

OPINION OF ADVOCATE GENERAL
GEELHOED

delivered on 22 May 2003 ¹

I — Introduction

1. In these cases the Verwaltungsgericht (Administrative Court) Frankfurt am Main (Germany) has submitted for a preliminary ruling 11 questions on the compatibility of German legislation on pensions for officials, and more specifically the reduction of pensions of officials working part-time for which that legislation provides, with the principle of the equal treatment of men and women in the labour market, as laid down in Article 141 EC and secondary Community law.

application of the principle that men and women should receive equal pay for equal work.

For the purposes of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.’

II — Legislative background

A — *Community law*

The Treaty

2. The first and second paragraphs of Article 119 of the Treaty read:

3. In the meantime, the Treaty of Amsterdam has replaced the first and second paragraphs of Article 119 of the Treaty with Article 141(1) and (2), first subparagraph, EC. Article 141(1) and (2) EC read:

‘Each Member State shall during the first stage ensure and subsequently maintain the

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

¹ — Original language: Dutch.

2. For the purpose of this article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

principle of equal treatment for men and women in matters of social security² (hereinafter ‘Directive 79/7’), this Directive applies to statutory schemes which provide protection inter alia against old age.

...

6. Article 4(1) of Directive 79/7 stipulates:

4. The Protocol concerning Article 119 of the Treaty establishing the European Community (now the Protocol concerning Article 141 EC; hereinafter ‘the Barber Protocol’) stipulates:

‘The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

‘For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.’

— the scope of the schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

Directive 79/7

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.’

5. Pursuant to Article 3(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the

2 — OJ 1979 L 6, p. 4.

Directive 86/378

(a) occupational schemes which provide protection against the following risks:

7. Article 2(1) of Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes³ as amended by Council Directive 96/97 of 30 December 1996⁴ (hereinafter 'Directive 86/378') reads:

...

— old age, including early retirement,

"Occupational social security schemes" means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.'

...

9. Article 5(1) of Directive 86/378 reads:

'1. Under the conditions laid down in the following provisions, the principle of equal treatment implies that there shall be no discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status, especially as regards:

8. Article 4 of Directive 86/378 provides:

'This Directive shall apply to:

— the scope of the schemes and the conditions of access to them;

3 — OJ 1986 L 225, p. 40.

4 — OJ 1997 L 46, p. 20.

- the obligation to contribute and the calculation of contributions;
- the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.’

In the case of funded defined-benefit schemes, certain elements (examples of which are annexed) may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme’s funding is implemented;

...’

10. Article 6(1) of Directive 86/378 stipulates:

Directive 97/80

‘Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:

11. Article 2(2) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex⁵ (hereinafter ‘Directive 97/80’) provides:

...

‘For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.’

- (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes.

⁵ — OJ 1998 L 14, p. 6.

12. Article 4 of Directive 97/80 reads:

BeamtVG') in the version published on 16 March 1999 stipulates, under the heading 'Normal pensionable service':

'1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

'(1) Pensionable service is the period of service completed by the official from the date of appointment as an official in the service of a public-law employer within national territory. That does not include periods

...

2. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

5. of unpaid leave

3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.'

...

Periods of part-time employment are pensionable only in such proportion as the reduced working time bears to normal working time... .'

B — National law

13. Paragraph 6 of the Beamtenversorgungsgesetz (Law on civil service pensions) of 24 August 1976 (hereinafter 'the

14. The Fünftes Gesetz zur Änderung dienstrechtlicher Vorschriften (Fifth law amending civil service-related legislation) of 25 July 1984 (hereinafter 'the amending law of 1984') introduced into the second

clause of the first sentence of Paragraph 14(1) of the BeamtVG under the heading 'Amount of pension' a pension abatement in the event of unpaid leave and reduction of working time for family reasons and on grounds covered by the regulation concerning special leave.

16. The pension abatement introduced by the amending law of 1984, applied on the degressive pension scale of the old version of Paragraph 14 of the BeamtVG, was abolished by Paragraph 14(16) of the Fünftes Gesetz zur Änderung besoldungsrechtlicher Vorschriften (Fifth Law amending regulations concerning remuneration) of 28 May 1990 (hereinafter 'the Fifth amending law of 1990').

15. Paragraph 14(1) of the BeamtVG in the version amended by the amending law of 1984, applicable from 1 August 1984 until 31 December 1991 (hereinafter 'Paragraph 14 of the BeamtVG (old version)'), read:

17. In addition, the degressive scale of increases provided for in Paragraph 14 of the BeamtVG (old version) was replaced with a linear system.

'(1) On completion of ten years' pensionable service the pension shall amount to 35% and shall rise with every further year of service by 2% until completion of the twenty-fifth year of service, and thereafter by 1% of pensionable service, subject to a maximum of seventy-five percent...; in the case of part-time work, leave or reduced working time, the rate of pension which would have been attained hereunder but for these departures from full-time work, and before application of the maximum rate, shall be reduced in such proportion as actual pensionable service bears to the period of time which but for the departures from full-time working would have been completed but shall not be less than 35% or more than 75%.'

