

JUDGMENT OF THE COURT (Sixth Chamber)
15 December 1994 *

In Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landesarbeitsgericht Hamm (C-399/92), the Arbeitsgericht Hamburg (C-409/92 and C-425/92), the Arbeitsgericht Bochum (C-34/93), the Arbeitsgericht Elmshorn (C-50/93) and the Arbeitsgericht Neumünster (C-78/93) for a preliminary ruling in the proceedings pending before those courts between

Stadt Lengerich

and

Angelika Helmig (C-399/92),

and between

Schmidt

and

* Language of the case: German.

Deutsche Angestellten-Krankenkasse (C-409/92),

and between

Elke Herzog

and

Arbeiter-Samariter-Bund Landesverband Hamburg eV (C-425/92),

and between

Dagmar Lange

and

Bundesknappschaft Bochum (C-34/93),

and between

Kussfeld

and

Detlef Bogdol GmbH (C-50/93),

and between

Ursula Ludewig

and

Kreis Segeberg (C-78/93),

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

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler, President of the Chamber, P. J. G. Kapteyn, G. F. Mancini, C. N. Kakouris and J. L. Murray (Rapporteur), Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Elke Herzog (Case C-425/92), by Max Gussone, the person responsible for such matters at the Gewerkschaft Öffentliche Dienste, Transport und Verkehr, Bezirksverwaltung Hamburg,
- the Arbeiter-Samariter-Bund Landesverband Hamburg eV (Case C-425/92), by Tay Eich, Rechtsanwalt, Hamburg,
- the Bundesknappschaft Bochum (Case C-34/93), by U. Bielefeld, Rechtsanwalt, Hamm,
- Ursula Ludewig (Case C-78/93), by Dorothea Goergens, Rechtsanwalt, Hamburg,
- Kreis Segeberg (Case C-78/93), by Gerion Mihr, Adviser to the Kreisausschuß,
- the Commission of the European Communities, by Karen Banks, of its Legal Service, and Horstpeter Kreppel, a German civil servant seconded to the Commission's Legal Service, acting as Agents (Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93),
- the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry of the Economy, and Claus-Dieter Quassowski, Regierungsdirektor at the same Ministry, acting as Agents (Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93),

- the French Government, by Claude Chavance, Principal Attaché in Central Administration at the Ministry of Foreign Affairs, and Jean-Pierre Puissochet, Director of Legal Affairs at the Ministry of Foreign Affairs, acting as Agents (Case C-78/93),
- the Greek Government, by Nikolaos Mavrikas, Assistant Legal Adviser at the State Legal Council, and Kyriaki Grigoriou, legal assistant at the State Legal Council (Case C-399/92), Fokionas Georgakopoulos, Assistant Legal Adviser at the State Legal Council (Case C-409/92), Dimitrios Raptis, State Legal Adviser (Case C-425/92), Vassileios Kondolaimos, Assistant Legal Adviser at the State Legal Council, and Maria Basdeki, legal assistant at the State Legal Council (Case C-34/93), acting as Agents,
- the United Kingdom, by S. Lucinda Hudson, Treasury Solicitor, and David Pannick, Barrister (Cases C-399/92, C-409/92, C-425/92 and C-50/93), John Collins, Treasury Solicitor, and David Pannick, Barrister (Case C-34/93), and S. Lucinda Hudson, Treasury Solicitor (Case C-78/93), acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Elke Herzog; Dagmar Lange, represented by Max Gussone, the representative of the Gewerkschaft Öffentliche Dienste, Transport und Verkehr, ÖTV, Bezirksverwaltung Hamburg; Angelika Kussfeld, represented by Ute Lorenz, Rechtssekretärin of the DGB (Deutscher Gewerkschaftsbund), Düsseldorf; Detlef Bogdol GmbH, represented by Johannes Bungart, Rechtsanwalt, Bonn; Ursula Ludewig, the German Government, the Greek Government, the French Government, the United Kingdom and the Commission of the European Communities at the hearing on 10 March 1994,

after hearing the Opinion of the Advocate General at the sitting on 19 April 1994,

gives the following

Judgment

- 1 By six orders of 22 October, 4 and 6 November and 18 December 1992, 21 January and 1 February 1993, the Landesarbeitsgericht Hamm, the Arbeitsgericht Hamburg, the Arbeitsgericht Elmshorn, the Arbeitsgericht Bochum and the Arbeitsgericht Neumünster referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning the interpretation of Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19, hereinafter 'the directive').
- 2 The questions were raised in the course of proceedings between women working part-time and their employers. The women claim that they are entitled to overtime supplements for hours worked in addition to their individual working hours at the same rate as that applicable for overtime worked by full-time employees in addition to normal working hours. Under the relevant collective agreements full-time or part-time employees are entitled to overtime supplements only for time worked in addition to the ordinary working hours laid down by those agreements, but part-time employees are not entitled to the supplements for hours they work over and above their individual working hours.
- 3 The applicants in the main proceedings consider that the relevant provisions of the collective agreements discriminate against them in breach of Article 119 of the EEC Treaty and the directive by restricting overtime supplements to overtime worked in excess of the normal working hours.

