employee and CM (Case C-185/22) working 80% of the normal weekly working hours of a full-time employee.

19. According to the information provided by the defendant, 76.96% of its workforce, over 5000 employees in total, are female and 52.78% are part-time. Of all its part-time employees, 84.74% are female and 15.26% are male whereas, within the group of full-time employees, 68.20% are female and 31.80% are male.

20. The defendant maintains working time accounts, including for the applicants. At the end of the month of March 2018, IK’s working time accounts showed a working time credit of 129 hours and 24 minutes, and at the end of February 2018, CM’s working time accounts showed a working time credit of 49 hours. These are the hours worked in excess of the working time agreed in the applicants’ employment contracts. For those hours, the defendant did not pay the applicants overtime supplements as provided for in the second sentence of Paragraph 10, point 7, of the MTV (‘the national provision at issue’) or enter a time credit equal to those supplements in the applicants’ working time accounts.

21. The applicants instituted legal proceedings for, in particular, the award of a time credit equal to the supplements for the overtime accrued and for the payment of compensation as provided for in Paragraph 15(2) of the AGG. In that regard, they claimed that, inasmuch as they were not paid overtime supplements and no credit equal to those supplements was entered in their working time accounts, the defendant unlawfully discriminated against them as part-time employees by comparison with full-time employees. In addition, they were indirectly discriminated against on grounds of sex, since most of the defendant’s part-time employees are women. The defendant takes the view that the national provision at issue does not give rise to unlawful discrimination on grounds of either part-time working or sex.

22. The Landesarbeitsgericht (Higher Labour Court, Germany) found that the applicants were discriminated against because of their part-time employment and ordered the defendant to enter in their working time accounts a time credit equal to the supplements for the overtime they had accrued. By contrast, the Court dismissed the applicants’ claim for the payment of compensation as provided for in Paragraph 15(2) of the AGG. The applicants brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany), the referring court, for the payment of compensation. The defendant brought a cross-appeal on a point of law directed against the order for it to enter in the applicants’ working time savings accounts a time credit equal to the supplements for the overtime accrued.

23. The referring court notes that the decision on the disputes in the main proceedings depends on the question of discrimination on grounds of sex and part-time working. So far as concerns part (a) of the second question referred for a preliminary ruling in the present cases, the referring court indicates that it starts from the principle that, in the context of the application of Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54, the answer to the question whether a difference in treatment affects considerably more women than men is contingent upon the category of persons to which the provision in question is applicable[7] and that account is to be taken in that connection of all of the employees subject to the provision in which the difference in treatment has its origin.[8] Within those employees, it is necessary to compare the proportions of persons, among male and female employees respectively (that is to say, in each group), who are affected by the provision in question.[9]

24. According to the referring court, the MTV is applicable at all of the defendant’s locations and, in accordance with Paragraph 1 thereof, to all the defendant’s employees. Paragraph 2(1) of the MTV excludes from its scope only ‘employees whose salary exceeds the last step of the highest tariff group, … management staff and doctors’. Paragraph 2(2) of the MTV further stipulates that trainees are subject to other collective agreements if such agreements exist. If, according to the

[7] The referring court refers in that regard to the judgment of 13 January 2004, *Allonby* (C-256/01, EU:C:2004:18, paragraph 73 et seq.).

[8] The referring court refers to the judgments of 6 December 2007, *Voß* (C-300/06, EU:C:2007:757, paragraph 40), and of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraphs 47 and 52).

[9] The referring court refers to the judgment of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraphs 47 and 52).

Court's answer to part (a) of the second question referred, the outcome of the disputes in the main proceedings is dependent on whether – and if so how – the exceptions to the scope of the MTV affect the proportions of persons, among the defendant's full-time and part-time male and female employees respectively, it would be for the Landesarbeitsgericht (Higher Labour Court) to make the necessary findings of fact.

25. The referring court takes the view that, in the present case, in order to verify whether the difference in treatment affects considerably more women than men, it is necessary to compare the proportions of persons, among male and female employees respectively, who are adversely affected by the national provision at issue. In the disputes in the main proceedings, the percentage shares have not been definitively established. It is apparent, however, that, as a group, women are strongly represented among both part-time employees and full-time employees. It is also apparent that, as a group – albeit a minority group – men are more strongly represented among full-time employees than among part-time employees.