18. Paragraph 14(1) of the BeamtVG, which is entitled 'Amount of pension' and entered into force on 1 January 1992 (hereinafter 'Paragraph 14 of the BeamtVG (new version)'), thus reads as follows:

'(1) In respect of each year of pensionable service the pension shall amount to 1.875% of... remuneration, subject, however, to a maximum amount of 75%... '

19. Paragraph 85 of the BeamtVG, which is entitled 'Rate of pension for officials in

service as at 31 December 1991', stipulates:

III — Facts of the case and procedural background

'(1) Where on 31 December 1991 the person concerned already had the status of an official, the rate of pension acquired by that date shall be maintained. In that connection calculation of pensionable service and rate of pension shall be determined in accordance with the law applicable up to 31 December 1991. The second and third clauses of the first sentence of Paragraph 14(1) shall not apply. The rate of pension resulting from the first and second sentences shall rise with each year which from 1 January 1992 onwards is completed as pensionable service under the law applicable as from that date by one percent of the pensionable remuneration up to a maximum rate of 75%.

...

(4) The rate of pension under paragraphs (1), (2) or (3) shall be used as the basis for calculating the pension if such rate is higher than the rate of pension resulting under this law for the whole period of pensionable service. The rate of pension under paragraph (1) may not exceed the rate of pension which would result from calculation under the law applicable until 31 December 1991.'

Case C-4/02

20. Mrs Schönheit, who was born on 12 July 1939, had been employed as a social worker by the City of Frankfurt am Main since 1966, initially as an employee and from 1 January 1984 as an official.

21. Until 30 June 1992 she worked full-time; between 1 July 1992 and 31 December 1995 she was employed on a half-time basis. Thereafter she was on unpaid leave for six months (from 1 January 1996 until 30 June 1996). Subsequently, she again worked on a half-time basis.

22. On 8 March 1999 Mrs Schönheit applied for early retirement on the basis of her serious invalidity. By its decision of 12 July 1999 the City of Frankfurt am Main granted her request for early retirement on the basis of incapacity for service with effect from 1 August 1999.

23. Similarly by a decision of 12 July 1999 the City of Frankfurt am Main determined

Mrs Schönheit's pension benefits at 65.80% of her pensionable remuneration.

24. The City of Frankfurt am Main proceeded as follows when determining the pension.

25. Step 1: The years of pensionable service were first calculated in accordance with Paragraph 6 of the BeamtVG, i.e. periods of part-time working were deducted from the period of service to be taken into account ('actual period of service'). The actual period of service amounted to 30 years and 142.5 days (30.39 years). Pursuant to Paragraph 14 of the BeamtVG (new version), this period of pensionable service was multiplied by 1.875%, which resulted in a pension of $30.39 \times 1.875 = 56.98125\%$, rounded up to 56.99%.

26. Step 2: As Mrs Schönheit was already an official on 31 December 1991, an alternative calculation was then made in accordance with Paragraph 85 of the BeamtVG. In respect of the period from 1 April 1965 until 31 December 1992 the period of pensionable service under Paragraph 6 of the BeamtVG amounted to 26 years and 219 days, which was rounded up to 27 years. Under Paragraph 14 of the BeamtVG (old version), but without the pension abatement which until then was

still in force, the pension amounted to 67%. In respect of the period from 1 January 1992 until 31 July 1999 the period of pensionable service, pursuant to Paragraph 6 of the BeamtVG, was 3 years and 228.5 days (3.79 years), resulting in a pension entitlement of 3.79%. The total pension therefore amounted to $67\% + 3.79\% = 70.79\%$.

27. Since the rate of pension under this alternative calculation would have been higher than the rate resulting from the linear calculation under the law applicable at that time, the City of Frankfurt am Main, having regard to Paragraph 85(4) of the BeamtVG, compared that rate of pension with the rate resulting from a calculation only under Paragraph 14 of the BeamtVG (old version), thus also including a pension abatement.

28. Step 3: In this process the notional pension was first calculated, i.e. the pension which Mrs Schönheit would have received if she had worked full-time throughout her period of service ('notional period of service'). This notional period of service amounted to 34 years and 66 days (34.18 years). It would have resulted in a rate of pension of 74%. This percentage was then reduced in the ratio of actual period of service to notional period of service: $30.39 \div 34.18 \times 74\% = 65.80\%$.

29. On 3 August 1999 Mrs Schönheit raised an objection to the determination of the amount of her pension.

33. By order of 5 January 2000 the Regierungspräsidium Darmstadt determined Mrs Becker's pension benefits at 52.18% of her pensionable remuneration.

30. By a decision of 4 January 2000 the City of Frankfurt am Main dismissed her objection.

34. The Regierungspräsidium Darmstadt proceeded as follows when determining the pension.

31. On 7 February 2000 Mrs Schönheit appealed to the Verwaltungsgericht Frankfurt am Main. She is seeking the annulment of the order of 12 July 1999 and of the decision of 4 January 2000. She is also demanding that the City of Frankfurt am Main award her a pension of at least 70.79%.

35. Step 1: Mrs Becker's years of pensionable service were first calculated in accordance with Paragraph 6 of the BeamtVG. The result was 25 years and 83.58 days (25.23 years). These years of pensionable service were then multiplied, pursuant to Paragraph 14(1) of the BeamtVG (new version), by 1.875, which gave a pension rate of $25.23 \times 1.875\% = 47.30625\%$, which was rounded up to 47.31%.

Case C-5/02

32. Mrs Becker, who was born on 15 July 1951, was employed as a subject teacher by the *Land of Hesse* from 23 August 1971. From 1 August 1981 until 31 July 1989 she worked part-time for a number of periods of varying duration. From 1 August 1989 until 31 July 1995 she took unpaid leave, and from 1 August 1995 she again worked part-time. From 1 February 2000 her employer granted her a retirement pension on the ground of incapacity for service.