- 4 The national courts consider that the proceedings raise questions regarding the interpretation of Community law and therefore decided to refer the following questions to the Court of Justice for a preliminary ruling:

— In Case C-399/92:

‘1. Is there “indirect discrimination”, and thus an infringement of Article 119 of the EEC Treaty, where a collective wage agreement for the public service in the Federal Republic of Germany (“the BAT”) provides for the payment of overtime supplements only for hours worked in excess of the normal working hours laid down in the collective agreement, thus excluding from any payment of overtime supplements persons employed under individual agreements for fewer than the normal working hours laid down in the collective agreement, and where such exclusion affects disproportionately more women than men?

2. If so:

Is the exclusion by the collective agreement of overtime supplements for part-time employees objectively justified on the grounds that

- (a) the purpose of the collectively agreed overtime supplements is to compensate employees for the extra demands made on them, and to prevent excessive demands being made, experience justifying the assumption that overtime is more demanding for full-time employees than for part-time employees;
- (b) it may be assumed without examining each individual case that the restriction on leisure affects employees working full-time under the collective

agreement who are required to work more than the normal working hours agreed therein to a greater extent than part-time employees?

3. If not:

Does Article 119 of the EEC Treaty require that part-time employees must also be paid the full amount of the collectively agreed overtime supplements payable in the case of overtime worked by full-time employees under a collective agreement, for each hour worked in addition to the individually agreed working hours, or are part-time employees entitled only to a percentage of the overtime payable to full-time employees in such proportion as their individual working hours bear to the normal collectively agreed working hours?

— In Case C-409/92:

'Is it consistent with Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women for a collective agreement to provide for the payment by an employer of overtime supplements only for overtime worked in excess of the collectively agreed normal working hours, but not for hours worked by part-time employees in excess of their individual working hours but within the collectively agreed working hours, notwithstanding that the proportion of women working part-time is appreciably greater than that of men?'

— In Case C-425/92:

'1. Is it consistent with Community law (Article 119 of the EEC Treaty) for a rule contained in a collective agreement (Paragraph 34 of the BAT), applying to an individual employment relationship by virtue of a business practice or an actual collectively agreed obligation, to provide that the pay of employees not engaged on a full-time basis who work longer hours than those contractually agreed in respect of part-time work is to amount only to the corresponding proportion of the pay of an equivalent employee engaged on a full-time basis (without overtime supplement), where the rule affects more women than men?

2. Is the different treatment of those two categories of employee justified by objective factors unrelated to sex discrimination?

3. Can the different treatment of the sexes be justified on the ground that such different treatment meets a real need of the undertaking, is appropriate for the achievement of its goals and is necessary in accordance with the principle of proportionality, where it is claimed in support of such arguments that the different treatment is justified on the ground that overtime supplements are intended to compensate for an increased physical burden and to prevent the imposition of excessive demands upon employees, but that no comparable burden is imposed upon a part-time employee where the latter merely exceeds the contractually agreed working hours without working the normal weekly hours (on average 38.5 hours) worked by a full-time employee (see Paragraphs 17(1) and 15(1) of the BAT)?'

— In Case C-34/93:

'1. Do Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975, in particular Articles 1 and 4 thereof, preclude a provision in a collective wage agreement for a corporation governed by public law, the Bundesknappschaft (Federal Insurance Fund for Miners), which provides for the payment of overtime supplements only for hours worked in excess of the normal working hours laid down in the collective agreement, thus excluding from any payment of overtime supplements up to that limit persons employed under contract for fewer than the normal working hours laid down in the collective agreement, where that exclusion affects considerably more women than men, in so far as that provision is not justified by objective factors unrelated to sex discrimination?

2. If so:

Do the considerations set out below constitute objective factors unrelated to sex discrimination and are they capable of justifying the provision referred to in Question 1:

- (a) The provision is intended to compensate for increased physical strain and to prevent excessive demands being made of employees in so far as the increased strain resulting from overtime is higher *a priori* in the case of full-time employees than it is in the case of part-time employees.
- (b) It may generally be assumed that the restriction on leisure time affects employees employed for normal working hours under the collective agreement more than part-time employees?

