

OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 10 July 2007¹

1. The Bundesverwaltungsgericht (German Federal Administrative Court) has referred a question to the Court for a preliminary ruling on the interpretation of Article 141 EC with regard to overtime pay for part-time workers, most of whom are women.

I — The legal framework*A — Community legislation*

3. Equal pay for men and women for equal work 'forms part of the foundations of the Community',³ as a clear expression of the abolition of inequalities in the employment sector.⁴

4. Since 1957 that principle has been enshrined in Article 119 of the EC Treaty which now, following the Treaty of Amsterdam,⁵ has become Article 141 EC, with the following wording:

2. Specifically, the national court asks whether, in consequence of the judgment of 27 May 2004 in *Elsner-Lakeberg*,² the applicable national provisions entail indirect discrimination, prohibited by Community law, since they calculate remuneration according to professional category and not in proportion to the salary of a full-time employee.

'1. Each Member State shall ensure that the principle of equal pay for male and female

1 — Original language: Spanish.

2 — Case C-285/02 *Elsner-Lakeberg* [2004] ECR I-5861.

3 — Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 12.

4 — Quintanilla Navarro, B., *Wage Discrimination. Wage differences on the basis of sex*, Ed. Marcial Pons, Madrid, 1996, pp. 63-168.

5 — OJ 1997 C 340, p. 1.

workers for equal work or work of equal value is applied.

B — *The German legislation*

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.

5. According to Paragraph 35(2) of the Landesbeamtengesetz (Civil Service Code for Land Berlin),⁶ overtime is only permitted in exceptional cases, and if overtime ever amounts to five hours per month over and above normal working hours, extra leave must be granted or, if that is not possible, remuneration must be paid.

Equal pay without discrimination based on sex means:

6. Paragraph 4 of the Regulation on the Granting of Overtime Remuneration for Civil Servants (Verordnung über die Gewährung von Mehrarbeitsvergütung für Beamte; ‘MVergV’)⁷ provides that remuneration for each hour of overtime is fixed on a scale according to the grade of the person carrying out the additional work. Paragraph 5(2)(1) adds that for overtime in the teaching sector, three hours teaching count as five hours.

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

II — The facts, the main proceedings and the question referred for a preliminary ruling

(b) that pay for work at time rates shall be the same for the same job.

7. Mrs Voß is employed as a teacher by Land Berlin. She was granted part-time work, from

...’

6 — New version of 20 February 1979 (GVBl BE, p. 368).

7 — Communication of 3 December 1998 (BGBl. I, p. 3494).

15 July 1999 to 29 May 2000, on the basis of 23 hours of classes a week, as opposed to 26.5 hours for full-time teachers.

8. Between 11 January and 23 May 2000 Mrs Voß worked 27 additional teaching hours. Under the MVergV she was entitled to payment of DEM 1 075.14 but she claimed an amount equal to that paid to the full-time teachers, the higher figure of DEM 1 616.15.

9. Land Berlin refused the claim, but Mrs Voß successfully challenged that refusal before the Verwaltungsgericht (Administrative Court), which, relying upon Article 141 EC and Article 1 of Directive 75/117/EEC,⁸ recognised her right to be paid, in respect of the overtime, at the same level as employees of her professional grade.

10. An appeal was brought on a point of law and the Bundesverwaltungsgericht (Second

Chamber) stayed the proceedings to refer the following question for a preliminary ruling:

'Does Article 141 EC preclude national legislation under which remuneration for additional work which takes place outside of normal working hours is paid at the same rate with regard to full-time as well as part-time public servants and that rate is lower than the pro-rata remuneration allotted to full-time public servants as regards a period of equal length within normal working hours if it is predominantly women who are employed part-time?'

III — The proceedings before the Court of Justice

11. Mrs Voß, the German Government and the Commission lodged observations within the period prescribed in Article 23 of the Statute of the Court.

12. Mrs Voß claims that the MVergV entails indirect discrimination against part-time workers, principally teachers, as they receive

8 — 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).

less money than full-time workers, without an objective justification, since, according to case-law, overtime involves an extra burden for those who do not work full-time.

15. Upon the closure of the written procedure, no party requested a hearing; accordingly, following the general meeting on 5 June 2007, the case was ready for the preparation of this Opinion.

IV — Analysis of the question referred

13. The Federal Government, however, denies that there is unequal treatment, since, in the light of the different components of the salary, it is clear that, having regard to the professional category, the remuneration is the same for all employees and for whatever type of working hours.