36. Step 2: As Mrs Becker was already an official on 31 December 1991, an alternative calculation was made in accordance with Paragraph 85 of the BeamtVG. In respect of the period until 31 December 1991 the period of pensionable service under Paragraph 6 of the BeamtVG amounted to 18 years and 228.32 days, which was rounded up to 19 years. Under Paragraph 14 of the BeamtVG (old version), but without the pension abatement, the rate of pension amounted to 53%. In respect of the period from 1 January 1992

until 31 July 1999 the period of pensionable service pursuant to Paragraph 6 of the BeamtVG was 4 years and 341.93 days (4.94 years), resulting in a pension entitlement of 4.94%. The total pension therefore amounted to $53\% + 4.94\% = 57.94\%$.

37. Step 3: Finally, the pension was calculated in accordance with Paragraph 85(4) of the BeamtVG, with the pension abatement applied. The notional pension was first calculated. Mrs Becker's notional period of service amounted to 32 years and 78.68 days (32.22 years). This notional period of service would have given her a rate of pension of 72%. The pension abatement was then applied: 25.23 (actual period of service) $\div$ 32.22 (notional period of service) $\times$ 72% (notional pension), which ultimately resulted in a rate of pension of 52.18%.

38. On 8 February 2000 Mrs Becker raised an objection to the determination of her pension.

39. By a decision on the objection dated 30 November 2000 the Regierungspräsidium Darmstadt dismissed the objection.

40. On 21 December 2000 Mrs Becker lodged an appeal. She is seeking the annulment of the order of the Regierungspräsidium Darmstadt of 5 January 2000 as set out in the decision on the objection of 30 November 2000. She is also demanding that her pension be calculated at at least 57.94%.

Questions submitted for a preliminary ruling

41. By a decision of 12 November 2001 the Verwaltungsgericht Frankfurt am Main submitted nine questions for a preliminary ruling in Case C-4/02 and 11 such questions in Case C-5/02.

42. According to the referring court, both appeals are well founded. It maintains that the provisions of Paragraph 14 of the BeamtVG (old version) concerning the pension abatement for part-time working is incompatible with Article 141 EC since it gives rise to indirect discrimination on the ground of sex.

43. The referring court explains that official statistics reveal it is predominantly women who work part-time. When pensions are determined, it is therefore pre-

dominantly women who are affected by the pension abatement.

of indirect discrimination on the ground of sex.⁶ According to this view, the second clause of the first sentence of Paragraph 14(1) of the BeamtVG (old version) was meant to correct the relatively more favourable treatment of officials working other than full-time that resulted from the former depressive pension scale.

44. According to the referring court, there are no clear objective factors to justify the difference of treatment. The aim pursued by the authorities of saving costs by introducing the pension abatement cannot in itself be seen as justification for the difference of treatment.

46. As views differ on the interpretation of the relevant Community legislation, the referring court decided to refer the following questions to the Court of Justice for a preliminary ruling:

— In Cases C-4/02 and C-5/02

45. This position contrasts, however, with that of the Bundesverwaltungsgericht (Federal Administrative Court). This court takes the view that the reduction of pensions in proportion to working time in the case of part-time working and unpaid leave does not amount to inadmissible indirect discrimination against women, even though far more women than men take advantage of such dispensations. It argues that awarding pensions only in proportion to the length of service is, like the reduction or withholding of pay, a consequence of more limited performance and is therefore objectively justified; there can therefore be a priori no question of an infringement of a prohibition in Community law of direct or

‘1. Is the grant of an old-age pension under the BeamtVG subject to Article 119 of the EC Treaty, now superseded by Article 141(1) and (2) EC, in conjunction with Directive 86/378/EEC or the provisions of Directive 79/7/EEC?

2. Do benefits under the BeamtVG constitute a scheme under Article 6(1)(h) of Directive 86/378/EEC with the con-

6 — Bundesverwaltungsgericht, judgment of 23 April 1998, 2 C 2.98, ZBR 1998, pp. 357 ff.; judgment of 22 July 1999, 2 C 19.98, ZBR 2000, pp. 38 ff.

sequence that, irrespective of their being financed by budgetary resources, it is legitimate to take into account actuarial factors or analogous matters in order to differentiate levels of benefit?

3. Are the factors required to justify indirect discrimination on the ground of sex provided for by Article 2(2) of Directive 97/80/EC applicable in the case of Article 119 of the EC Treaty and Article 141(1) and (2) EC, as well as Directive 86/378/EEC, irrespective of whether a question arises in judicial proceedings as to relaxation of the burden of proof or whether that question is of no significance under the principle applicable to judicial proceedings of official establishment of facts?
4. Is an apparently neutral criterion in a legal provision to be judged as to its necessity solely on the basis of the intention of the legislature and the grounds for enactment which are apparent from the legislative process, in particular where the existence of such intentions and grounds is documented in the procedure leading to adoption of the legislation and demonstrably constituted the relevant reason for the enactment?
5. In so far as, in parallel with or addition to those intentions and grounds (see Question 4), regard may also be had to other legitimate aims of the legislation as justificatory factors within the meaning of Article 2(2) of Directive 97/80/EC, or the case-law of the Court of Justice on establishing the existence of indirect discrimination on the ground of sex, can a national court in that connection establish of its own motion the existence of legitimate aims for a provision of law and, where appropriate, use them to justify a distinguishing criterion, in particular where its reasoning in that regard is founded on considerations inherent in the scheme of the law? Can it also do so where such considerations are not discernibly reflected in the grounds for the enactment documented in the course of the legislative procedure?
6. Can the discrimination initially apparent in the calculation of the pensions of older female part-time civil servants as a proportion of final salary be justified on the ground that it is necessary to achieve a legitimate aim where that discrimination is intended, as it were, to offset a minimum pension acquired during the first 10 years of service with no account being taken of the reduced working time, although civil servants' pension benefits are met solely from general budgetary resources without any contribution by female officials? As justification for such necessity, if appropriate on an ancillary basis, can reference be made to the fact that

pension benefits are in the nature of maintenance support and to their characteristic as a traditional principle of the professional civil service under Article 33(5) of the Grundgesetz (Basic Law)?