3. If not:

Does Article 119 of the EEC Treaty require that part-time employees be paid for each hour worked in addition to the working hours agreed in the individual contract of employment the full amount of the collectively-agreed overtime supplement payable in the case of overtime in excess of the full normal weekly working hours under the collective agreement?’

— In Case C-50/93:

‘Is there an infringement of Article 119 of the EEC Treaty and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women where a collective wage agreement provides for the payment of overtime supplements only for hours worked in excess of the normal hours laid down in the collective wage agreement, thus excluding as a rule part-time employees from any payment of overtime supplements, although many more women than men are affected by that provision relating to pay?’

— In Case C-78/93:

‘1. Is there “indirect discrimination”, and thus an infringement of Article 119 of the EEC Treaty, where a collective wage agreement for the public service in the Federal Republic of Germany (“the BAT”) provides for the payment of overtime supplements only for hours worked in excess of the normal working hours laid down in the collective agreement, thus excluding from any payment of overtime supplements persons employed under individual agreements for fewer than the

normal working hours laid down in the collective agreement, and where such exclusion affects disproportionately more women than men?

2. If so:

Is the exclusion by the collective agreement of overtime supplements for part-time employees objectively justified on the grounds that

- (a) the purpose of the collectively agreed overtime supplements is to compensate employees for the extra demands made on them, and to prevent excessive demands being made, experience justifying the assumption that overtime is more demanding for full-time employees than for part-time employees;
- (b) it may be assumed without examining each individual case that the restriction on leisure affects employees working full-time under the collective agreement who are required to work more than the normal working hours agreed therein to a greater extent than part-time employees?

- 5 By two orders of 5 March and 15 July 1993 made in accordance with Article 43 of the Rules of Procedure the Court joined Cases C-399/92, C-409/92, C-425/92 and C-34/93, and Cases C-50/93 and C-78/93, for the purposes of the oral procedure and the judgment.

Jurisdiction of the Court

- 6 The defendant in the main proceedings in Case C-78/93 submits that the reference for a preliminary ruling is inadmissible because even if the provisions are incompatible with Article 119 of the EEC Treaty the plaintiff in the main proceedings could not obtain payment of the overtime supplements she seeks: were the national court to annul the contested provisions the result would be a legal vacuum which could not be filled by the Court of Justice, which would be unable to ascertain how the parties would have settled the matter had they been aware of the alleged breach of Community law.
- 7 The Court notes that by virtue of Article 177 of the EEC Treaty whenever a question concerning the interpretation of the Treaty or of acts of the institutions of the Community based thereon is raised before a court or tribunal of a Member State that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
- 8 As regards references for preliminary rulings the national court, which alone has direct knowledge of the facts of the case, is best placed to appreciate in the light of the circumstances of the case the necessity of obtaining a preliminary ruling before it gives judgment (Case 83/78 *Pigs Marketing Board* [1978] ECR 2347 and Case C-186/90 *Durighello* [1991] ECR I-5773).
- 9 Consequently, provided that the questions raised by the national court or tribunal have to do with the interpretation of a provision of Community law the Court of Justice is, in principle, bound to rule (see Case C-231/89 *Gmurzynska* [1990] ECR I-4003, paragraph 20).

- 10 In these proceedings, both the questions raised in Case C-78/93 and those raised in Cases C-399/92, C-409/92, C-425/92, C-34/93 and C-50/93 are undoubtedly germane to the disputes before the German courts.
- 11 Accordingly, the Court of Justice cannot refuse to supply those courts with the elements of Community law they seek on the basis of the argument that should they annul the relevant provisions the result might be a 'legal vacuum'.
- 12 As regards the existence of this 'legal vacuum', it should be noted at the outset that the prohibition on discrimination between men and women at work is mandatory and therefore applies not only to public authorities but also to any agreement which seeks to govern employment in a collective fashion as well as to contracts between individuals (Case 43/75 *Defrenne* [1976] ECR 455). Moreover, Article 119 is sufficiently precise to be relied upon before the national courts by individuals seeking to have set aside any provision of national law, including if necessary a collective agreement, which proves to be incompatible with that article (*Defrenne*, cited above).
- 13 As the Court emphasized in Case C-33/89 *Kowalska* [1990] ECR I-2591, if the national courts set aside the provisions of a collective agreement because they are incompatible with Article 119 of the Treaty the category of persons discriminated against are entitled to enjoy thenceforth the benefit of the provisions applicable to other workers, in proportion to their working hours.
- 14 Consequently, contrary to the submissions of the defendant in the main action in Case C-78/93, the annulment of such provisions by the national courts would not create a legal vacuum.