16. To facilitate replying to the question referred for a preliminary ruling it is necessary, first, to explain the prohibition on discrimination in employment in the European context, in line with what has been outlined in earlier opinions;⁹ secondly, to set out the specific characteristics of part-time work, with particular reference to the remuneration for that type of work; and, thirdly, to address the question referred by the Bundesverwaltungsgericht.

14. The Commission highlights the method used to compare the remunerations, arguing that for an effective review each component of the salary should be considered, without an overall assessment. On that premise, the Commission argues that under the German system, for an equal number of hours weekly, part-time teachers receive less pay than those who work full-time. That difference in treatment will infringe Article 141 EC if it affects more women than men.

A — Equality between male and female workers in the Union

17. The discrimination against women in the workplace is due, in large part, to the fact

⁹ — Opinion in Case C-207/04 *Vergani* [2005] ECR I-7453, points 19 to 38.

that, traditionally, they were considered as the weaker sex, and therefore they were left to carry out the family duties.¹⁰ Saint Thomas Aquinas thought that masculinity was nature at its most noble, and that woman was 'deficient and unintentionally caused', 'naturally subject to man, because in man the discretion of reason predominates. Nor is inequality among men excluded by the state of innocence'.¹¹ With an ideology such as that it is unsurprising that medieval law required the acquiescence of the father or husband for a woman to seek fortune, distribute goods or present herself before a court, although the reality was very different, as shown, in 1270, by the following statement in the introduction to the *Sachsenspiegel* (Collection of German Customs): 'as it is clear that women read more books, they should receive them by way of inheritance'.¹²

for the most part usually foolish and lacking common sense'. Later, he refers to '... the flippancy of women, their inconsistency, their duplicity, their false promises, their corrupt faith, and finally, their lack of tact in showing their thoughts and feelings'.¹³

18. Miguel de Cervantes echoed that secular characterisation when, in recounting to Don Quixote the story of Leandra, the goatherd says '... the inclination of women, who are

19. But, progressively, voices such as that of Stuart Mill in 1869 were heard denouncing the condition of 'civil slavery' in which married women found themselves,¹⁴ although, on account of the Civil Codes of the 19th century, inspired by Napoleon, the legal incapacity of women remained in place.

20. At the time of the creation of the European Communities the principle of the equal treatment of men and women was serious flawed. The Treaty of Rome, in its original version, proclaimed only equal pay, but that did not prevent the principle of

10 — Rodríguez-Piñero y Bravo-Ferrer, M., 'La reconciliación de la vida familiar y laboral de las personas trabajadoras (I)', *Relaciones Laborales*, 1999/II, p. 27.

11 — Summa Theologica, part I, question 92, *On the generation of women*.

12 — I am taking the citation from Rucquoy, A., 'La mujer medieval: fin de un mito', *Cuadernos de Historia* 16, Grupo 16, Madrid, 1985.

13 — Cervantes Saavedra, M., *Don Quijote de la Mancha*, editing., introduction and notes by Martín de Riquer, Chapter LI of the first part, Ed. RBA, Barcelona, 1994, pp. 597 and 598.

14 — Stuart Mill, J., *The subjection of women* Ed. EDAG, Madrid, 2005.

equal treatment from becoming an axis of Community action, giving rise to a plethora of rules,¹⁵ such as those concerning equality as regards pay,¹⁶ access to employment, professional training and promotion, as well as working conditions¹⁷ or social security.¹⁸

21. Through the Treaty on European Union in 1992,¹⁹ that Community policy of equality acquired its own status independent of economics (former Article B of the EU Treaty and former Article 2 of the EC Treaty).

22. The trend was continued in the Treaty of Amsterdam in 1997, which expressly empowered the Community ‘... to promote ... equality between men and women ...’ (Article 2), incorporating into its objectives

the elimination of unequal treatment and the promotion of equality (Article 3). Moreover, former Article 119, now Article 141 EC, adds two new paragraphs which provide, first, that the Council is to ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation — including remuneration — and, secondly, that Member States may maintain or adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to avoid or compensate for disadvantages in professional careers.

23. The Treaty of Nice in 2001 confirmed the earlier advances and amended the wording of Article 13 EC, the first paragraph of which enables the Council to take ‘appropriate action to combat discrimination based on sex ...’.