26. Against that background, the referring court is faced with the question as to whether Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54 must be interpreted as meaning that, in such a case, a finding that the difference in treatment affects considerably more women than men is adequately sustained by the fact that the part-time employees are made up of considerably more women than men, or whether that finding requires in addition that the group of full-time employees be made up of considerably more men or a significantly higher proportion of men.

27. The referring court observes that the latter scenario is not present in the disputes in the main proceedings since, within the group of full-time employees, 68.20% are female and only 31.80% are male. In the defendant's case, there are considerably more women in both the part-time employee and full-time employee groups. The referring court cannot determine with the necessary clarity how to establish in such a situation whether a difference in treatment affects considerably more women than men, within the meaning of EU law.

28. In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54/EC be interpreted as meaning that a provision in a national collective agreement, to the effect that the payment of overtime supplements is available only for hours worked in excess of the standard working time of a full-time employee, entails a difference in treatment as between full-time employees and part-time employees?

(2) In the event that the Court answers Question 1 in the affirmative:

(a) Must Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54 be interpreted as meaning that, in such a case, a finding that the difference in treatment affects considerably more women than men is not sustained by the fact alone that the part-time employees are made up of considerably more women than men, but requires in addition that the full-time employees be made up of considerably more men or a significantly higher proportion of men?

(b) Or does something different also follow, in the case of Article 157 TFEU and Directive 2006/54, from the findings of the Court of Justice in paragraphs 25 to 36 of the judgment of 26 January 2021 – *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zaktad Opieki Zdrowotnej w Krakowie*, (C-16/19, EU:C:2021:64) – according to which a difference in treatment even within a group of persons with disabilities may be covered by the "concept of 'discrimination'" referred to in Article 2 of Directive 2000/78[/EC] [[10]]?

(3) In the event that the Court answers Question 1 in the affirmative and Questions 2(a) and 2(b) to the effect that, in a case such as that in the main proceedings, it may be found that the difference in treatment in respect of pay affects considerably more women than men, must Article 157 TFEU and Article 2(1)(b) and the first sentence of Article 4 of Directive 2006/54 be interpreted as meaning that, it may be a legitimate aim for the parties to a collective agreement, by means of a provision such as that referred to in Question 1, on the one hand, to pursue the aim of deterring the employer from mandating overtime and rewarding recourse to employees to an extent in excess of that contracted by means of an overtime supplement, but, on the other hand, also to pursue the aim of preventing full-time employees from being treated less favourably than part-time employees and to provide for that reason that supplements are payable only for overtime worked in excess of a full-time employee's working hours in a calendar month?

(4) Must Clause 4(1) of the Framework Agreement on part-time work annexed to Directive 97/81 [[11]] be interpreted as meaning that a provision in a national collective agreement to the effect that the payment of overtime supplements is available only for hours worked in excess of the normal working hours of a full-time employee entails a difference in treatment as between full-time employees and part-time employees?

(5) In the event that the Court answers Question 4 in the affirmative, must Clause 4(1) of the Framework Agreement on part-time work annexed to Directive 97/81 be interpreted as meaning that there may be an objective ground for the parties to a collective agreement, by means of a provision such as that referred to in Question 4, on the one hand, to pursue the aim of deterring the employer from mandating overtime and rewarding recourse to employees to an extent in excess of that contracted by means of an overtime supplement, but, on the other hand, also to pursue the aim of preventing full-time employees from being treated less favourably than part-time employees and to provide for that reason that supplements are payable only for overtime worked in excess of a full-time employee's working hours in a calendar month?'

29. Written observations were submitted to the Court by the applicants, the defendant, the Danish, Polish and Norwegian Governments, and the European Commission.

IV. Analysis

30. By part (a) of the second question referred in Cases C-184/22 and C-185/22, on which the Court has asked that this Opinion be focused, the referring court asks, in essence, whether Article 157 TFEU and Article 2(1)(b) and the first sentence of Article 4 of Directive 2006/54

[10] Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p.16).

