Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 27 February 2014[1]

Case C-173/13

Maurice Leone,
Blandine Leone
v
Garde des Sceaux, Ministre de la Justice,
Caisse nationale de retraites des agents des collectivités locales

(Request for a preliminary ruling from the Cour administrative d'appel de Lyon (France))

(Social policy — Article 141 EC — Equal pay for male and female workers — Early retirement with immediate payment of pension — Service credit — Advantages granted, without distinction by sex, subject to career break for bringing up children — Lack of legal framework allowing male civil servants to take leave equivalent to the maternity leave available to female civil servants — Indirect discrimination — Possible justification — Positive action)

I – **Introduction**

1. The request for a preliminary ruling submitted by the Cour administrative d'appel de Lyon (Administrative Appeal Court, Lyons) (France) concerns the principle of equal pay for male and female workers. In the light of the date of the facts in the main action, the interpretation sought must be understood as concerning Article 141 EC rather than Article 157 TFEU, to which the national court refers but which did not come into force until 1 December 2009; the tenor of those provisions is nevertheless virtually identical.

2. The request is made in the context of liability proceedings brought by Mr and Mrs Leone against the French State for an alleged breach of EU law. The proceedings follow the refusal by the Caisse nationale de retraites des agents des collectivités locales (National pension fund for local community civil servants) ('the CNRACL') to apply to Mr Leone the provisions of French law granting advantages in respect of retirement pensions on the grounds that he failed to take a career break in order to bring up his children. They claim in particular that Mr Leone has been a victim of indirect discrimination because they consider that, despite their neutral appearance, the conditions for access to those advantages are more favourable for female civil servants.

3. The two types of advantage concerned by this request for a preliminary ruling, namely the possibility of early retirement with immediate payment of pension — which is the subject of the first question — and the right to a service credit for pension purposes — which is the subject of the second question — are subject to similar conditions. In both cases, the pensioner must have taken a career break for a continuous period of at least two months, taking one of the types of child-raising leave

1 — Original language: French.

listed in the relevant national provisions. The main issue is whether such provisions, which apply without distinction of sex, nevertheless constitute indirect discrimination against male workers since they stipulate a condition of absence from work for a period of time equivalent to compulsory maternity leave.

4. A similar problem was submitted to the Court of Justice only recently. A service credit rule similar to that involved in the second question in this case was the subject of a request for preliminary ruling in the *Amédée* case, on which I delivered an opinion [2] before the case was removed from the register. [3] I believe the views and arguments I expounded in that case will be relevant, *mutatis mutandis*, for an examination of the present one. I therefore think it appropriate both to consider that question first and to invite the reader to take note of the tenor of that other Opinion in advance.

5. The third question is asked only in the alternative, for the event that the indirect discrimination referred to in the first two questions is found to be present. In substance, the Court of Justice is asked whether such discriminatory factors might be justified on the basis of Article 141(4) EC [4] as measures intended to offset disadvantages suffered by women in their professional careers.

II – **The French legal framework**

A – *The relevant provisions on early retirement*

6. According to the Civil and Military Retirement Pensions Code ('the Pensions Code'), civil servants may take early retirement and be paid their pension immediately, without having reached the statutory retirement age, provided they satisfy certain conditions.

7. Article L. 24 of the Code, as amended by Article 136 of Law No 2004-1485 of 30 December 2004 [5] ('Law No 2004-1485') provides:

'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.

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; …'

2 — Opinion delivered on 15 December 2011 in Case C-572/10 *Amédée*.

3 — That case was removed from the register by order of 28 March 2012, the request having been withdrawn by the national court after the order for reference was annulled on appeal.

4 — The national court refers to Article 157(4) TFEU, but I would point out that this is not the provision applicable *ratione temporis* (see point 1 of this Opinion).

5 — Finance (Amendment) Law for 2004 (French Official Gazette of 31 December 2004, p. 22522).

8. Article L. 18(II) of the Code, as amended by Law No 91-715 of 26 July 1991,[6] defines the categories of children in respect of which such a benefit may be paid; these include in particular 'legitimate children, natural children whose filiation is established and adoptive children of the person entitled to the pension'. Paragraph III of the same Article adds in particular that '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'.

9. Article R. 37 of the Pensions Code as amended by Decree No 2005-449 of 10 May 2005[7] ('Decree No 2005-449'), provides:

'I. — The career break referred to in the first subparagraph of Article L. 24(I)(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. …

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.

… [8]

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.'

6 — Law enacting various provisions relating to the civil service, French Official Gazette of 27 July 1991, p. 9952.