24. Those innovations in primary legislation, as well as evolution through time and the consolidation of the rejection of making distinctions between workers on the basis of gender, have encouraged not only the adoption of provisions which set the general

15 — A study of the most important provisions and of their normative evolution can be found, inter alia, in Pérez del Río, T. *Una aproximación al derecho social comunitario*, Ed. Tecnos, Madrid, 2000 pp. 87 et seq.; Sala Franco, T., ‘Equality of treatment. Collective dismissal’ in *El Espacio social europea*, Centro de Documentación Europea, Universidad de Valladolid, Ed. Lex Nova, Valladolid, 1991, pp. 249 et seq.; or Saulle, M.R., ‘Gli interventi comunitari in tema di parità uomo-donna e le azioni positive in favore delle donne’, in *Lavoro femminile e pari opportunità*, Ed. Cacucci, Bari, 1989, pp. 60 et seq.

16 — Directive 75/117, cited above.

17 — Council Directive 76/207/EEC of 7 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

18 — Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24); and 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 schemes (OJ 1986 L 225, p. 40) amended by Council Directive 96/97/EC of 20 December 1996 (OJ 1997 L 46, p. 20).

19 — OJ 1992 C 191, p. 1.

standard for equal treatment in employment and occupation,²⁰ but also the reform of Directive 76/207.²¹

25. However, that range of rules against discrimination has not changed the tendencies engrained in society for centuries, since, although the number of women in the labour market has increased, the employment rates²² and the level of pay²³ are not comparable with those of men.

26. Those figures show that, to achieve a more equitable balance, legislative initiatives are not enough, since the misfortune of women in the workplace owes its origins to beliefs and habits firmly anchored in old prejudices. A change of mentality is required, so that the historical foundations for such a lack of consideration will be uprooted, and that will be a difficult, complex and slow task, involving everyone, in particular public authorities.

20 — Council Directive 2000/78/EC of 27 November 2000 (OJ 2000 L 303, p. 16).

21 — Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002, which amended Directive 76/207 referred to above (OJ 2002 L 269, p. 15).

22 — Rivas García, J., *La Europa Social*, Ed. José María Bosch, Barcelona, 1999, pp. 77-80, compared statistics to show that, in 1995, the average employment level had risen to 66.2% for men and 45% for women.

23 — In 2002 European women earned on average 18% less than men in the private sector and 13% less in the public sector (*Europeas discriminadas*, EL PAÍS, 14 October 2002, p. 12).

27. The Court of Justice has taken on that task, and within its jurisdiction, contributes to the elimination of the frequent discrimination that still remains in legal systems as advanced as those of the European Union and its Member States.

B — *Part-time work*

1. General approach

28. In the Community context, the term 'part-time worker' means 'an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker'.²⁴

24 — Clause 3(3) of the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC annexed to Council Directive 97/81/EC of 15 December 1997 (OJ 1998 L 14, p. 9). For the International Labour Organisation ('ILO') the expression 'means an employed person whose normal hours of work are less than those of comparable full-time workers' (Article 1(a) of C175 Part-time Work Convention adopted on 24 June 1994, in force since 28 February 1998).

29. The breadth of the concept allows it to cover a multiplicity of work relationships which meet different objectives; accordingly, there has been a notable increase in that type of work, stemming from its use to promote the 'division of labour',²⁵ on account of the flexibility which it offers.²⁶

30. According to that concept of part-time work, the working day is shorter than the full working day, which is that worked by the majority of employees since it comprises the reference number of hours laid down by statute and in collective agreements. The key feature of part-time work is the number of working hours, which are also affected by overtime, which is why the practice of overtime on reduced pay has attracted repeated criticism.²⁷

25 — Durán López, F., 'La reducción del tiempo de trabajo: una aproximación al debate europeo', *Revista de Trabajo*, No 57 and 58, 1980, p. 52.

26 — First paragraph of the preamble, recitals 3 and 4 and Clause 1(b) of the abovementioned Framework Agreement.