[11] Council Directive of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

must be interpreted as meaning that, in the examination of the existence or otherwise of indirect discrimination, a finding that an apparently neutral national provision puts ‘persons of one sex at a particular disadvantage compared with persons of the other sex’ requires there to be a significantly higher proportion of people of a given sex in the group of employees put at a disadvantage by that provision, but does it also require there to be a significantly higher proportion of people of the other sex in the group of employees who are not subject to that provision?

31. Under Article 157(1) TFEU, ‘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’. Furthermore, the first paragraph of Article 4 of Directive 2006/54 states that, ‘for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration is to be eliminated’. In accordance with Article 2(1)(b) thereof ‘the concept of ‘indirect discrimination’ is defined as ‘the situation 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’.

32. It follows from that definition that ‘indirect discrimination’, within the meaning of Directive 2006/54, is established where three elements are met, for which the intention of the author of the national measure at issue is not relevant. First, there is an apparently neutral measure in that it makes no formal distinction between categories of people for the same work or for work to which equal value is attributed. Second, that measure creates a particular disadvantage to persons of one sex compared with persons of the other sex. Third, such a particular disadvantage cannot be justified by objective factors wholly unrelated to any discrimination based on sex.[12]

33. In the present case, first, with regard to the element relating to the apparent neutrality of the national provision at issue, this does not raise any particular difficulty. It is apparent from the orders for reference that the provision of the MTV in question,[13] according to which an overtime supplement is payable in respect of hours which are worked in excess of a full-time employee’s working hours in a calendar month, is applicable to all of the defendant’s locations and, without exception, to all of the defendant’s employees.[14] Therefore, that provision, by targeting male and female employees without distinction, does not establish direct discrimination, within the meaning of Article 2(1)(a) of Directive 2006/54.

34. Second, so far as concerns the element relating to the existence of a particular disadvantage, that implies, in the first place, that a group of persons is put at a disadvantage, namely, in the present case, part-time employees with regard to the payment of pay supplements for overtime. I note that the referring court stated that the second question referred in the present cases arises only if the answer to the first question is in the affirmative. In that regard, I take the view that the national provision at issue puts part-time employees at a disadvantage in that the hours worked in excess of the working time agreed in the employment contract and up to the same number of

[12] For an application of those three elements, see, in particular, judgment of 5 May 2022, *BVAEB* (C-405/20, EU:C:2022:347, paragraphs 47 to 69).

[13] According to the Court’s case-law, in the context of Directive 2006/54, the prohibition of discrimination between male and female workers extends to all agreements which are intended to regulate paid labour collectively (see judgment of 18 November 2020, *Syndicat CFTC*, C-463/19, EU:C:2020:932, paragraph 48 and the case-law cited).

[14] The exceptions to the scope of the MTV do not appear, at this stage, relevant in the context of the answer to be given to part (a) of the second question referred in the present cases (see, to that effect, point 24 of this Opinion).

hours worked by a full-time employee,[15] does not result in the payment of an overtime supplement. In other words, the additional hours worked by part-time employees are paid less than the additional hours worked by full-time employees.[16]

35. In the second place, the apparently neutral measure must have the result, in practice, of putting persons of one sex at a particular disadvantage compared with persons of the other sex. In that regard, the Court has long recognised the usefulness of statistics in the context of analysing the existence or otherwise of indirect discrimination, in particular in the judgment of 31 March 1981, *Jenkins* (96/80, EU:C:1981:80, paragraph 13). In that judgment, the Court referred to a 'considerably smaller percentage' of women than of men who can claim the full-time hourly rate of pay. That reference was included, in particular, in the judgment of 13 May 1986, *Bilka-Kaufhaus*, (170/84, EU:C:1986:204, paragraph 29). To that end the Court has adopted a pragmatic approach in the examination of discrimination.[17]

36. The concept of 'indirect discrimination' was subsequently enshrined by the EU legislature, in particular in Directive 2002/73/EC,[18] replaced by Directive 2006/54. The latter retained, in Article 2(1)(b) thereof, a definition of 'indirect discrimination' worded in exactly the same terms as that contained in the second indent of Article 1(2) of Directive 2002/73. Neither that definition, nor the other provisions of Directive 2006/54, make any reference to *quantitative* elements in the examination of indirect discrimination. Moreover, that definition adopts a *qualitative* approach, namely that it is necessary to verify whether the national provision at issue is likely, by its nature, to put persons of one sex at a 'particular disadvantage' compared with persons of the other sex. It follows that the national court must examine all relevant qualitative elements with a view to determining whether such a disadvantage exists, for example without limiting itself to the company to which the provision at issue applies, by looking at the situation in the Member State in question or within the Union in general. Furthermore, in certain situations, it may prove very difficult to obtain statistical data[19] or the data obtained may give rise to difficulties of use[20] or interpretation[21].