can additional personnel costs incurred in the recruitment of additional persons by an expansion of part-time employment, in contrast to the hitherto predominant full-time employment, justify the necessity of passing these costs on to part-time employees by way of a disproportionate reduction in their rate of pension, as occurred under the second and third clauses of the first sentence of Paragraph 14(1) of the BeamtVG in the version thereof applicable until 31 December 1991?

7. If such discrimination is deemed necessary under Question 6, is a reduction in the rate of pension for older female and male officials with entitlement to benefits far above the minimum pension in respect of at least 10 reckonable years of service, applicable by virtue of their previous part-time service, still reasonable (proportionate) if the amount of such reduction is calculated by reference not only to the extent of the reduced working time on a linear basis but also, to the detriment of those concerned, to the duration of full-time employment in relation to that of part-time employment — even though for older female and male civil servants the possibly disproportionately favourable grant of a minimum pension irrespective of the reduction of their working time is no longer possible? Would it not in this context be (more) appropriate to abandon the disproportionate reduction in the rate of pension for older and longer-serving female and male officials and instead for there merely to be a proportionate reduction in the minimum pension?

9. Is it reasonable for such costs to be taken into account as a matter of necessity (Question 8) if the additional costs are passed on solely to earlier part-time employees, so that women, for by far the most part, must bear them, even though the expansion of part-time employment opportunities at the time of the legislative amendment in that regard principally pursued the objective of reducing general unemployment by the partial absorption of surplus male and female applicants to the civil service?

In Case C-5/02

8. Where the numbers of budgetary and established posts remain unchanged,

- ‘10. Does the Protocol concerning Article 119 of the EC Treaty as part of the Treaty on European Union of 1992 (OJ 1992 C 191, p. 68) generally

preclude examination under Article 141(1) and (2) EC (formerly Article 119 of the EC Treaty) of the detailed rules for the inclusion of periods of employment prior to 17 May 1990? Does the prohibition on such examination also apply where after 17 May 1990 the provisions relevant to the inclusion of periods of employment completed before the relevant date of 17 May 1990 have been amended but those amendments effect only a partial adjustment to meet the requirements of Article 119 of the EC Treaty and, for certain categories, effect no such favourable adjustment?

action, Mrs Schönheit (Case C-4/02) and Mrs Becker (C-5/02), by the German Government and by the Commission. On 6 March 2003 a hearing took place at which Mrs Becker and the Commission explained their positions in greater detail.

IV — Assessment

Preliminary comments

11. In determining adherence to the relevant date of 17 May 1990 in the enactment of laws is the date of publication in the official gazette decisive, or is the matter determined by the conclusion of deliberations in the legislative bodies — even where the assent of the Federal Government is required by law?’

48. The questions submitted for a preliminary ruling concern the German pension scheme for officials and more specifically the abatement of the pensions of officials working part-time for which this scheme provides.

Proceedings before the Court

47. By decision of 8 February 2002 the President of the Court joined the two cases. Written comments have been submitted to the Court by the applicants in the main

49. Before these questions are considered, it will be helpful to describe the operation of the German system as it once was, as it operated with the abatement and as it operates now. Although it is for the German court, as the court with full knowledge of the facts, to interpret and enforce the rules, I would none the less like to dwell on this aspect briefly with a view to making the following more readable and comprehensible.

50. Initially, until the end of 1991, this system was characterised by a degressive scale of increases, with a minimum rate of 35% for the first 10 years, a 2% increase for each of the following 15 years of service and a further increase of 1% for each remaining year of service, up to a maximum of 75%.

51. In 1992 this degressive scale of increases gave way to a linear scale based on 40 years of service, the pension for each year of pensionable service being 1.875% up to a maximum of 75%.

52. Any period worked part-time was and continues to be taken into account in accordance with Paragraph 6 of the BeamtVG. Thus an official who has worked part-time for 30 years, for example, is entitled to 15 years' worth of pension.

53. The contested pension abatement dates back to the early 1980s. Its introduction was associated with the expansion for labour market policy reasons of the opportunity for officials to work part-time. Part-time working was initially taken into account through the reduction of the pension at a flat rate of 0.5% for each year of part-time working. In 1984 the pension abatement was also introduced for unpaid leave and the reduction of working time for

family reasons and under the regulation concerning special leave. The flat-rate deduction was also replaced with a proportional reduction of pensions. The following formula was applied in this context: (actual period of service ÷ notional period of service) × notional pension. The difference between notional pension and the pension calculated in accordance with this formula is the pension abatement. However, pensions may not amount to less than 35% after abatement.

54. From the sources cited in the order for reference it is evident that the introduction of the pension abatement was essentially intended to compensate for the costs associated with the wider availability of part-time working and the staff administration it entailed.