27 — Cabeza Pereiro, J., and Losada Arochena, J.F., *El nuevo régimen legal del trabajo a tiempo parcial*, Ed. Comares, Granada, 1999, pp. 43 to 45, outline the doctrinal objections, such as the dysfunctionality of overtime with respect to the characteristics of part-time work, the contradiction with the objective of division of labour and with the flexibility of that contract, as well as the fraud it involves. An echo of those objections is heard in the Member States, for example, in Spain Article 12(4)(c) of the Law on Workers [in the version included in the Royal Decree Law 15/1998 of 27 November 1998 (BOE n° 285, p. 39188 et seq.)] prohibits in general that overtime, replacing it with 'additional' hours'; in France, Articles L. 212-4-3 and L. 212-4-4 of the Employment Code [amended by Law 2005-841, of 26 July 2005 (JORF 27 July 2005)], also mention 'additional hours'; and in Italy, Article 3 of Legislative Decree No 61 of 25 February 2000, attuazione della direttiva 97/81/CE relativa all'accordo-quadro sul lavoro a tempo parziale (GURI No 66 of 20 March 2000), imposes certain restrictions.

31. Additionally, it has been found that women make more use of part-time work than men, because it allows them more time to complete other tasks, such as household chores,²⁸ although the time devoted to the family depends on the number of family members, the age of the children, any other dependants, cultural and social habits, the economic means available, the environment²⁹ and various other circumstances.

2. Discrimination as regards pay

(a) General remarks

32. A basic principle underlies the relationship between contracts for part-time work and those for full-time work: the principle of equality, which precludes less favourable treatment for part-time work, except where

28 — McRae, S., *Part-time work in the European Union: The Gender Dimension*, Office for Official Publications of the European Communities, Luxembourg, 1996, identifies the advantages and the drawbacks for women in this kind of work. Grossin, W., in the introduction to the Spanish Edition of his work *Trabajo y tiempo*, Ed. Nova Terra, Barcelona, 1974, points out that 'the work life determines the overall life of the worker'. The applicant herself, in her written observations, claims she is working part-time in order to reconcile family and professional life.

29 — Beltrán Felip, R., 'Las mujeres y el trabajo a tiempo parcial en España. Elementos para su análisis', *Cuaderno de Relaciones Laborales*, No 17, 2000, p. 145.

justified by objective reasons.³⁰ That principle arises from the fact that the differences between the two contracts relate to working time only, as the rights and obligations are the same.

33. That equality also applies in the area of pay,³¹ given that the remuneration must be proportionate to the length of time worked.³² But various components appear together on the payslip, some of which are not linked to working hours and are therefore unlikely to be considered.³³ That is why equality does not mean having to adopt linear or identical positions which might lead to absurd conclusions.³⁴

34. The Court of Justice has already looked at discrimination on grounds of sex in

relation to the remuneration of part-time workers as compared with male colleagues working full-time.³⁵

35. In *Jenkins*³⁶ the Court ruled on a claim brought by a part-time employee who received less pay per hour than that of a full-time colleague. The Court considered that the difference in income between one class of employee and another infringed ex-Article 119 of the EC Treaty, since it reduced the wages of part-time employees, when 'that group of workers is composed exclusively or predominantly of women' (paragraph 15).

36. In the wake of *Jenkins*, some years later, came *Bilka*³⁷ in which it was held that the exclusion of part-time workers, especially women, from the company's pension scheme infringed Community law, unless it was on account of objectives wholly unrelated to discrimination based on sex; *Rinner-Kühn*³⁸

30 — Clause 4(1) of the Framework Agreement mentioned above which, however, restricts the principle to 'employment conditions'.

31 — Benavente Torres, M.L., *El trabajo a tiempo parcial*, Ed. Consejo Económico y Social de Andalucía, Sevilla, 2005, p. 333.

32 — Article 5 of C175 of the ILO requires wages 'proportionality' calculated on 'an hourly, performance-related, or piece-rate basis'.

33 — The disparity between some items is dealt with at point 10 of Recommendation No 182 of the ILO, of the same date as C175, where it recognises the right to enjoy, in equitable conditions, additional financial remunerations.

34 — Merino Senovilla, H., *El trabajo a tiempo parcial*, Ed. Lex Nova, Valladolid, 1994, p. 136.

35 — Similarly the Court has decided on other aspects of part-time work, as shown, most recently, in Case C-144/04 *Mangold* [2005] ECR I-9981 on the possibility of continual use of that type of contract; Case C-196/02 *Nikoloudi* [2005] ECR I-1789 on calculating seniority and integration into the permanent staff; and Case C-313/02 *Wippel* [2004] ECR I-9483 relating to the length of the working day and the distribution of working hours.

36 — Case 96/80 *Jenkins* [1981] ECR 911.