37. However, also in the context of that qualitative framework, the Court has continued to refer to statistical evidence, where it exists, in order to establish the existence of indirect discrimination in connection with the implementation of the principle of equal treatment between men and women. According to the Court's settled case-law relating to Directive 2006/54, the existence of a particular disadvantage can be established, for example, if it were proved that national legislation *is to the disadvantage of a significantly greater proportion* of individuals of one sex as compared with individuals of the other sex.[22] As is also apparent from recital 30 of Directive 2006/54, the appreciation of the facts from which it may be presumed that there has been

[15] Namely 38.5 hours a week, as provided for in Paragraph 10(1) of the MTV.

[16] See, to that effect, judgment of 27 May 2004, *Elsner-Lakeberg* (C-285/02, EU:C:2004:320, paragraph 17).

[17] See the Opinion of Advocate General Lenz in *Enderby* (C-127/92, EU:C:1993:313, point 15).

[18] Directive of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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 2002 L 269, p. 15).

[19] See Ellis, E., and Watson, P., *EU Anti-Discrimination Law*, 2nd ed., Oxford University Press, Oxford, 2012, in particular p. 151.

[20] See, to that effect, Opinion of Advocate General Medina in *INSS (Cumulative total occupational disability pensions)*, (C-625/20, EU:C:2022:132, point 1), who notes that the use of figures and statistics can be problematic in establishing indirect discrimination because the result can vary depending on the reference group used to make the comparison.

[21] See Barnard, C., and Hepple, B., 'Indirect Discrimination: Interpreting Seymour-Smith ', Cambridge Law Journal, 58(2), 1999, pp. 399 to 412. These authors present a critical view of the approach adopted by the Court consisting of referring to statistical data, in particular in the context of a request for a preliminary ruling.

[22] Judgment of 5 May 2022, *BVAEB* (C-405/20, EU:C:2022:347, paragraph 49 and the case-law cited).

indirect discrimination is the task of the national court, in accordance with national law or national practices which may provide, in particular, that indirect discrimination may be established by any means, *including on the basis of statistical evidence.* [23]

38. I wish to emphasise that the abovementioned statistical evidence is only one factor among others and that, moreover, such evidence may be diverse. Accordingly, the Court has held that a worker who considers him or herself wronged by indirect discrimination on grounds of sex may substantiate a prima facie case of discrimination by relying on general statistical data concerning the labour market in the Member State concerned, where the person concerned cannot be expected to produce more precise data regarding the relevant group of workers, such data being difficult to access or unavailable. [24] It is not sufficient to consider the number of persons affected, since that depends on the number of working people active in the Member State as a whole as well as the percentages of men and women employed in that Member State. [25]

39. In the event that the national court has statistical evidence available to it, the Court has held that the national court must take into account all the workers subject to the national legislation in which the difference in treatment has its origin [26] and that the *best approach to the comparison of statistics* is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are also affected. [27]

40. It should be noted that while the use of statistical evidence can be useful in establishing the existence of indirect discrimination, such evidence must be taken into account with caution in so far as the way the evidence is compiled affects the validity of the results obtained. [28] In that context, according to the Court's settled case-law, it is for the national court to assess to what extent the statistical evidence is adduced before it is valid and whether it can be taken into account, that is to say, whether, for example, it illustrates purely fortuitous or short-term phenomena, and whether it is sufficiently significant. [29]

41. Third, should the statistics to which the referring court may have regard actually show that the percentage of workers of one gender is affected by the national legislation at issue *to a considerably higher degree* than workers of the other gender also within the scope of that legislation, it would be necessary to hold that that situation is evidence of indirect sex discrimination, contrary to Article 14(1)(c) of Directive 2006/54, unless that legislation is justified by objective factors wholly unrelated to any discrimination based on sex. [30]

[23] See judgments of 24 September 2020, *YS (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 50), and of 5 May 2022, *BVAEB* (C-405/20, EU:C:2022:347, paragraph 50).

