JUDGMENT OF THE COURT (Sixth Chamber)

30 March 2000 *

In Case C-236/98,

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

Jämställdhetsombudsmannen

and

Örebro läns Landsting

on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the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

* Language of the case: Swedish.

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Schintgen (Rapporteur), C. Gulmann, J.-P. Puissochet and F. Macken, Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Jämställdhetsombudsmannen, by L. Svenaeus, assisted by Lord Lester of Herne Hill QC, and L. Bergh, Ställföreträdande Jamställdhetsombudsman,

— the Örebro läns Landsting, by G. Bergström, Arbetsrättchef, and A. Barav, Barrister,

— the Finnish Government, by H. Rotkirch, Ambassador, Head of the Legal Service in the Ministry of Foreign Affairs, and T. Pynnä, Legal Adviser in that Ministry, acting as Agents,

— the Commission of the European Communities, by K. Oldfelt, Principal Legal Adviser, and M. Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Jämställdhetsombudsmannen, represented by L. Svenaeus, assisted by Lord Lester of Herne Hill, of the Örebro läns Landsting, represented by G. Bergström and A. Barav, of the Finnish Government, represented by E. Bygglin, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by K. Oldfelt, at the hearing on 21 October 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1999,

gives the following

Judgment

1 By decision of 2 July 1998, received at the Court on 6 July 1998, the Arbetsdomstolen (Labour Court) referred five questions for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

2 Those questions were referred in proceedings between the Jämställdhetsombudsmannen (Equal Opportunity Ombudsman, hereinafter 'the JämO') and the Örebro Läns Landsting (Örebro County Council, hereinafter 'the Landsting') concerning the pay of two midwives, which is lower than that received by a clinical technician even though, according to the JämO, those midwives perform work of equal value.

Legal background

Community law

3 The first paragraph of Article 1 of Directive 75/117 provides that the principle of equal pay for men and women outlined in Article 119 of the Treaty means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

4 Article 3 of the directive provides that Member States are to abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.

5 Under Article 4, Member States are to take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.

6 Article 1 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) concerns the implementation in the Member States of the principle of equal treatment for men and women in the matter of, *inter alia*, access to employment and working conditions.

National law

7 The objective of the Jämställdhetslagen (Law on equal opportunity, SFS 1991 No 433) in Sweden is to promote equal rights between men and women with respect to work, recruitment and other working conditions, and to opportunities for professional development.

8 Article 2 of the Jämställdhetslagen provides that the employer and the worker are to cooperate in order for equality to be attained in working life. In particular, they are to aim to reduce and eliminate differences in salary and other working conditions between men and women who perform work which is to be regarded as identical or of equal value.

9 Article 18 of the Jämställdhetslagen provides:

'Unlawful discrimination on grounds of sex is to be regarded as existing where an employer accords lower pay or otherwise applies less favourable conditions of employment to an employee than those which he accords to an employee of the opposite sex where such employees perform work which is to be regarded as identical or of equal value.

However, there is no discrimination if the employer can show that the different conditions of employment are based on differences in the employees' actual qualifications for the work or that in any event they have no direct or indirect connection with the sex of the employees.'

10 Article 46 of the Jämställdhetslagen provides that, in proceedings relating to the application of Article 18, the JämO may bring an action on behalf of a worker or a job applicant if the latter consents and the JämO considers that it is in the interests of the application of the law for the matter to be the subject of a judicial decision or that such an action is justified on other grounds.

11 The main proceedings are governed by collective agreement Allmänna Bestämmelser 95.

12 Article 8 of that agreement provides as follows:

'The standard working week for full-time staff shall, unless this agreement provides otherwise, comprise an average of 40 hours where there are no bank holidays ... The standard working week incorporating days of the week such as Sundays and bank holidays or week-days and bank holidays shall, for full-time staff, comprise an average of 38 hours and 15 minutes ... However, where arrangements such as shift-work pertain, the average working week shall comprise 34 hours and 20 minutes.'

13 Article 13 of the agreement provides:

'The worker shall be remunerated in accordance with this agreement. His remuneration shall comprise his salary within the meaning of Articles 14 to 18, paid-holiday benefits, paid-holiday allowance and holiday pay, plus the following specific sums: over-time pay, travel expenses, the inconvenient-hours supplement, on-call and availability pay and the postponement supplement.'