37 — Case 170/84 *Bilka* [1986] ECR 1607.

38 — Case 171/88 *Rinner-Kühn* [1989] ECR 2743.

dealt with a similar situation and found a similar infringement consisting in depriving workers of the right to be paid when on sick leave; and in *Kowalska*³⁹ the Court, in similar circumstances, prohibited the refusal to pay a temporary benefit in the case of termination of employment.

least a part of their working life, where that category of civil servants includes a considerably higher number of women than men' is contrary to Community law (point 74).

37. In *Nimz*⁴⁰ concerning the duration of probation periods necessary in order to reach a higher wage level, and in *Böttel*⁴¹ concerning the lower pay received by staff council members for training courses undertaken, inequality was also found to exist with regard to part-time workers, particularly women.

(b) Criteria for comparison

38. More recently in *Kutz-Bauer*⁴² and *Steinicke*⁴³ the Court examined the conditions in which German civil servants who had attained a certain age could enjoy a reduced working day; and in *Schönheit and Becker*⁴⁴ the Court reiterated the *Bilka* doctrine in finding that legislation which entailed 'a reduction in the pension of civil servants who have worked part-time for at

39. Although the above cases have a common guiding thread, there are differences in the evidence required to support a finding of discrimination.

40. Thus, in *Helmig and Others*,⁴⁵ part-time employees who had exceeded their contractual working hours sought a supplementary payment as provided for in a collective agreement on overtime for exceeding the normal working day. In the judgment, the Court emphasised that 'there is unequal treatment wherever the overall pay of full-

39 — Case C-33/89 *Kowalska* [1990] ECR I-2591.

40 — Case C-184/89 *Nimz* [1991] ECR I-297.

41 — Case C-360/90 *Böttel* [1992] ECR I-3589.

42 — Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741.

43 — Case C-77/02 *Steinicke* [2003] ECR I-9027.

44 — Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575.

45 — Joined Cases C-399/92, C-409/02, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig and Others* [1994] ECR I-5727.

time employees is higher than that of part-time employees, for the same number of hours worked, on the basis of an employment relationship' (paragraph 26) something which had not occurred in the case before the referring court, in which both classes of employees received the same remuneration for the same number of normal or overtime hours worked (paragraphs 27 to 29).⁴⁶

such a way that it was granted to those who worked full-time, they took place outside the normal working hours of the part-time worker in question (paragraph 26).

41. In *Royal Copenhagen*⁴⁷ the Court referred, once more, to a 'global' assessment (paragraph 18), stating that although in the context of piece-work, differences in the average salaries of women and men '[do] not suffice to establish that there is discrimination with regard to pay' (paragraph 22). Similarly, in *Lewark*⁴⁸ the Court turned again to the concept of 'overall pay' (paragraph 25) in order to hold that the refusal to pay a part-time female worker for attending a number of training courses — necessary for the carrying out of staff council functions — constituted different treatment, because although those courses were attended in the course of full-time working hours, in

42. Nevertheless, *Barber*⁴⁹ shows that genuine transparency, enabling an effective judicial review of inequality, is not achieved by comparing all the various types of bonuses granted, according to the circumstances, to men and women, but rather by applying the principle of equal pay to each of the elements of remuneration paid to men or women (paragraph 34).

43. The *Barber* case-law has been reiterated in subsequent judgments, such as *JämO*,⁵⁰ in which it was held that it was essential to compare 'the midwives' monthly basic salary ... with the like salary of clinical technicians' (paragraph 44), or in *Elsner-Lakeberg* which concerned a situation where both full-time and part-time workers were only remunerated for overtime above three hours per month. The Court insisted that the remuneration for normal working hours and the remuneration for overtime must be compared separately (paragraph 15), finding that even if the overtime conditions were the same for both part-time and full-time work-

46 — On the one hand, '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' (paragraph 28), since the extra hour is paid as a normal hour; on the other hand, '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' (paragraph 29).

47 — Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275.

48 — Case C-457/93 *Lewark* [1996] ECR I-243.

49 — Case C-262/88 *Barber* [1990] ECR I-1889.

50 — Case C-236/98 *JämO* [2000] ECR I-2189.

ers, the ‘three additional hours is in fact a greater burden for part-time teachers than it is for full-time teachers’ resulting in ‘unequal treatment’ to the detriment of the former (paragraph 17).⁵¹

they did similar jobs; the Court ruled that ‘equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees but also in the light of each aspect of pay taken in isolation’(first indent of the operative part).