55. As indicated above, with effect from 1 January 1992 the degressive pension scale provided for in Paragraph 14 of the BeamtVG was replaced by the Fifth amending law of 1990 with a linear pension scale. At the same time, the pension abatement — which had been strongly criticised — was abolished. To enable the change to be made from a degressive to a linear system, a transitional scheme was needed for officials who had already been in service before 31 December 1991. This is defined in Paragraph 85 of the BeamtVG.

56. According to that provision, officials who were already in service on 31 December 1991 retained any pension rights acquired before that date. To determine what pension officials already in service before 31 December 1991 will ultimately receive, a number of comparative calculations have to be made.

notional pension, i.e. the pension which would be paid if the official concerned had worked full-time throughout his period of service. The rate of pension is then calculated in relation to the actual period of service.

57. A calculation is first made on the basis of the new legislation, the period of service actually worked part-time being taken as the starting point and multiplied by 1.875%.

60. The following example will serve as an illustration. Let us assume that an official has worked for 30 years on a part-time basis. His notional pension (as if he had worked full-time for 30 years) is then calculated as follows: 35% for the first 10 years; 30% ($15 \times 2\%$) for the 11th to the 25th year; and 5% ($5 \times 1\%$) for the 26th to the 30th year, making a total of 70%.

58. A second calculation is then made, based partly on the degressive scale applicable until 31 December 1991, as referred to in Paragraph 14 (old version), but without the pension abatement, and partly on the new legislation in respect of years of pensionable service thereafter. If the result of this calculation is higher, this calculation applies. In the case of officials who have worked part-time, however, this amount is limited by the third comparative calculation (second sentence of Paragraph 85(4) of the BeamtVG).

61. If the pension abatement is now applied, the result is a pension of 35% ($70\% \times 15/30$).

59. This third calculation does include the pension abatement provided for in the old version. The first step is to calculate the

62. If the pension abatement was not applied and the pension was calculated solely in accordance with Paragraph 6 of the BeamtVG, 15 years would have been worked full-time, giving an entitlement to 45% (35% for the first 10 years, 2% for each of the remaining years).

63. A worker who worked full-time for 15 years would similarly be entitled to a rate of pension of 45%.

64. To summarise, part-time working is taken into account in the determination of pensions in two ways: first, in the determination of the number of years of pensionable service and, then, through the pension abatement contested here.

65. The third to ninth questions primarily concern the requirements that must be met to justify the indirect discrimination to which this pension abatement allegedly gives rise. They will be considered together below.

66. The first two questions concern, in particular, the applicable Community legislation. In the order for reference the referring court remarks that in its view the German pension scheme for officials falls within the scope of Article 141 EC. It adds that for the assessment of the discrimination against women resulting from the pension abatement it makes no difference whether the pension scheme does not constitute pay within the meaning of Article 119 of the EC Treaty (now Article 141 EC) or must be regarded as a statutory system for protection against the

risks of old age within the meaning of Article 3(1)(a) of Directive 79/7. Discrimination is, after all, prohibited under Article 4(1) of that Directive. If Directive 86/378 was deemed applicable to the pension scheme, the same would be true since Article 5(1) of that Directive prohibits direct and indirect discrimination on the basis of sex *inter alia* in the calculation of benefits.

67. Finally, in Case C-5/02 the referring court has submitted two further questions concerning the interpretation of what has come to be known as the Barber Protocol.

The first two questions submitted for a preliminary ruling in Cases C-4/02 and C-5/02

68. According to the two applicants in the main action, the German Government and the Commission, the award of retirement pensions within the meaning of the Beamtenversorgungsgesetz is governed by Article 141 EC. Reference is made in this context to the judgments in *Gerster*,⁷ *Beune*,⁸ *Griesmar*⁹ and *Evrenopoulos*.¹⁰

7 — Judgment in Case C-1/95 *Gerster* [1997] ECR I-5253.

8 — Judgment in Case C-7/93 *Beune* [1994] ECR I-4471.

9 — Judgment in Case C-366/99 *Griesmar* [2001] ECR I-9383.

10 — Judgment in Case C-147/95 *Evrenopoulos* [1997] ECR I-2057.

69. The Commission and the German Government also maintain that Directive 79/7 is not applicable in this instance. They claim that pensions based on the *Beamten-versorgungsgesetz* are not pension payments made under a statutory social security scheme within the meaning of Article 3 of that Directive.

Assessment

70. Directive 86/378 cannot, according to the Commission, restrict the scope of Article 141 EC. According to the German Government, this Directive is applicable to the German system of pension provision for officials because the German system conforms to the definition given in Article 2 of the Directive of an occupational social security scheme. The application of a number of provisions of the Directive might possibly be precluded by the specific features of employment relationships governed by public law, but this did not extend, according to the German Government, to the prohibition of discrimination under Article 5 of the Directive.

71. The German Government and the Commission take the view that the exception referred to in Article 6(1)(h) of Directive 86/378 does not apply to the cases under consideration here. In this context the German Government states that the pension abatement for officials who have previously worked part-time is not based on an actuarial calculation within the meaning of this article, but emanates from the system underlying the German pension scheme for officials.