14 Article 14 of the agreement provides that all workers are to receive one contractually determined salary payment per calendar month.

15 Under Article 32, workers whose duties are determined by a roster or similar document and who have worked inconvenient hours — albeit not over-time — are, by virtue of that fact, entitled to a supplement.

The main proceedings

16 The JämO brought an action before the national court on behalf of two midwives for an order against the Landsting for the payment to them of damages in respect of pay discrimination for the period 1 January 1994 to 30 June 1996 and in respect of the differential between their pay and the higher amount received by a clinical technician, on the ground that their work was of equal value.

17 The midwives in the main proceedings, Ms Ellmén and Ms Wetterberg, and the clinical technician, Mr Persson, are all employed by the Landsting at the regional hospital of Örebro. Their pay and working conditions are governed by collective bargaining agreements, in particular the Allmänna Bestämmelser 95 collective agreement.

18 The basic monthly salaries received by Ms Ellmén and Ms Wetterberg are SEK 17 400 and SEK 16 600 respectively, while Mr Persson's basic monthly salary is SEK 19 650.

19 The inconvenient-hours supplement is governed by a collective agreement and is calculated in the same way for all the workers concerned. The supplement varies according to the time of day and according to whether the hours are worked on a Saturday or a bank holiday. Inconvenient-hours remuneration is generally only accorded for work between the hours of 7 p.m. and 6 a.m. in the week. The midwives received the supplement on a regular basis, unlike the clinical technician, who did not work hours entitling him to it.

20 The midwives work under a three-shift system from 7 a.m. to 3.30 p.m., from 2 p.m. to 10 p.m., and from 9.30 p.m. to 7.30 a.m. The roster is drawn up for periods of 15 weeks. The JämO argues that midwives on the labour ward are the only group of workers who work on a shift basis in the Swedish health care sector.

21 Pursuant to the Allmänna Bestämmelser 95 collective agreement, the average full-time working week comprises 40 hours, except where Sundays or bank holidays or both are worked, in which case the average week comprises 38 hours and 15 minutes, or where agreements have been reached, as for shift work, where the week comprises 34 hours and 20 minutes.

22 Before the Arbetsdomstolen, the JämO argued that the work performed by Ms Ellmén and Ms Wetterberg was to be regarded as of equal value to that performed by the clinical technician, and that therefore their pay should be the same as his. As regards the pay comparison in respect of the workers concerned, it submitted that no account should be taken either of the inconvenient-hours supplement or of the value of the reduced working time. The JämO made the point that, during the relevant period, the clinical technician worked day-time hours and did not work shifts. The midwives had mostly worked under a three-shift system, although on occasion the roster had been limited to two shifts (day and evening) or the work had been performed at night. Their fixed monthly pay remained the same regardless of the roster, whereas the inconvenient-hours supplement varied according to the roster.

23 The Landsting, on the other hand, argued that a midwife's work was not of equal value to that of a clinical technician. Even if the two types of work were deemed to be of equal value, there was on any view no discrimination since the terms of employment applicable to midwives and those applicable to clinical technicians were not related, direct or indirectly, to the sex of the worker concerned. In any event, the Landsting argued, the inconvenient-hours supplement and the value of the reduced working time must be incorporated in the basis for a pay comparison and, if they are, there is no pay differential to the detriment of midwives.

24 In those circumstances, the JämO applied to the Arbetsdomstolen for an interim order declaring that the Landsting had fixed the midwives' pay at a lower level than that of the clinical technician.

25 The Landsting challenged the JämO's arguments, relying in particular on Article 119 of the Treaty and Directive 75/117.

The questions referred

26 Leaving open the question whether a midwife's work is of equal value to that of a clinical technician, the Arbetsdomstolen considered it necessary, in order to be able to determine whether the midwives were paid less by the Landsting than the clinical technician in this case, to refer to the Court the question whether the inconvenient-hours supplement and the value of the reduced working time enjoyed by the midwives form part of the pay to be compared. According to the Arbetsdomstolen, neither Article 119 of the Treaty nor Directive 75/117 provides a precise answer to that question, nor, for that matter, does the case-law of the Court, in particular its judgment in Case C-262/88 *Barber* [1990] ECR I-1889.