7 — Decree implementing Article 136 of Law No 2004-1485 and amending the Civil and Military Retirement Pensions Code (French Official Gazette of 11 May 2005, p. 8174).

8 — The foregoing subparagraph notwithstanding, for some of the children listed in Article L. 18(II) of the Pensions Code whom the person concerned has brought up in the circumstances envisaged in paragraph III of that Article — among whom biological children such as those concerned in the present case do not appear — the career break must occur either before their sixteenth birthday or before the age at which they ceased to be dependent.

B – *The relevant provisions concerning service credit*

10. 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 [9] ('the local community civil servants decree'):

'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 natural child born 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; …'

III – **The dispute in the main proceedings, the questions referred for a preliminary ruling and the proceedings before the Court of Justice**

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

12. On 4 April 2005, he applied for early retirement with immediate payment of his pension as father of three children born on 8 October 1990, 31 August 1993 and 27 November 1996 respectively, on the basis of Article L. 24 of the Pensions Code.

13. His application was refused by the CNRACL by decision of 18 April 2005 on the grounds that Mr Leone had not taken a career break for each of his children as required by paragraph I, subparagraph 3, of that Article. Mr Leone's appeal against that decision was dismissed as inadmissible by order of the Tribunal administratif de Lyon (Administrative Court, Lyons) of 18 May 2006.

9 — French Official Gazette of 30 December 2003, p. 22477.

14. In an application registered on 31 December 2008, Mr Leone and his wife [10] began a dispute procedure, the main purpose of which was to obtain compensation for the loss [11] that would result from the indirect discrimination which they alleged Mr Leone had suffered as a result of the new version of the combined provisions of Articles L. 24 and R. 37 of the Pensions Code on early retirement and of Articles L. 12 and R. 13 of the Pensions Code on service credit being applied in his case. [12]

15. Mr and Mrs Leone have argued that the conditions which those provisions impose for receipt of the benefits they provide for bringing up children are contrary to the principle of equal pay under Article 141 EC. In substance, they argue inter alia that female civil servants always satisfy the career break condition laid down in those provisions since maternity leave is automatic and mandatory, whereas in practice male civil servants are for the most part denied the advantages of those provisions since there are no statutory arrangements for them to take paid leave equivalent to maternity leave.

16. Their application having been rejected by the Tribunal administratif de Lyon on 17 July 2012, Mr and Mrs Leone appealed against that judgment to the Cour administrative d'appel de Lyon Lyon (Administrative Appeal Court, Lyons).

17. By decision of 3 April 2013, lodged on 9 April 2013, the Cour administrative d'appel de Lyon 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 [the] decree [on local community civil servants] 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]?'

18. Written observations have been submitted to the Court of Justice by Mr and Mrs Leone, the CNRACL, [13] the French Government and the European Commission. No hearing has been held.

IV – **Analysis**

A – *Admissibility of the request for a preliminary ruling*

19. The French Government objects that the request for a preliminary ruling is inadmissible, and its main submission is that it should be rejected on that ground. It argues that the referring court has not set forth the reasons why it entertains doubts as to the conformity of the national provisions at issue with EU law, neither has it explained the link it makes between the content of those provisions

10 — In their observations, Mr and Mrs Leone explain that Mrs Leone is objecting alongside her husband to the loss incurred as a result of the contested refusal since in the event of Mr Leone's decease it will reduce the amount of widow's pension she would receive by an amount proportional to the service credit for bringing up children.

11 — More precisely, Mr and Mrs Leone have asked that the French State be declared liable and ordered to pay them compensation provisionally set at a total sum of EUR 86 595 plus interest at the statutory rate.

12 — The tenor of the said Articles L. 12 and R. 13, which are not per se the subject of this request for a preliminary ruling, is given in point 7 et seq. of my Opinion in *Amédée*.

13 — Nevertheless, the CNRACL does not say how it would like the questions referred for a preliminary ruling to be answered.

and Article 157 TFEU, interpretation of which it is requesting.[14] It adds that the Cour administrative d'appel de Lyon ought to have said why it thought it necessary to refer a question to the Court of Justice when the Conseil d'État, the supreme administrative court in France, has already ruled on a number of occasions that there is no such discrimination, without making a reference for a preliminary ruling.[15] It argues that the absence of such explanations makes it impossible for interested parties to submit observations in full knowledge of the facts[16] and for the Court of Justice to provide an answer that will be helpful in resolving the dispute in the main action.