44. I discern, therefore, two approaches in the case-law as regards the criteria to be used for deciding whether the equal pay principle has been infringed: that which involves an overall assessment and that which involves an assessment of each separate aspect. That choice lies at the heart of the question referred by the Bundesverwaltungsgericht.

45. I think that the Court itself is aware of the two approaches, since it links them in *Brunnhöfer*⁵² — where a bank employee did not receive a personal pay rise which was granted to a male colleague in her professional category — when considering whether

46. With the same aim of reconciling the two criteria, Advocate General Jacobs stated, at point 32 of his Opinion in *JämO*, that when, for historical or other reasons, the pay structure is complex and that makes it difficult or impossible to identify its components or the basis on which they were granted, it would be unrealistic and unhelpful to consider each element of the overall pay ‘individually’, so that an ‘overall assessment’ was necessary.⁵³

51 — The judgment instructed the referring court to assess whether the different treatment affected considerably more women than men, whether there was an objective unrelated to sex which justified such different treatment and whether it was necessary to achieve the objective pursued (paragraph 18).

52 — Case C-381/99 *Brunnhöfer* [2001] ECR I-4961.

53 — At point 44 of the Opinion, the Advocate General adds that ‘the general rule must be that the number of hours worked by two employees whose pay is being compared will naturally be taken into account and a difference will justify a difference in pay, so that, to take extreme examples, it would obviously not be discriminatory to pay a man working full-time twice as much as a woman doing the same job half-time, or indeed a man working overtime more than a woman not working overtime’.

C — *The issue raised by the question referred*

which are wholly unrelated to any discrimination based on sex.⁵⁷

47. There is no doubt that payment for overtime constitutes remuneration and is subject to the principle of equality between male and female workers laid down in Article 141 EC.

49. The application of those ideas in the present case involves three consecutive steps: it must be established (i) whether there is unequal treatment between full-time and part-time workers and whether there are any unfavourable consequences for the latter; (ii) whether it affects more women than men; and (iii) whether it is unavoidable for the purposes of achieving the objective pursued and is based on objective factors wholly unrelated to any discrimination based on sex.

48. Case-law has established that the application of different rules in comparable situations or the use of the same rule for different situations may be discrimination contrary to that principle;⁵⁴ the assessment of those situations requires a determination of whether the disputed provisions have unfavourable effects on the workers of a given sex,⁵⁵ without forgetting that the principle of equal pay, like that of non-discrimination (of which it is a particular form) presupposes that the situations are similar.⁵⁶ There is also indirect discrimination where, for example, a regulation is adopted which, although formulated in a neutral way, in fact adversely affects a far larger proportion of women than men, except if it is justified by objective reasons

1. A finding of discrimination

(a) The question

50. A full-time teacher is paid on the basis of 26.5 hours compulsory teaching per week. A part-time teacher earns an amount propor-

54 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 16; and Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 39.

55 — Case C-167/97 *Seymour-Smith and Pérez* [1999] ECR I-623, paragraph 58; and *Schönheit and Becker*, paragraph 69.

56 — Case C-218/98 *Abdoulaye and Others* [1999] ECR I-5723, paragraph 16, and Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 39.

57 — Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 22; Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 30; Case C-100/95 *Kording* [1997] ECR I-5289, paragraph 16; Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, paragraph 34; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 129; Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 32; *Rinner-Khün*, paragraph 12; *Lewark*, paragraph 31; and *Kutz-Bauer*, paragraph 50.

tional to the 23 hours per week assigned. Overtime is paid equally in both cases, on the basis of the grade of the employee concerned, irrespective of their normal working hours, although it is paid at a rate lower than that applied to a normal working hour of a full-time teacher.⁵⁸

effects can be found if the comparison is based exclusively on (i) the lower pay of part-time workers as compared with the pay of full-time workers and (ii) the remuneration paid in each case for overtime worked.

53. In consequence, the dilemma lies in the choice of the criteria for comparison.

51. That way of calculating the hourly rate means that a part-time employee who works extra hours in addition to the number of hours assigned (23 hours in a week), but not enough to exceed the number of hours worked by a full-time employee in the course of normal working hours (26.5 hours in a week), receives — proportionately — lower remuneration than those who work full-time. Consequently, if the part-time employee works 3.5 hours more than the 23 hours assigned, she will not receive the salary of someone who was obliged to work 26.5 hours by way of normal working hours, since the remuneration for those 3.5 hours will be different in the two cases.⁵⁹

(b) Proposed solution

(i) Preliminary ideas

54. I have already pointed out that, to find an infringement of the principle of equal pay, case-law shows that it is necessary to carry out either an overall assessment or an examination of the various components of the remuneration.