27 In the light of those considerations, the Arbetsdomstolen decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Under Article 119 of the Treaty of Rome and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, must a supplement for inconvenient working hours be included in the basis for a pay comparison in relation to a pay discrimination claim? What difference does it make that the supplement for inconvenient working hours varies from month to month depending on the working schedule?

2. In answering Question 1 should significance be attached to the fact that as part of their tasks the midwives must regularly work hours which entitle

them to the supplement for inconvenient working hours, whereas the clinical technician does not regularly perform work during times which afford entitlement to such a supplement?

3. In determining the question whether the supplement for inconvenient working hours is to be included in the basis for a pay comparison in relation to a pay discrimination claim, must significance be attached to the fact that, under national law, that supplement is included in basic pay for the purpose of determining pensions, sick pay, damages and other earnings-related payments?

4. Must a reduction in working time, representing the difference in standard working time for daytime work and work under a continuous three-shift regime, be taken into account when a pay comparison is made in relation to a pay discrimination claim, in accordance with Article 119 of the Treaty of Rome and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women? If the answer is in the affirmative: what significance does it have that under the collective agreement the lower standard working time applying under a continuous three-shift regime constitutes full-time working? If reduced working hours are to be given a particular value, is that value to be regarded as being comprised in the fixed monthly pay or as constituting special compensation which is to be included in the pay comparison?

5. In answering Question 4, is significance to be attached to the fact that the midwives, but not the clinical technician, perform shift work which, under the terms of the collective agreement, affords entitlement to reduced working hours?'

Relevance of the questions referred

28 The Landsting contends that the Court cannot answer the questions referred without first determining whether the duties in point in the main proceedings are of equal value. Since, in its submission, a midwife's duties are not comparable to those of a clinical technician, there can be no infringement of Article 119 of the Treaty.

29 At the hearing, the JämO maintained that the Arbetsdomstolen had decided to refer the matter to the Court without deciding the issue of equal value of the work on the ground that this would require complex and costly investigations.

30 In that respect, it should be borne in mind that Article 177 of the Treaty lays down the framework for close cooperation between the national courts and the Court of Justice based on the assignment to each of different functions. It is clear from the second paragraph of Article 177 that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5).

31 It is true that the need to provide an interpretation of Community law which will be of use to the national court makes it essential to define the legal context in which the interpretation requested should be placed and that, in that respect, it may be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court, so as to enable the latter to take cognisance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called upon to give (*Irish Creamery Milk Suppliers Association*, paragraph 6).

32 However, those considerations do not in any way restrict the discretion of the national court, which alone has a direct knowledge of the facts of the case and of

the arguments of the parties, which will have to take responsibility for giving judgment in the case, and which is therefore in the best position to appreciate at what stage in the proceedings it requires a preliminary ruling from the Court of Justice (Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 10).

33 In this case, taken as a whole, the request for an interpretation of Community law made by the national court has arisen in the context of a genuine dispute and the Court of Justice has the information it needs in order to give a useful reply to the questions referred.

34 Whilst the description in this case of the factual and legal context does appear incomplete in some respects, thus preventing the Court from replying in various respects with the precision it would wish to the questions raised, the Court can none the less give a helpful ruling on the basis of the information before it. The Court may, however, depending on the circumstances, have occasion to leave open certain aspects of the questions raised (see Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 25).

The first three questions

35 By its first three questions, which it is appropriate to consider together, the national court is essentially asking whether the inconvenient-hours supplement must be taken into consideration in calculating the salary used as the basis for a pay comparison for the purposes of Article 119 of the Treaty and Directive 75/117.

36 It should be recalled at the outset that Article 119 of the Treaty lays down the principle that men and women should receive equal pay for the same work or for work deemed to be of equal value. Thus, the same work or work deemed to be of equal value must be remunerated in the same way whether it is performed by a man or a woman. As the Court has already held in Case 43/75 *Defrenne* v *Sabena* (*Defrenne II*) [1976] ECR 455, paragraph 12, that principle is one of the foundations of the Community.

37 Furthermore, the Court has also held that Article 1 of Directive 75/117, which is essentially designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty, in no way alters the scope or content of that principle as defined in Article 119 (Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911).