72. I endorse the largely identical views expressed by the applicants in the main action, the Commission and the German Government. In my opinion there is no doubt that the German pension scheme for officials falls within the scope of Article 141 EC. The Court has already confirmed this in the aforementioned judgments in respect of the Dutch, French and Greek pension schemes for officials and recently in the *Niemi* judgment¹¹ in respect of the Finnish pension scheme for officials. It is evident from this case-law that the decisive factor for the qualification of a pension scheme is whether the pension is paid to the worker on the basis of an employment relationship between the person concerned and his former employer, i.e. whether it satisfies the criterion of 'employment' derived from the wording of Article 141 EC. The German pension scheme at issue satisfies this criterion. This scheme is applicable to a specific category of workers, the benefits are determined by reference to the period of service completed by those entitled, and they are based on the final salary. The link is thus forged between pension and employment relationship. As the pension benefits under consideration are not payments made under a statutory social security scheme, Directive 79/7 does not apply to them.

11 — Judgment in Case C-351/00 *Niemi* [2002] ECR I-7007.

73. I agree, moreover, with the Commission that the reference in the first question submitted for a preliminary ruling makes little sense since that Directive cannot restrict the scope of Article 141 EC, as the Court has explicitly ruled, unnecessarily perhaps, in paragraph 64 of the judgment in *Beune*.

74. The answer to the second question, which is hardly a request for a more precise interpretation, can be kept very brief. As the German Government itself has already explained, the abatement rules contested in the main action have nothing whatever to do with actuarial calculation factors, as referred to in Article 6(1)(h) of Directive 86/378. It is therefore impossible to derive from this provision any argument to justify different levels of benefit.

The third to ninth questions submitted for a preliminary ruling

75. The German Government contends that, even if women are placed at a great disadvantage by the pension abatement, as the referring court claims, this does not automatically mean that the pension abatement amounts to discrimination against former officials who worked part-time, since the abatement is justified by objective factors unrelated to sex.

76. According to the German Government, the conditions justifying indirect discrimination, as defined in Article 2(2) of Directive 97/80, apply irrespective of the distribution of the burden of proof and irrespective of whether the court is assigned an official or a more passive role in national proceedings. Article 2(2) of Directive 97/80, after all, summarises the Court's rulings in the area of indirect discrimination, which applies irrespective of the distribution of the burden of proof or of the nature of national proceedings.

77. Secondly, according to the German Government, considerations other than those referred to in the explanatory memorandum on the law may be taken into account to justify indirect discrimination. It deduces this from the judgment in *Finalarte*.¹² The referring court should therefore consider whether there are other justificatory grounds.

78. In this context the German Government states that it can be deduced from national legislation that the pension abatement is a correction mechanism inherent in the system, its object being to prevent

¹² — Judgment in Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-7831, paragraph 37 et seq.

part-time officials from being better placed as a result of the former degressive system.

79. The pension abatement was therefore objectively justified since, when introducing it, the national legislature had opted not for a rigid system of deductions but for a formula of individual calculations which reflected the relationship between actual years of pensionable service and years of pensionable service had part-time working not occurred. According to this formula, the longer the period of full-time working as a proportion of the total period of service, the smaller the pension abatement (in the event of part-time working or unpaid leave).

80. Furthermore, the financing of the increased staff administration costs resulting from the expansion of the opportunity to work part-time had not been the decisive factor in the introduction of the pension abatement. It had been intended rather as a means of maintaining the internal balance in the German pension scheme for officials.

81. The applicants in the main action point out that the pension abatement results in a lower pension, by some 5% in their case, than that of a full-time official who has completed a similar number of years of pensionable service. The abatement discriminated against women in particular, because in Germany's public service it was predominantly women who worked on a part-time basis. That is not disputed; what is important, therefore, is the objective justification.

82. According to the applicants in the main action, there is no objective justification. They do not endorse the argument advanced by the German Government regarding preferential treatment. Only in well-defined circumstances could there be said to be an advantage. For all practical purposes, however, it was negligible. It was true that under the 35% rule of the old degressive pension scale officials working part-time and officials working full-time accumulated the same rate of pension in the first 10 years and that this could be considered favourable for officials working part-time. If the same part-time officials continued to work part-time for a further 10 years, this advantage was already greatly reduced, since only their part-time working was considered in the calculation. Consequently, they still had 35% after 20 years, whereas officials who had worked

full-time attained 55%. Full-time officials benefited, moreover, from the 35% rule if they left the service after five years.

in unequal pay for men and women was inconsistent with Article 141 EC.

83. The Commission believes that Paragraph 85 of the BeamtVG in conjunction with the second clause of the first sentence of Paragraph 14(1) of the BeamtVG (old version) makes for discrimination on the ground of sex if those provisions result in more women than men being affected by the abatement when their pensions are determined and in the pensions of officials working part-time being reduced by a greater amount than would have been the case if a *pro rata temporis* rule had applied.

85. The Commission further points out that the German Government has contended that the introduction of the pension abatement was a necessary adjustment to the 35% rule. According to the Commission, however, there is no justification for applying this abatement solely to part-time officials.

86. The Commission then states that Community law is not opposed to part-time workers receiving pensions *pro rata temporis*. It does, however, oppose any measure, such as a pension abatement, which results in a disproportionate reduction in pensions and thus in indirect discrimination on the ground of sex.

84. The Commission also contends that the introduction of the pension abatement was prompted by cost considerations. Referring to the judgment in *Roks*,¹³ it claims that, while the Member States may cut back on their social systems for budgetary reasons, they may not do so in a manner which is inconsistent with Community law. A national scheme which was introduced solely for budgetary reasons and resulted

Assessment

87. According to settled case-law, the prohibition imposed by Article 141 EC covers not only direct but also indirect discrimination on the ground of sex. Indirect discrimination occurs when a (national)

¹³ — Judgment in Case C-343/92 *Roks* [1994] ECR I-571.

provision or rule, though worded in neutral terms, in fact places women at a far greater disadvantage than men, unless this difference of treatment is justified by objective factors unrelated to discrimination on the ground of sex.