[24] See, to that effect, judgment of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 56).

[25] See judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 39 and the case-law cited).

[26] See, in particular, judgment of 30 June 2022, *INSS (Combination of total occupational invalidity pensions)* (C-625/20, EU:C:2022:508, paragraph 40 and the case-law cited). In that regard, I note that the referring court stated that the percentage shares have not been definitively established in the cases in the main proceedings.

[27] See, in particular, judgment of 6 December 2007, *Voß* (C-300/06, EU:C:2007:757, paragraph 41 and the case-law cited).

[28] See, in legal literature, Robin-Olivier, S., 'L'émergence de la notion de discrimination indirecte: évolution ou révolution ?' in Fines, F., Gauthier, C., Gautier, M., *La non-discrimination entre les Européens*, Pedone, Paris, 2012, p. 23 to 36, in particular p. 30.

[29] See, in particular, judgment of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 48 and the case-law cited).

[30] See, to that effect, judgment of 5 May 2022, *BVAEB* (C-405/20, EU:C:2022:347, paragraphs 50 and 51 and the case-law cited).

42. I note that there is no reference threshold beyond which statistical evidence may be considered sufficient, that assessment being essentially empirical in nature.[31] However, such statistical evidence must be relevant in the sense that it must relate to a sufficient number of individuals to be representative, but also rigorous and unambiguous.

43. So far as concerns the disputes in the main proceedings, it is apparent from the orders for reference that the analysis to determine whether the national provision at issue introduces indirect discrimination, within the meaning of Article 2(1)(b) of Directive 2006/54, takes into account statistical evidence, which concerns the defendant. It follows from the Court's case-law referred to in point 39 of this Opinion that the referring court must establish, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are so affected.

44. In the present case, it is apparent from the orders for reference that the defendant has over 5 000 employees and 76.98% of its workforce are women. Of all of its employees, 52.78% are part-time and of these 84.74% are female and 15.26% are male.

45. By part (a) of the second question referred, the referring court asks whether, in examining the existence of a particular disadvantage with regard to female employees, within the meaning of Article 2(1)(b) of Directive 2006/54, it is sufficient if the group of part-time employees includes considerably more women than men or if, in addition, the group of full-time employees must include considerably more men, or if the proportion of men is considerably higher.

46. In the present case, female employees are in the majority in both the group put at an 'advantage' and the group 'disadvantaged' by the national provision at issue. In such a situation, I accept that it is not easy to consider that that provision in question puts women at a particular disadvantage compared to men.

47. In that regard, as I have already stated, I take the view that the national court must adopt a qualitative approach, without limiting itself only to statistical evidence. Such an approach involves examining the labour market as a whole and not just within the company in question.

48. With regard to statistical evidence, in relation to which the referring court raises a question of law concerning the procedure for taking it into account, it is worth remembering the logic behind the examination of indirect discrimination in the context of Directive 2006/54.

49. First of all, according to the wording of Article 2(1)(b) of that directive, indirect discrimination refers only to a provision, criterion or practice which would put persons of one sex at a 'disadvantage' compared with persons of the other sex. Consequently, Article 2(1)(b) focuses on the group 'disadvantaged' by the provision, criterion or practice, in this case part-time employees. That provision does not mention the group put at an 'advantage', that is to say the group of persons who are not subject to the measure at issue. Consequently, it follows from the terms of that provision that indirect discrimination may be characterised by the sole fact that persons of one sex are put at a particular disadvantage compared with persons of the other sex.