38 In order to give a helpful reply to the national court, it must first of all be established whether the inconvenient-hours supplements awarded to workers under the Allmänna Bestämmelser 95 collective agreement fall under Article 119 of the Treaty and therefore under Directive 75/117.

39 In that connection, the concept of pay, within the meaning of the second paragraph of Article 119 of the Treaty, covers any other consideration, in cash or in kind, present or future, provided that the worker receives it, even indirectly, in respect of his employment from his employer (see *Barber*, paragraph 12).

40 The supplement at issue in the main proceedings constitutes a form of pay to which the worker is entitled in respect of his employment. The supplement is paid to the worker for performing duties at inconvenient hours and to compensate him for the resultant disruption and inconvenience.

41 As to the manner in which salaries are negotiated at the level of the Landsting, it is common ground that, by reason of its mandatory character, Article 119 of the Treaty falls to be applied not only to provisions of law and regulations but also to collective agreements and individual contracts of employment (Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig* [1994] ECR I-5727, paragraph 18).

42 Accordingly, since the inconvenient-hours supplement falls within the concept of pay for the purposes of Article 119 of the Treaty, it must be ascertained whether it has to be taken into account in comparing midwives' pay with that of clinical technicians.

43 With regard to the method to be adopted, in making such a comparison, for verifying compliance with the principle of equal pay, the Court has already held that if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of Article 119 would be diminished as a result. It follows that genuine transparency, permitting effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women (*Barber,* paragraph 34).

44 In this case, therefore, in order to ensure greater transparency and guarantee compliance with the requirement of effectiveness underlying Directive 75/117, the midwives' monthly basic salary should be compared with the like salary of clinical technicians.

45 The fact that the inconvenient-hours supplement varies from month to month according to the part of the day during which the hours in question were worked

makes it difficult to make a meaningful comparison between, on the one hand, a midwife's salary and supplementary allowance, taken together, and, on the other hand, the basic salary of the comparator group.

46 The Finnish Government observed that it is easy to compare salaries where persons of the opposite sex do the same or very similar work under the same conditions and for similar hours. However, it maintains, the more different the duties are, the more difficult it is not only to compare the various elements of pay but also to assess the equivalence of the work. In such a case, it might be possible to evaluate the demands imposed by the duties concerned, in particular by employing a non-discriminatory method for that purpose.

47 In that connection, it must be pointed out that the Court is not called upon in these proceedings to rule on questions relating to the concept of work of equal value.

48 It is for the national court, which alone has jurisdiction to assess the facts, to determine whether, in the light of facts relating to the nature of the work done and the conditions in which it is carried out, the work can be deemed to be of equal value (Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraph 42).

49 Should that be the case, the Court finds that a comparison of the midwives' basic monthly salary with that of the clinical technicians shows that the midwives are paid less.

50 It follows that, in order to establish whether it is contrary to Article 119 of the Treaty and to Directive 75/117 for the midwives to be paid less, the national court must verify whether the statistics available indicate that a considerably higher percentage of women than men work as midwives. If so, there is indirect sex discrimination, unless the measure in point is justified by objective factors unrelated to any discrimination based on sex (Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 65).

51 It is for the national court to determine whether a provision of national law, an agreement whose purpose is to regulate employment collectively or even unilateral action by an employer with respect to his staff, which, though applying independently of the sex of the worker, actually affects a considerably higher percentage of women than men, is justified by objective reasons unrelated to any discrimination on grounds of sex (*Seymour-Smith and Perez,* paragraph 67, and Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 26).

52 The national court must also ascertain, in the light of facts relating to the nature of the work done and the conditions in which it is carried out, whether those facts may be considered to be objective factors unrelated to any discrimination on grounds of sex such as to justify any differences in pay.

53 Finally, as the Advocate General pointed out at paragraph 36 of his Opinion, where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be deprived of the means of securing compliance with the principle of equal pay before national courts if evidence establishing a prima facie case of discrimination

did not have the effect of imposing on the employer the onus of proving that the difference in pay is not in fact discriminatory (see *Enderby*, paragraph 18).