20. In this regard, I note that it is true that the grounds of the decision to refer are somewhat obscure. In particular, the Cour administrative d'appel de Lyon has failed to state whether, and if so to what extent, it believes it is objectively more difficult for male civil servants than for female civil servants to satisfy the conditions laid down by the two sets of provisions at issue, citing any statistics in support of that view.

21. In my opinion, the decision does however contain sufficient details of fact and law to allow the main issues of the case to be identified and to enable the Court of Justice to rule on the questions referred as required under Article 94 of the Court's Rules of Procedure and its case-law.[17]

22. The referring court has in fact described the subject-matter of the dispute, set out the relevant facts, given the tenor of the national provisions applicable to the case, stated its reasons — inherent in the pleadings of the parties to the main action, which are reproduced — for inquiring about the interpretation of the EU law provisions referred to and established a connection — briefly, it is true — between them and the said national provisions. Finally, it seems to me undeniable that the answer to the questions raised will be useful for settling the dispute before the referring court. I therefore believe that the present request for a preliminary ruling is admissible.

B – *Preliminary remarks*

23. I would make clear from the outset that the national measures at issue do fall within the scope *ratione materiae* of Article 141 EC. That article does in fact cover pensions paid under a scheme such as the French retirement scheme for civil servants, such pensions being, in accordance with Court of Justice case-law, related to pay received in respect of employment,[18] the latter criterion being the only determining factor.[19]

14 — The French Government stresses that the appeal court confines itself to quoting the arguments of the parties to the main proceedings and the national provisions relied on, whereas it ought to have identified, however briefly, which of those provisions' effects it considered likely to result in indirect discrimination, having regard to the criteria established in Court of Justice case-law.

15 — The French Government refers to the judgments of the Conseil d'État of 29 December 2004, *D'Amato* (application No 265097); of 6 December 2006, *Delin* (application No 280681); and of 6 July 2007, *Fédération générale des fonctionnaires Force Ouvrière and Others* (joined applications No 281147 and No 282169).

16 — Given that, for the purpose of obtaining any written observations, only the order for reference is notified to the parties to the main action and the other interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union, the Member States in particular.

17 — See in particular Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraphs 17 to 19; Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 41; and Case C-145/10 *Painer* [2011] ECR I-12533, paragraph 46 et seq., and the case-law cited. These judgments are concerned with a version of the Rules of Procedure antedating that applicable in the present case (OJ 2012 L 265, p. 24), but remain applicable.

18 — See, on the subject of the service credit then provided for in Article L. 12(b) of the Pensions Code, Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 25 et seq., and on the subject of entitlement to a retirement pension payable immediately, resulting at the time from Article L. 24(I)(3)(b) of the said Code, Case C-206/00 *Mouflin* [2001] ECR I-10201, paragraph 20 et seq.

19 — See in particular the judgment of 26 March 2009 in Case C-559/07 *Commission* v *Greece*, paragraphs 42, 47 et seq., and the case-law cited, and Case C-385/11 *Elbal Moreno* [2012] ECR, paragraphs 19 to 26.

24. Finally, I would point out that EU law[20] prohibits discrimination indirectly based on sex resulting from a provision, criterion or practice of national origin which is apparently neutral, since applying to men and women without distinction, unlike cases of direct discrimination, but which in practice puts one of those categories of persons at a disadvantage compared with the other. Such a difference in treatment between female workers and male workers is contrary to Article 141 EC unless the situation of the one is not comparable to that of the other or unless the difference can be justified by a legitimate objective and the means employed to achieve it are appropriate and proportionate.[21]

25. It seems to me that, on a conceptual level, there is a difference between the latter justification, which is valid in the context of the indirect discrimination that may result from the behaviour of an employer, for example, and the positive action that EU law, in particular Article 141(4) EC,[22] expressly allows Member States to maintain or adopt.

C – *The arrangements for granting a service credit for bringing up children*

26. In substance, the second question concerns whether the principle of equal pay for male and female workers laid down in Article 141 EC must be interpreted as meaning that a provision such as Article 15 of the local community civil servants decree gives rise to indirect discrimination in contravention of that principle by reason of the conditions — chiefly relating to a career break of at least two continuous months in the form of one of the five types of leave listed — laid down for entitlement to a service credit of four trimesters for bringing up one or more children.

27. Mr and Mrs Leone and the Commission believe that this question must be answered in the affirmative. In support of their view that EU law should render a provision such as the one at issue inapplicable, they argue that the absence of a legal framework allowing male civil servants, on the birth of a child, to enjoy two months' paid leave equivalent to the maternity leave granted to female civil servants would result in indirect discrimination. The French Government is of the opposite view.