88. In the present case Paragraph 85(4) of the BeamtVG in conjunction with the second clause of the first sentence of Paragraph 14(1) of the BeamtVG (old version) is worded in sexually neutral terms. None the less, discrimination can be said to obtain if it is clear that significantly more women than men are affected by this legislation.

89. In this context the referring court has commented that it is evident from statistics that, as significantly more women than men work part-time, it is primarily female officials who are affected by the pension abatement. It would therefore seem at first glance that indirect discrimination exists.

90. In that case, it must be considered whether there is any justification on the ground of objective factors unrelated to discrimination on the ground of sex.

91. It is ultimately for the national court to determine whether such factors exist in the specific case before it. None the less, the dossier in the main action and the written and oral observations of the parties enable the Court to give some indications which may be helpful to the referring court.¹⁴

92. It is settled case-law that it is for the Member State which has adopted the allegedly discriminatory legislation to show that this legislation reflects a legitimate aim and that the means of achieving this aim are necessary and reasonable. The Court's rulings leave the Member States considerable scope for assessing the need to pursue social and employment objectives.¹⁵ This scope is, however, restricted in that it may not have the effect of frustrating a fundamental principle of Community law, such as that of equal pay for men and women.¹⁶

14 — Judgments in Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623 and Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741.

15 — Judgments in Case C-317/93 *Nolte* [1995] ECR I-4625 and in the cases cited in the previous footnote.

16 — See the case-law cited in footnote 14.

93. From the official sources cited in the order for reference it can be discerned that the pension abatement was introduced for budgetary reasons. It follows from the Court's rulings that, although budgetary considerations may underlie such a choice of policy, they may not themselves constitute the aim pursued by that policy and cannot therefore justify discrimination against one of the sexes.¹⁷

96. Although this reason is not explicitly evident from the background to the passing of the legislation relating to the pension abatement, the introduction of such a correction mechanism may be legitimate. The question is, however, whether this legislation is necessary and reasonable.

94. If it transpires that the pension abatement was introduced solely to save costs, I do not believe that this reason can serve as justification.

97. It must first be said that simple, general declarations that the pension abatement at issue in the main action has a correction as its objective do not in themselves demonstrate that this abatement is unrelated to discrimination on the ground of sex. Nor do they provide information on the basis of which it can reasonably be judged that the means chosen were appropriate to achieving that objective.

95. Referring to the case-law of the Bundesverwaltungsgericht, however, the German Government has also argued that the pension abatement was intended as a means of correcting the relatively more favourable treatment of officials working other than full-time that was due to the former degressive pension scale. A more favourable situation of this kind could not be avoided by taking part-time working into account solely on the basis of Paragraph 6(1) of the BeamtVG. The measure was therefore justified.

98. I would also point out that, although in certain circumstances the minimum rate of 35% which applied under the degressive system could be to the advantage of part-time officials, the same was true of officials who had always worked full-time. Yet the pension abatement was introduced solely for part-time working.

99. That the abatement can be described as disproportionate is evident from simple

17 — Judgments in *Roks*, cited in footnote 13, and *Kutz-Bauer*, cited in footnote 14.

calculations and is illustrated in the example given in paragraphs 58 to 63.

of their service careers working part-time. They are still confronted with this abatement and are therefore worse off than officials who were similarly in service before 31 December 1991, but have worked full-time and have the same number of years of pensionable service.

100. In fact, the introduction of the pension abatement in the event of part-time working amounts, as it were, to the early introduction of the current linear system, which is based on 40 years of service.¹⁸ However, this has led to officials who have worked part-time being treated differently from officials who have always worked full-time: their pensions are different even though they have completed the same number of years of pensionable service.¹⁹

101. Although the pension abatement was abolished when the linear calculation system entered into force in 1992, it continues to be applicable under the transitional legislation to officials who have spent some

102. As the Commission has pointed out, Community law does not oppose a *pro rata temporis* pension abatement for part-time working.²⁰ A *pro rata temporis* reduction of this nature is implied by Paragraph 6 of the BeamtVG. The application of the second clause of the first sentence of Paragraph 14(1) of the BeamtVG (old version), however, (still) leads to an additional abatement of pensions. If, besides part-time working being considered when the number of years of pensionable service is determined, an additional — disproportionate — pension abatement is applied, there is indirect discrimination on the ground of sex which cannot be justified on grounds of reduced working time or the need to rectify any preferential treatment allegedly enjoyed by part-time employees.

18 — The maximum pension is 75% under both the linear and the degressive system, although it is attained in the former case after 40 years of service and in the latter case after 35 years of service (on the basis of full-time working). If all 40 years are worked part-time, the pension under the linear system is 37.5% ($20 \times 1.875\%$). The same result is achieved under the degressive system by means of the pension abatement ($75\% \times (20 \div 40)$).

19 — See the previous footnote. Under the degressive system an official who had worked full-time for 20 years would have a pension amounting to 55% of his final salary. See also the example given in paragraphs 58 to 63. A linear calculation would give him 37.5%.

20 — See, for example, the judgments in 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, Case C-333/97 *Lewen* [1999] ECR I-7243, Case C-411/96 *Boyle* [1998] ECR I-6401 and Case C-249/97 *Grüßer* [1999] ECR I-5295.