50. Next, according to the Court's case-law cited in point 39 of this Opinion, the *best approach to the comparison of statistics* is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the

[31] See, in particular, in legal literature, Alberton, G., 'Et la Cour de cassation se fit plus "européaniste" que la CJUE', *AJDA*, 2018, No 6, p. 340.

workforce who are also affected. Accordingly, the Court has expressly ruled on the approach to be adopted and considered that it is necessary to focus on the group of persons 'disadvantaged' by the national provision in order to determine whether it introduces indirect discrimination. In that regard, I find it helpful to cite a recent judgment of the Court of 24 February 2022 in *TGSS (Domestic worker unemployment)* (C-389/20, EU:C:2022:120). In that judgment, the Court held as follows, with regard to a national provision which excludes unemployment benefits from the social security benefits granted to domestic workers by a statutory social security scheme:

'45. It should be noted that the statistics … indicate, first, that on 31 May 2021, the number of employed persons subject to [the] general scheme was 15 872 720, of which 7 770 798 were women (48.96% of employees) and 8 101 899 were men (51.04% of employees). Secondly, on the same date, the cohort of employees covered by the Special Scheme for Domestic Workers consisted of 384 175 workers, of which 366 991 were women (95.53% of the persons enrolled in the special scheme, that is to say, 4.72% of the female employees) and 17 171 were men (4.47% of the persons enrolled in the special scheme, that is to say, 0.21% of the male employees).

46. Those statistics show, therefore, that the proportion of female employees covered by the Spanish general social security scheme who are affected by the difference in treatment arising from the national provision at issue in the main proceedings is significantly greater than the proportion of male employees.'

51. Consequently, in its case-law on indirect discrimination, the Court examined only the group of persons put at a disadvantage, namely domestic workers, composed of 95.53% women, without taking into account the total number of persons subject to the general social security scheme, evenly composed of women (48.96% of employees) and men (51.04% of employees).

52. Lastly, the objective of Directive 2006/54 is to prohibit discrimination on grounds of sex, in particular indirect discrimination. Up to now, the Court has considered that that objective involves specifically examining the situation of the group of persons disadvantaged by a national measure. I take the view that that objective does not allow for taking into account the situation of the group of persons who are not subject to that measure. Assuming that the national provision at issue puts employees of one sex at a particular disadvantage compared with employees of the other sex, it would then be necessary to examine whether it is justified by objective factors unrelated to any discrimination on grounds of sex.

53. Consequently, I consider that, in order to establish the existence of a particular disadvantage with regard to female employees, within the meaning of Article 2(1)(b) of Directive 2006/54, it is appropriate to examine only the group of employees put at a disadvantage. I add that since the qualitative approach aimed at determining whether an apparently neutral provision, criterion or practice puts persons of one sex at a particular disadvantage compared with persons of the other sex could have implementation difficulties, I take the view that discrimination on account of part-time working – the subject of the fourth and fifth questions referred in the present cases – may constitute an appropriate basis for ensuring equal treatment between full-time and part-time workers.[32]

54. I therefore propose that the following answer be given to part (a) of the second question referred: Article 157 TFEU and Article 2(1)(b) and the first sentence of Article 4 of Directive 2006/54 must be interpreted as meaning that, in the examination of the existence or otherwise of

[32] See, in that regard, judgment of 19 October 2023, *Lufthansa CityLine* (C-660/20, EU:C:2023:789).

indirect discrimination, a finding that an apparently neutral national provision puts 'persons of one sex at a particular disadvantage compared with persons of the other sex' requires the national courts to examine all relevant qualitative elements with a view to determining whether such a disadvantage exists. So far as concerns statistical evidence, which is only one factor among others, it is necessary to verify whether there is a significantly higher proportion of people of a given sex in the group of employees put at a disadvantage by that national provision, without it also being necessary for there to be a significantly higher proportion of people of the other sex in the group of employees who are not subject to that provision.

V. Conclusion

55. In the light of the foregoing considerations, I propose that the following answer be given to the second question referred for a preliminary ruling by the Bundesarbeitsgericht (Federal Labour Court, Germany) in Joined Cases C-184/22 and C-185/22 as follows:

Article 157 TFEU and Article 2(1)(b) and the first sentence of Article 4 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

must be interpreted as meaning that in the context of examining the existence or otherwise of indirect discrimination, a finding that an apparently neutral national provision puts 'persons of one sex at a particular disadvantage compared with persons of the other sex' requires the national courts to examine all relevant qualitative elements with a view to determining whether such a disadvantage exists. So far as concerns statistical evidence, which is only one factor among others, it is necessary to verify whether there is a significantly higher proportion of people of a given sex in the group of employees put at a disadvantage by that national provision, without it also being necessary for there to be a significantly higher proportion of people of the other sex in the group of employees who are not subject to that provision.