52. However, as the Bundesverwaltungsgericht correctly maintains, no unfavourable

55. Those two criteria, far from being contradictory, complement one another and in each case their application depends on the circumstances of the case. There is no discernable order of priority since, in general, the Court carries out a specific examination and, occasionally, a general assessment.

58 — That is contrary to normal practice, according to the applicant, since additional hours are normally better paid, although the German Government argues differently (point 35 of its observations).

59 — That does not occur when the hours exceed a normal working day, from 26.5 hours onwards, since from that moment on the levels are exactly the same.

56. To seek to determine the outcome by mechanically turning to either of the two criteria would be to distort the balanced application of the Community principle of equal pay for employees of both sexes (explained above), and the special characteristics of part-time work, as well as to overlook the basic rule of Article 141 EC that equal work should receive equal pay.

normal or additional, comparing only the one with the other, there would be no infringement found, given that, in essence, overtime worked by part-time workers and overtime worked by full-time workers is remunerated in the same way.

57. Moreover, reference to gross pay or to its components is misleading, since some of those components are not linked to the working hours fixed, which, in turn, represents the key element of contracts for part-time employment. It is also possible to carry out an overall assessment of certain specific components.

60. However, to proceed in that way would be to neglect the impact on the amount paid in both cases on the final payslip, despite both being identical in nature. Furthermore, at no stage has it been suggested that the work carried out by Mrs Voß in addition to her normal working hours differs from that carried out during normal working hours or that carried out by a full-time teacher.

58. Thus, the work of the Court of Justice is not confined within a straitjacket: rather, where the Court has several tools at its disposal, it must choose the most appropriate tool for achieving the objective of the Community rule to be interpreted.

61. It is necessary therefore to carry out an overall assessment, evaluating homogenous aspects, with the focus on the principle that equal work merits equal pay.

(ii) The dispute in the main proceedings

59. If the principle of equality focuses upon the remuneration for hours worked, whether

62. Thus, I can but agree with the observations of the applicant and of the Commission to the effect that the Court of Justice must assess whether, in the circumstances of the

case, the work carried out as overtime by part-time employees is less well paid than the work carried out by full-time employees in respect of the same periods.

court must assess whether the majority of part-time contracts are fulfilled by women, even though it is anticipated that that will be the case.⁶⁰

63. Any other approach would disturb the equilibrium of the relationship between workers with different types of working hours, to the detriment of part-time workers.

64. Thus, discrimination arises only in respect of the period falling between the end of the part-time working day and the end of the full-time working day, since remuneration for overtime worked over and above normal full-time working hours is the same.

3. The existence of a justification

65. It is also necessary to bear in mind the position of the employer, who, according to the Commission, could be tempted by greed to compel its part-time workers to work overtime in order to save costs.

67. By the same token (as the previous paragraph), it is for the national court to ascertain if the inequality in treatment is such as to achieve the intended objective and if it should be allowed on objective grounds, unrelated to discrimination on the grounds of sex, although the national court has also submitted its opinion in that regard.⁶¹

2. The effect on women

66. Once discrimination contrary to Community law has been established, the national

60 — According to point 2 of the order for reference, the Verwaltungsgericht noted that, in spring of 2000, approximately 88% of teachers employed part-time by the Berlin Land were women, a figure repeated in point 19 of that order.

61 — Point 19 of the reference for a preliminary ruling states that 'there is nothing to suggest that the lower remuneration of the working hours is based on factors which are objectively justified and are unrelated to discrimination on the grounds of sex'.

V — Conclusion

68. In light of the foregoing, I propose that the Court give the following answer to the Bundesverwaltungsgericht's question:

'Article 141 EC must be interpreted as precluding national legislation under which overtime carried out by part-time workers is paid at a lower rate — for the period of time falling between the end of their working day and the end of the working day for full-time staff — than the rate applied for hours normally worked by full-time staff, where that difference in treatment affects a much greater number of women than men, unless it is shown that such a system is necessary to achieve a legitimate aim and justified by objective factors wholly unrelated to discrimination based on sex.'