28. For my part, I would like to stress that if the argument advanced by Mr and Mrs Leone and backed by the Commission were accepted by the Court, the practical effect of that would be that all a male civil servant would have to do in order to receive the service credit provided by the provision at issue would be to invoke his position as a father, as Mr Leone wishes to do.

29. But I do not see how such an approach can be consistent with the position taken by the Court in the *Griesmar* judgment. According to the reasoning adopted by the Court, it is compatible with the principle of equal pay for the granting of a service credit for bringing up children, similar to the one at issue here, to be conditional on *particular investment* by the civil servant concerned in the bringing-up of his children and that it should not be obtained simply by dint of having been involved in their conception. Indeed, the Court found there to be direct discrimination only in so far as the provision in question made the service credit payable only to female civil servants who were mothers, thus excluding all male civil servants, *including those able to prove that they did in fact take a career break in order to bring up their children and have thereby been exposed to career-related disadvantages*.[23]

20 — According to the definitions appearing, inter alia, in Article 2(1)(a) and (b) 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 (OJ 2006 L 204, p. 23).

21 — See inter alia Case C-285/02 *Elsner-Lakeberg* [2004] ECR I-5861, paragraph 12; Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraphs 44 and 57; and Case C-123/10 *Brachner* [2011] ECR I-10003, paragraphs 55 and 56.

22 — This possibility of a derogation for the purpose of 'positive action' is adopted in secondary law (see inter alia recital 22 in the preamble to and Article 3 of Directive 2006/54).

23 — See paragraph 52 et seq. of that judgment, in particular paragraph 57, in which the Court noted that Article L. 12(b) of the Pensions Code, in the version in force at the time, did not permit a male civil servant who was exposed to career-related disadvantages related to the bringing-up of his children to claim the credit at issue in the main proceedings, even if he was in a position to prove that he did in fact assume the task of bringing up his children.

30. Following that judgment, the French legislature amended the provisions at issue, namely Article L. 12 of the Pensions Code,[24] and other provisions similarly restricting the right to a service credit. That is why Article 15 of the local community civil servants decree, at issue in the present case, was adopted around the same time[25] and in largely identical terms. There is clearly some legislative connection between the service credit arrangement under the Pensions Code as so amended and the credit referred to in the second question for a preliminary ruling,[26] a connection that was reinforced in a reform subsequent to the dispute in the main action.[27]

31. In addition to these links, I would underline the substantial similarity that exists between the service credit provided in Articles L. 12 and R. 13 of the Pensions Code, in the version that was the subject of the *Amédée* case, and that provided in Article 15 of the said decree, at issue in the present case. Indeed, even if the benefits respectively set out in these two sets of provisions show some differences as to their effects, the conditions for receipt of them are identical, especially as regards the length of career break required and the list of types of leave conferring entitlement to the credit concerned.

32. In view of the fact that these are the only conditions at issue in the present case and given the similarity in this regard between Article 15 of the local community civil servants decree and the provisions involved in the said *Amédée* case, I therefore repeat, *mutatis mutandis*, the view I expressed in my Opinion in that deleted case.

33. In this regard I would point out that, according to the settled case-law of the Court,[28] it is essential, if indirect discrimination is to be found to be present under EU law, that the respective situations of the groups concerned are comparable. Only if the situations of female workers and male workers are comparable does Article 141 EC, according to the Court of Justice, preclude a national measure which, although worded in neutral terms, like that at issue here, in fact works to the disadvantage of a much higher percentage of persons of one sex in their career than persons of the other sex, without there being any objectively justified factors for the resultant difference in treatment.[29]

34. Now I still think, for the reasons explained in the case of *Amédée*,[30] that the situation of female civil servants who have assumed responsibility for bringing up their children in the context of compulsory maternity leave and the situation of male civil servants who, like Mr Leone, cannot prove that they assumed responsibility for bringing up their children are not comparable as regards the conditions laid down in the provision in question for receipt of the service credit. The same lack of comparability of situations obtains between fathers or mothers who have taken a career break on the one hand and those who have not on the other. True, it cannot be denied that a father is capable of having invested in his children both in economic terms and in terms of affection, just like a mother. That is not the question, however, since, as the Court has repeatedly held, the essential criterion is

24 — Amendment introduced by Law No 2003-775 of 21 August 2003 on pensions reform (French Official Gazette of 22 August 2003, p. 14310) and by Decree No 2003-1305 of 26 December 2003 implementing Law No 2003-775 and amending the Civil and Military Retirement Pensions Code (French Official Gazette of 30 December 2003, p. 22473), which introduced a new Article R. 13 into the Pensions Code to lay down the conditions for payment of the service credit provided in Article L. 12.

25 — Note that this decree, numbered 2003-1306, is also dated 26 December 2003.

26 — Thus, the beginning of Article 15 of the decree states that the service credits listed in that article 'shall be added subject to the conditions laid down for State civil servants'. In addition, Article 25(I) states that 'the provisions of Article L. 24(I) of the [Pensions Code] shall apply to the civil servants referred to in Article 1 of this Decree'.

27 — An express reference to the 'conditions set out in Article R. 13 of the Pensions Code' was in fact introduced into Article 15 of the local community civil servants decree with effect from 1 July 2011 by Decree No 2010-1740 of 30 December 2010 implementing various provisions of Law No 2010-1330 of 9 November 2010 reforming pensions for civil servants, military personnel and workers in State industrial establishments (French Official Gazette of 31 December 2010, text No 93) at the same time as the amendments made to the said code (see footnote 41 of my Opinion in *Amédée*).

28 — Inter alia Case C-218/98 *Abdoulaye and Others* [1999] ECR I-5723, paragraph 16, and Case C-427/11 *Kenny and Others* [2013] ECR, paragraph 19 et seq.

29 — In particular *Nikoloudi*, paragraphs 44 and 47.

30 — See point 31 et seq. of my Opinion in *Amédée*.

the fact that the career has been sacrificed for the sake of bringing up the children, and this makes compensation in terms of pension legitimate.[31] Since the situations are not comparable, Article 15 of the local community civil servants decree cannot give rise to a difference in treatment to the detriment of male civil servants and hence to indirect discrimination contrary to Article 141 EC.

35. I would add that it appears from a variety of statistics, both those quoted in Mr and Mrs Leone's observations[32] and those taken from a recent official source,[33] that in France female workers take a career break or simply reduce their working hours far more frequently in order to devote themselves to bringing up their children regardless of whether that may damage their careers and whether or not they receive a financial advantage in compensation. Under these circumstances, it is inevitable that women are likely to benefit more often than men from any national measure which, like the one at issue, is subject to a requirement of such family-related leave[34]. Thus, even if maternity leave did not appear on the list of types of leave conferring entitlement to the credit at issue and the other conditions were identical, female civil servants would be almost the only ones to benefit from the measure since it is in practice still rare for male civil servants to choose to devote themselves to bringing up their children as is required.

36. In other words, if we were to consider there to be no indirect discrimination in such a case, we would have to remove the requirement of proof that the pensioner has devoted him- or herself to bringing up his or her children, a requirement that follows from the *Griesmar* judgment, although it was certainly not the Court's intention to rule that all fathers should enjoy an advantage such as that at issue. Having looked at the facts, which show that the gaps between the involvement of women and of men still persist in France and in other Member States,[35] I do not believe it is possible to consider the conditions which the legislature imposed for the service credit at issue to be discriminatory without at the same time holding that the requirement so formulated in that judgment itself results in indirect discrimination against male civil servants.

37. I therefore propose that the answer to the second question should be that the principle of equal pay for male and female workers set forth in Article 141(1) EC is not disregarded by national measures introducing a service credit for bringing up a child subject to conditions such as those laid down in Article 15 of the local community civil servants decree.

31 — For the disadvantages caused to the working lives of women by maternity and the offsetting they justify, see inter alia Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 27; Case C-450/93 *Kalanke* [1995] ECR I-3051, paragraph 18 et seq.; and *Abdoulaye and Others*, paragraph 19.

32 — Mr and Mrs Leone mention that according to data for the year 2007 94% of parental leave is taken by women and only 6% by men and that, more generally, during the period 2007-2011 men accounted for 0 to 2% of absences for family reasons and women for 98 to 100%.

33 — A report by the Institut national de la statistique et des études économiques (INSEE) highlights the fact that 'despite child-related family allowances [which reduce the differences in valid contribution periods], the levels of pensions which women receive in their own right [that is excluding widow's pensions] are very much lower than those received by men. Even though the gap is gradually narrowing, it is likely to remain for the generations of women currently at work'. It points out that 'it is still common for women to stop working temporarily following a birth' and that in 2010 31% of women, as compared to only 7% of men, changed over to part-time working as a result of having children and that the former figure is as high as 47% for women with three or more children (see *Femmes et hommes — Regards sur la parité — Édition 2012*, Insée Références, Paris, 2012, in particular p. 39 et seq. and p. 112).