The 10th and 11th questions submitted for a preliminary ruling in Case C-5/02

103. These questions concern the Barber Protocol. In submitting these questions, the referring court is seeking to establish whether — contrary to this Protocol — periods of service occurring before the date of the ruling in the *Barber* case, 17 May 1990, may be taken into account if after 17 May 1990 the legislation applicable to periods of service before that date was subsequently amended, without however eliminating the unequal treatment involved for a certain group.

104. The referring court states in this context that the Protocol is based on the judgment in *Barber*, in which the Court restricted the effect of that judgment *ratione temporis*. As the ground for this restriction the Court based its ruling on the principle of legitimate expectations. The referring court doubts whether the principle of legitimate expectations can be relied upon in the present case, since the authors of the legislation were aware of the discriminatory effect of the pension abatement, yet made an amendment which in certain situations permits this effect to persist.

105. In the written documents the Commission has stated that the Court not only considered the restriction *ratione temporis* from the angle of the principle of legitimate

expectations and legal certainty but also bore in mind the possibility of claims with a retroactive effect upsetting the financial balance of a number of pension schemes. The Commission therefore proposes in the written documents, in accordance with that judgment, that claims to equal treatment should not relate to periods before 17 May 1990.

106. During the hearing the Commission and Mrs Becker's representative pointed out, however, that there is a difference between the present case and the *Barber* case. The Commission points out that the latter case concerned a scheme that had already been in existence for many years, whereas in the present case the pension abatement was allowed to stand by the Fifth amending law of 1990 in respect of pension rights acquired in the period prior to the entry into force of that law. While the Member States could reasonably assume in the case of the *Barber* judgment that Article 141 EC did not apply to pension schemes, the same cannot be said of the period thereafter, i.e. after 17 May 1990. In this context the Commission contends that the amending law was published on 28 May 1990 and thus a few days after the *Barber* judgment. The Commission therefore believes that, strictly speaking, Germany cannot rely on the Barber Protocol where the abatement of Mrs Becker's pension is concerned. The principle of legitimate expectations did not apply in the present case. Nor did legal certainty require that the abatement be retained for prior periods.

107. Mrs Becker agrees that the German Government cannot rely on the principle of legitimate expectations since, as the referring court has also stated, the authors of the legislation were aware of the indirect discrimination. Furthermore, she believes that the financial implications of not applying the pension abatement which is inconsistent with Article 141 EC are insignificant. Finally, she points out that she was unable to lodge an earlier protest against the pension abatement retained in the transitional legislation. This was possible only in the case of a final decision on pensions, a preventive remedy being inadmissible under German law.

Assessment

108. Further support for the Commission's and Mrs Becker's argument cannot be found in the text of the Protocol, in its origins or in the rulings of the Court.

109. In the *Barber* judgment the Court ruled that contracted-out occupational pensions fall under the concept of pay as used in Article 141 EC and that no distinction may therefore be made on the ground of sex in the award of such pensions. As the

Member States and the interested parties could not have been aware of such an interpretation at that time and in order to prevent financial claims from having an unsettling effect on pension funds, the Court restricted this interpretation *ratione temporis*. The Court explained later that this ruling also applies to supplementary pensions, survivors' pensions, the transfer of pension rights and civil service pensions.²¹

110. The Court also explained in this subsequent case-law that, where these pensions are concerned, claims to equal treatment may be made only in relation to benefits payable in respect of periods of service subsequent to the date of the *Barber* judgment — 17 May 1990.²² One exception to this exists in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law. The Court abided strictly by the aforementioned date and exceptions thereto. The wording of the Barber Protocol is also clear in this regard.

21 — Judgments in Case C-110/91 *Moroni* [1993] ECR I-6591, Case C-152/91 *Neath* [1993] ECR I-6935, Case C-200/91 *Coloroll* [1994] ECR I-4389, Case C-408/92 *Smith* [1994] ECR I-4435, Case C-7/93 *Beune* [1994] ECR I-4471, Case C-28/93 *Van den Akker* [1994] ECR I-4527, Case C-57/93 *Vroege* [1994] ECR I-4541 and Case C-128/93 *Fischer* [1994] ECR I-4583.

22 — See the judgment in Case C-109/91 *Ten Oever* [1993] ECR I-4879.

This Protocol ties in with the date of the *Barber* judgment. If the contracting parties had wanted to make certain exceptions in respect of periods of work before that date, apart from those in favour of persons who

had already initiated legal proceedings, they could have done so. It is therefore inappropriate that an exception should be made in Mrs Becker's case in respect of the periods completed before 17 May 1990.

V — Conclusion

111. In view of the above I propose that the Court should answer the questions submitted by the Verwaltungsgericht Frankfurt am Main for a preliminary ruling as follows:

- Old-age pensions paid under the *Beamtenversorgungsgesetz* fall within the scope of Article 141 EC.

- Article 141 EC precludes national legislation, such as Paragraph 85(4) of the *Beamtenversorgungsgesetz* in conjunction with the second clause of Paragraph 14(1) of the *Beamtenversorgungsgesetz* (old version), if as a result of that legislation, which leads to a greater reduction in the pensions of officials working part-time than would be the case under a *pro rata temporis*

scheme, more women than men are affected when their pensions are determined.

- It is for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision 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.

- By virtue of the Protocol concerning Article 141 EC, the direct effect of Article 141 EC may be relied upon, for the purpose of claiming equal treatment in the matter of pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law.