- 15 In the light of those considerations the Court is bound to rule on the questions referred.

Whether there is discrimination prohibited by Article 119 of the Treaty and the directive

- 16 The national courts first query the compatibility with Article 119 of the Treaty and with the directive of provisions in collective agreements which provide for the payment of overtime supplements only for hours worked in excess of the normal working hours fixed by those agreements (that is to say, the working hours of the full-time employee) and which exclude any overtime supplement for part-time employees for hours worked in excess of their individual working hours if those hours do not exceed the number determined by those agreements.
- 17 The Commission and the plaintiffs in the main actions submit that collective agreements, like statutory and administrative provisions, are subject to the principle of non-discrimination laid down in Article 119 of the Treaty, which prohibits the application of any provision which, though formulated and applied in a manner which does not discriminate between men and women, entails *de facto* indirect discrimination because it places many more women than men at a disadvantage as a result of the fact that part-time employees are predominantly women.
- 18 As the Court has already had occasion to recall in the context of the issue of admissibility, it has been established that by reason of its mandatory character Article 119 of the Treaty must be applied not only to statutory and administrative provisions but also to collective agreements and individual employment contracts.

- 19 Article 119 of the Treaty lays down the principle of equal pay for men and women for equal work. Article 1 of the directive states that that principle means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. As the Court emphasized in Case 96/80 *Jenkins* [1981] ECR 911, Article 1 is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty, but in no way alters the content or scope of that principle as defined in the latter article.
- 20 The principle of equal pay excludes not only the application of provisions leading to direct sex discrimination, but also the application of provisions which maintain different treatment between men and women at work as a result of the application of criteria not based on sex where those differences of treatment are not attributable to objective factors unrelated to sex discrimination.
- 21 It is common ground that the provisions criticized by the Commission and the plaintiffs in the main actions do not entail direct sex discrimination.
- 22 It must therefore be considered whether those provisions may constitute indirect discrimination incompatible with Article 119 of the Treaty.
- 23 To that end it must be determined whether they establish different treatment for full-time and part-time employees and whether that difference affects considerably more women than men.

- 24 That is the nature of the review traditionally exercised by the Court of Justice in this area (see *inter alia* *Kowalska*, cited above, and Case 170/84 *Bilka* [1986] ECR 1607).
- 25 Only if those two questions are answered in the affirmative does the question arise of the existence of objective factors unrelated to discrimination which may justify such a difference in treatment.
- 26 There is unequal treatment wherever the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked on the basis of an employment relationship.
- 27 In the circumstances considered in these proceedings, part-time employees do receive the same overall pay as full-time employees for the same number of hours worked.
- 28 A part-time employee whose contractual working hours are 18 receives, if he works 19 hours, the same overall pay as a full-time employee who works 19 hours.
- 29 Part-time employees also receive the same overall pay as full-time employees if they work more than the normal working hours fixed by the collective agreements because on doing so they become entitled to overtime supplements.

- 30 Consequently, the provisions at issue do not give rise to different treatment as between part-time and full-time employees and there is therefore no discrimination incompatible with Article 119 of the Treaty and Article 1 of the directive.
- 31 It must therefore be stated in reply to the first question that Article 119 of the EEC Treaty and Article 1 of Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women does not prevent collective agreements from restricting payment of overtime supplements to cases where the normal working hours fixed by them for full-time employees are exceeded.

The other questions referred to the Court

- 32 In the light of the reply to the first question it is not necessary to reply to the questions concerning the existence of objective factors unrelated to discrimination based on sex capable of justifying different treatment or the appropriate method of calculating supplements to which part-time employees would be entitled.

Costs

- 33 The costs incurred by the German, French and Greek Governments and by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Landesarbeitsgericht Hamm, the Arbeitsgericht Hamburg, the Arbeitsgericht Elmshorn, the Arbeitsgericht Bochum and the Arbeitsgericht Neumünster by orders of 22 October 1992 (Case C-399/92), 4 November 1992 (Case C-425/92), 6 November 1992 (Case C-409/92), 18 December 1992 (Case C-50/93), 21 January 1993 (Case C-34/93) and 1 February 1993 (Case C-78/93), hereby rules:

Article 119 of the EEC Treaty and Article 1 of Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women does not prevent collective agreements from restricting payment of overtime supplements to cases where the normal working hours fixed by them for full-time employees are exceeded.

Schockweiler

Kapteyn

Mancini

Kakouris

Murray

Delivered in open court in Luxembourg on 15 December 1994.

R. Grass

F. A. Schockweiler

Registrar

President of the Sixth Chamber