34 — These facts alone explain that, according to the statistics cited by Mr and Mrs Leone, since Article 15 of the said decree came into force women have received on average 6.9 trimesters of service credits linked to bringing up children, whereas men have received none in the hospital civil service.

35 — An Insée study shows that 'following a birth, one man in nine reduces his hours or takes a career break compared with one woman in two' in France and that the latter proportion is even greater in Germany, Sweden and the United Kingdom (see Insee Première, No 1454, June 2013, http://www.insee.fr/fr/ffc/ipweb/ip1454/ip1454.pdf). Similarly, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled 'Strategy for equality between women and men 2010-2015' (COM(2010) 491 final, p. 7) underlines that 'many women work part-time or under atypical contracts: although this permits them to remain in the labour market while managing family responsibilities, it can have a negative impact on their pay, career development, promotion prospects and pensions'.

D – *The arrangement for early retirement with immediate payment of pension for having brought up children*

38. In substance, the first question is about whether Article 141 EC is to be interpreted as meaning that provisions such as Articles L. 24 and R. 37 of the Pensions Code give rise to indirect discrimination contrary to the principle of equal pay for male and female workers laid down in that article owing to the conditions they lay down for the recipient of a pension who has brought up three or more children to be entitled to early retirement with payment of pension without condition of age.

39. Mr and Mrs Leone and the Commission believe that this question should be answered in the affirmative, while the French Government, which proposes that the first two questions be dealt with together, considers that those articles of the Pensions Code do not entail any indirect discrimination.

40. I am also of the latter opinion, for reasons analogous to those I set forth in relation to the arrangement referred to by the second question, notwithstanding the fact that the latter has a number of differences compared to that provided in Articles L. 24 and R. 37 of the Pensions Code.[36] Those differences are not in fact to my mind crucial, since they apply to male and female workers without distinction.

41. It is true that the Court of Justice has, in the *Mouflin* case, already been called upon to rule on whether the principle of equal pay laid down in Article 119 EC (now, without major change, Article 141 EC) precluded the conditions laid down for early retirement in Article L. 24(I)(3) of the Pensions Code. However, that judgment has few lessons for the present case since, first, it concerns the version in force at the time of the dispute in the main action, that is to say before the reform resulting from that judgment and which introduced the very provisions applicable here and, second, it concerns a criterion markedly different from the child-raising conditions at issue here.[37]

42. Mr and Mrs Leone and the Commission maintain that there is indirect discrimination in the present case owing to the obligation that any party concerned must have taken a career break of a continuous period of at least two months during a period close to the birth of each of the children concerned[38] and falling within one of the six categories of eligible leave.[39] They argue that those conditions are automatically satisfied by female workers, who are required by law to take paid maternity leave, whereas they are much more difficult for male workers to satisfy, since they may choose not to take such a career break and are not always paid if they do.

43. For my part, I do not believe that Articles L. 24 and R. 37 of the Pensions Code discriminate in a manner prohibited by Article 141 EC for two main reasons similar to those I developed in my Opinion in the case of *Amédée*.

36 — The conditions for the granting of a service credit laid down in Article 15 of the local community civil servants decree are in substance similar to those laid down for early retirement by Articles L. 24 and R. 37, although there are three main differences. The first is that a service credit is granted if the person concerned has brought up at least one child, as against three children for early retirement. The second is that the career break required for early retirement must occur during a specific period directly linked to either the birth of the child or his or her reception into the household if the child is adopted, which is not the case for the service credit. The third is that periods for which compulsory contributions were not payable count towards the career break required for early retirement, which is not the case for the service credit.

37 — In that judgment, the Court in fact held that Article L. 24 of the Pensions Code then in force was in breach of the principle of equality in that entitlement to a retirement pension with immediate effect was reserved for female civil servants whose husbands suffered from a disability or incurable illness making it impossible for them to undertake any form of employment, thus depriving male civil servants in the same situation of that right.

38 — Namely a period located between four weeks prior to the birth (or adoption) and sixteen weeks after.

39 — Namely maternity leave, paternity leave, adoption leave, parental leave, parental care leave or availability to bring up a child below the age of eight.

44. First, as regards pensioners who are parents of biological children, it is true that there are potentially more women than men able to satisfy the conditions laid down in those provisions and that, in a way, they benefit from a presumption that they will have taken a career break in the form of maternity leave.[40] Nevertheless, such a difference in treatment cannot constitute indirect discrimination since it is only the necessary consequence of the fact that, as regards maternity leave in particular,[41] female workers and male workers are in different — not comparable — situations.

45. This difference in fact has its origin and justification in the legitimate objective, incidentally laid down in rules of international law,[42] of offsetting the career disadvantages always suffered by a female worker who, as a biological mother, is required by law to stay away from work for eight consecutive weeks, and that presumably on at least three occasions in the present case.[43] A male worker, on the other hand, is free to decide whether or not to take leave for family reasons and may, if he chooses, opt to take a shorter period than laid down for maternity leave. It is therefore legitimate to require a biological father to prove that he really has chosen to interrupt his career in order to devote himself to his children for the same period of time as a biological mother in order to establish that his career has suffered in the same way and that this needs to be offset in the same way as for female workers.

46. Secondly, in the case of pensioners who are parents of non-biological children, the conditions laid down in Articles L. 24 and R. 37 of the Pensions Code are no more likely to be satisfied by female workers than by male workers. Indeed, the four types of family leave that are relevant to this case[44] are freely and equally available to civil servants of either sex, even if women still make up the vast majority of those who take this option. Besides, as the French Government underlines, each of these types of leave allows the person taking them, male or female without distinction, to automatically satisfy the condition relating to the minimum length of career break required by those provisions.

47. I therefore believe that the answer to the first question should be that the principle of equal pay for male and female workers laid down in Article 141(1) EC is not disregarded by national measures allowing early retirement with immediate payment of pension subject to conditions such as those resulting from the combined application of the provisions of Articles L. 24 and R. 37 of the Pensions Code.

E – *Justification of any indirect discrimination caused by the arrangements in question*

48. In view of the negative answers that I recommend giving to each of the first two questions, I do not believe there is any need to answer the third question, which is expressly stated to be in the alternative by the referring court.

49. This last question invites the Court of Justice to determine whether any indirect discrimination that may have been identified as a result of its examination of the first two questions might be justified on the basis of the provisions of Article 141(4) EC. Mr and Mrs Leone and the Commission are of the opinion that it should be answered in the negative.

40 — In that regard see point 44 of my Opinion in *Amédée*.

41 — On the distinctive nature and purpose of maternity leave as acknowledged by the Court of Justice see, in particular, Case C-5/12 *Betriu Montull* [2013] ECR, paragraph 49 et seq. and the case-law cited.

42 — Note that the right to maternity leave that is both mandatory and paid is provided in both EU law and the conventions of the International Labour Organisation (see point 33 et seq. of my Opinion in *Amédée*).

43 — Given that the right to early retirement in question is granted only where the person concerned has looked after at least three children.

44 — Maternity leave and paternity leave being excluded for this category of parents.

50. The said paragraph 4 allows Member States to depart from the principle of equal pay for male and female workers by maintaining or adopting measures providing for specific advantages to compensate for disadvantages suffered by some workers in their professional careers. [45]

51. Furthermore, the Court of Justice has in its case-law [46] made clear that measures justifying a departure from that principle must not only serve a neutral, legitimate objective but the means to achieve it must also be proportionate, that is both appropriate and necessary for the purpose.

52. In the event, the question is whether either or both of the two sets of measures at issue could constitute positive action in favour of female civil servants who have had one or more children, designed to offset the disadvantages the women concerned may have suffered in their careers as a result of being away from work in order to give birth or bring up their children.

53. I note that Article 141(4) EC refers to 'measures providing for specific advantages *in order to* … prevent or compensate for disadvantages' (emphasis added). This may seem incompatible with the assumption of measures suspected, as in the present case, of being indirectly discriminatory. On such an assumption, there is no need to look for any intention on the part of the legislature to maintain or adopt positive measures to assist the sex that is suffering disadvantage in their professional careers, since no element of intent is required. All that is necessary is to identify the existence of a definite effect on equal pay. Both the wording and the origin of that provision suggest that it is intended rather to apply in cases of direct discrimination. But so far as I know, the Court of Justice has never expressly excluded the provision's application in cases of indirect discrimination.

54. Should the Court not go along with my proposed answers to the first two questions, I would point out that I have already, in my Opinion on the *Amédée* case, set out my position on the arrangements for a service credit linked to bringing up a child as they result from the combined application of Articles L. 12(b) and R. 13 of the Pensions Code at issue in that case. [47]

55. In that regard, I pointed out that if the Court found it necessary to answer the second question referred in that case, which was similar in substance to the third question examined here, it would have to take the negative approach adopted in the case of *Griesmar*. [48] Given that there is sufficient similarity between the arrangements resulting from the Pensions Code and those provided for in Article 15 of the local community civil servants decree, [49] which is the subject of the present case, I reiterate the same opinion with regard to the latter arrangements.

45 — Article 141(4) EC takes up, albeit in more general terms, the possibility of derogation that appeared, to the benefit of women only, in Article 6(3) of the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland (OJ 1992 C 191 p. 91) ('the Agreement on social policy') until the entry into force of the Treaty of Amsterdam on 1 May 1999. Article 23(2) of the Charter of Fundamental Rights of the European Union also states that 'the principle of equality [between men and women] shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'.

46 — See in particular *Kenny and Others*, paragraphs 36 and 37 and the case-law cited.

47 — See point 52 et seq. of that Opinion.

48 — In paragraphs 52 and 60 to 67 of that judgment, the Court of Justice held that a measure such as that provided in Article L. 12, in the version at the time applicable to the main action, could not be considered to be of a nature such as to offset the disadvantages to which the careers of female civil servants within the meaning of Article 6(3) of the agreement on social policy (equivalent to Article 141(4) EC) were exposed since it was limited to granting mothers a service credit at the date of their retirement without helping them by remedying the difficulties they may have encountered in the course of their professional careers.

49 — In that regard, see point 40 of this Opinion.

56. In my opinion, the same should apply, *mutatis mutandis*, for the other measures at issue in this case, namely those relating to early retirement with immediate payment of the pension as provided in Articles L. 24 and R. 37 of the Pensions Code. Indeed, those measures, too, are not such as to remedy [50] the problems which female civil servants are likely to encounter during the course of their professional careers by dint of leave taken for family reasons as provided by Article 141(4) EC, as interpreted in the *Griesmar* judgment. [51]

57. Nevertheless, in accordance with my analysis in the case of *Amédée*, [52] I would point out that in my opinion the *Griesmar* judgment regrettably disregards the fact that granting advantages in the form of additional rights paid on retirement avoids perpetuating the inequalities in pay from which, as is well known, female workers most frequently suffer, especially when they have taken a career break in order to assume the task of bringing up their children. I would add that, in view of the panel of judges who handed down that judgment, any reversal of the resulting case-law could in my opinion be made only by the Grand Chamber of the Court. [53]

58. Finally, I would point out that if it should be accepted that the two categories of measures at issue serve the legitimate objective of offsetting a sex-related disadvantage within the meaning of the case-law on indirect discrimination, those measures seem to me both appropriate and proportionate. Likewise, I note that *in concreto* most of those who suffer harm to their careers as a result of bringing up children are at present still women [54] and that situation is likely to persist unless and until there is a change to the imbalance in task-sharing behaviour between men and women or until measures of another kind are introduced, such as compulsory paternity leave, exclusive parental leave encouraging couples to opt for the father taking a career break or measures to redress the balance of the costs of family leave between employers with a mainly female workforce and those whose workforce is chiefly male.

V – **Conclusion**

59. In the light of the foregoing considerations, I propose that the Court of Justice answer the questions referred to it for a preliminary ruling by the Cour administrative d'appel de Lyon as follows:

(1) Article 141 EC must be interpreted as meaning that the principle of equal pay for male and female workers does not preclude national measures such as those resulting from the combined application of the provisions of Article L. 24 and Article R. 37 of the Civilian and Military Retirement Pensions Code.

(2) Article 141 EC must be interpreted as meaning that the principle of equal pay for male and female workers does not preclude national measures such as those resulting from the provisions of Article 15 of Decree No 2003-1306 of 26 December 2003 on the retirement scheme for civil servants affiliated to the Caisse nationale de retraites des agents des collectivités locales.

(3) In view of the negative answer to questions 1 and 2, there is no need to reply to the third question referred for a preliminary ruling.

50 — The Commission believes that this early retirement measure could on the contrary even have the effect of excluding female civil servants from working life and the possibility of pursuing a proper career.

51 — See, by analogy, concerning statutory retirement ages differing according to sex, the judgment of 13 November 2008 in Case C-46/07 *Commission* v *Italy*, paragraphs 57 and 58.

52 — See points 58 and 59 of my Opinion in that case.

53 — Ibidem point 57.

54 — Thus, recital 22 in the preamble to Directive 2006/54 mentions in respect of positive measures that 'given the current situation, … Member States should, in the first instance, aim at improving the situation of women in working life'.