54 Therefore, the answer to the first three questions must be that the inconvenient-hours supplement is not to be taken into account in calculating the salary which serves as the basis for a pay comparison for the purposes of Article 119 of the Treaty and Directive 75/117. If a difference in pay between the two groups compared is found to exist, and if the available statistical data indicate that there is a substantially higher proportion of women than men in the disadvantaged group, Article 119 of the Treaty requires the employer to justify the difference by objective factors unrelated to any discrimination on grounds of sex.

The fourth and fifth questions

55 By its fourth and fifth questions, which it is appropriate to consider together, the national court is essentially asking whether the reduction in working time awarded in respect of work performed according to a three-shift roster as compared to normal working time for day-work, or the value of that reduction, are to be taken into consideration in calculating the salary which serves as the basis for a pay comparison for the purpose of Article 119 of the Treaty and Directive 75/117.

56 In that respect, the Landsting maintains that the pay comparison must be made on the basis of the salary paid in respect of each hour actually worked. The value

of the reduction in working time, which the Landsting assesses at 11.4% of the basic salary, should therefore be included in the overall amount of monthly pay for the purposes of the comparison.

57 The JämO states that, in order to receive the basic full-time salary under the Allmänna Bestämmelser 95 collective agreement, both a midwife and a clinical technician must perform a week's full-time work as defined in the agreement. It points out that, under that agreement, a full-time working week for a midwife comprises 34 hours 20 minutes under a three-shift roster system, whereas a clinical technician has to work 40 hours from Monday to Friday during normal working hours. According to the JämO, workers who carry out their duties according to a three-shift roster system are subject to significantly greater pressures and also suffer from fatigue as a result of the irregular working hours that shift work entails. That is why the Allmänna Bestämmelser 95 collective agreement attributes a higher value to one hour worked under the roster system than to one hour worked during normal working hours from Monday to Friday.

58 As is clear from paragraph 38 of this judgment, in order to give a helpful reply to the national court, it must be ascertained whether the reduction in working time provided for under the Allmänna Bestämmelser 95 collective agreement falls under Article 119 of the Treaty and, consequently, under Directive 75/117.

59 In that regard, the Court has already held that the fact that the fixing of certain working conditions may have pecuniary consequences is not sufficient to bring such conditions within the scope of Article 119, which is based on the close connection which exists between the nature of the services provided and the amount of remuneration (Case 149/77 *Defrenne III* [1978] ECR 1365, paragraph 21).

60 Consequently, the reduction in working time relates to working conditions and therefore falls under Directive 76/207 (*Seymour-Smith and Perez*, paragraph 37).

61 However, any differences that might exist in the hours worked by the two groups whose pay is being compared may constitute objective reasons unrelated to any discrimination on grounds of sex such as to justify a difference in pay.

62 As is clear from paragraph 53 of this judgment, it is for the employer to show that such objective reasons do in fact exist.

63 Therefore, the answer to the fourth and fifth questions must be that neither the reduction in working time, by reference to the standard working time for day-work, awarded in respect of work performed according to a three-shift roster, nor the value of such a reduction, are to be taken into consideration for the purpose of calculating the salary used as the basis for a pay comparison for the purposes of Article 119 of the Treaty and Directive 75/117. However, such a reduction may constitute an objective reason unrelated to any discrimination on grounds of sex such as to justify a difference in pay. It is for the employer to show that such is in fact the case.

Costs

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

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the Arbetsdomstolen by decision of 2 July 1998, hereby rules:

1. **The inconvenient-hours supplement is not to be taken into account in calculating the salary which serves as the basis for a pay comparison for the purposes of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC) and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. If a difference in pay between the two groups compared is found to exist, and if the available statistical data indicate that there is a**

substantially higher proportion of women than men in the disadvantaged group, Article 119 of the Treaty requires the employer to justify the difference by objective factors unrelated to any discrimination on grounds of sex.

2. Neither the reduction in working time, by reference to the standard working time for day-work, awarded in respect of work performed according to a three-shift roster, nor the value of such a reduction, are to be taken into consideration for the purpose of calculating the salary used as the basis for a pay comparison for the purposes of Article 119 of the Treaty and Directive 75/117. However, such a reduction may constitute an objective reason unrelated to any discrimination on grounds of sex such as to justify a difference in pay. It is for the employer to show that such is in fact the case.

Moitinho de Almeida Schintgen Gulmann

Puissochet Macken

Delivered in open court in Luxembourg on 30 March 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber