# JUDGMENT OF THE COURT (First Chamber)

6 December 2007 *

In Case C-300/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesverwaltungsgericht (Germany), made by decision of 11 May 2006, received at the Court on 6 July 2006, in the proceedings

**Ursula Voß**

v

**Land Berlin,**

intervening party:

**Vertreterin des Bundesinteresses beim Bundesverwaltungsgericht,**

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano, A. Borg Barthet (Rapporteur), M. Ilešič and E. Levits, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Ms Voß, by E. Ribet Buse, Rechtsanwalt,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— the Commission of the European Communities, by V. Kreuschitz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2007,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 141 EC.

2 The reference has been made in the course of proceedings between Ms Voß and Land Berlin concerning the remuneration for overtime worked by Ms Voß, who is employed part-time.

## Legal context

*Community legislation*

3 Article 141(1) and (2) EC provides:

'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.

2. 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.

Equal pay without discrimination based on sex means:

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

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

*National legislation*

4 Paragraph 35(2) of the Civil Service Code (Landesbeamtengesetz), in the amended version of 20 February 1979 (GVBI BE, p. 368), states as follows:

'A civil servant is obliged to work without remuneration beyond his normal weekly working hours if mandatory job-related circumstances require him to do so and the overtime is limited to exceptional cases. If he is obliged to work for more than five hours per month outside of normal working hours on account of additional work which is required or sanctioned for job purposes, then he shall be granted, within three months, extra leave corresponding to the overtime worked. If extra leave is not possible for mandatory job-related reasons, civil servants in grades in which remuneration is proportional to seniority may instead receive pay for a period of up to 480 hours per year.'

5 Paragraph 6(1) of the Federal Law on Remuneration of Civil Servants (Bundesbesoldungsgesetz) ('BBesG') — Paragraph 1(1)(i) of which also regulates the pay of regional civil servants — states:

'In the case of part-time work, remuneration and working time shall be reduced by the same proportions.'

6 Paragraph 48 of the BBesG empowers the Federal Government to lay down, by regulation, the detailed rules governing remuneration of overtime in so far as it is not compensated for by extra leave.

7 Paragraph 2(1) of the Regulation on the Granting of Overtime Remuneration for Civil Servants (Verordnung über die Gewährung von Mehrarbeitsvergütung für Beamte) of 13 March 1992 (BGBl. 1992 I, p. 528), as amended on 3 December 1998 (BGBl. 1998 I, p. 3494) ('MVergV'), adopted on the basis of Paragraph 48(1) of the BBesG, provides:

'Those civil servants in grades in which remuneration is proportional to seniority may obtain remuneration for overtime in the following areas:

...

6. in teaching, in the case of teaching staff.'

8 Paragraph 3(1) of the MVergV states:

'The remuneration shall be paid only where the overtime is carried out by a civil servant subject to the civil service working hours regime and for whom the overtime:

(1) has been assigned or granted in writing,

(2) exceeds, by more than five hours per calendar month, the normal monthly working hours or, to the extent that the civil servant has worked during only part of the month, that share of the monthly working hours, and

(3) owing to mandatory job-related circumstances, cannot be compensated by extra leave granted within a period of three months.'

9 According to Paragraph 4 of the MVergV, the amount of remuneration paid for each hour of overtime worked depends on the grade of the civil servant.

10 Paragraph 5(2) of the MVergV states:

'In the case of overtime in the teaching sector,

(1) three hours teaching is equivalent to five hours for the application of Paragraph 3(1)(2) [of that regulation];

...'

11 It is clear from the order for reference that under the MVergV the hourly rate of pay for overtime is lower than the hourly rate of pay for work carried out in the course of 'normal working hours' (the hours which are fixed and obligatory as regards both the individual civil servant and employer).

## The dispute in the main proceedings and the question referred for a preliminary ruling

12 Ms Voß is a civil servant employed as a teacher by Land Berlin. For the period from 15 July 1999 until 29 May 2000 she worked as a part-time teacher on the basis of 23 teaching hours per week. At that time, the number of teaching hours required of a full-time teacher was 26.5.

13 Between 11 January and 23 May 2000, Ms Voß worked between four and six teaching hours each month in addition to her normal working hours.

14 The remuneration received by Ms Voß for that period amounted to DEM 1 075.14. According to the national court, the remuneration received by a full-time teacher for the same number of hours of work amounted to DEM 1 616.15 in respect of the same period.

15 According to the national court, the explanation for that situation lies in the fact that the hours worked by Ms Voß which are classed as overtime — that is, the hours worked over and above her normal working hours, but not sufficient to bring the hours worked overall above the level of normal working hours for full-time staff — were paid at a rate lower than the hourly rate applied to the corresponding number of hours worked by a full-time teacher which, for the latter, count as normal working hours.

16 The national court thus found that, in respect of the months from January to May 2000, for an equal amount of work, Ms Voß was paid less than a teacher employed full-time.

17 Ms Voß claimed that, instead of the hourly overtime rate laid down in the MVergV, remuneration for the overtime that she worked — up to the ceiling of 26.5 teaching hours per week — should be calculated at the same hourly rate as applies in the case of full-time teachers for the hours worked in the course of their normal working hours.

18 As that claim was rejected by Land Berlin, Ms Voß contested the rejection decision before the Verwaltungsgericht (Administrative Court) (Germany), which upheld her action. Land Berlin brought an appeal on a point of law before the Bundesverwaltungsgericht (Federal Administrative Court) (Germany) against the judgment upholding the applicant's action.

19 According to the Bundesverwaltungsgericht, the question at issue in the dispute before it is whether the remuneration of part-time teachers at a lower rate for teaching hours worked as overtime constitutes, in the light of the pay received by full-time teachers for the same number of hours worked in the course of their normal working hours, discrimination against women teachers as prohibited under Community law. According to the Bundesverwaltungsgericht, the reply to that question depends upon whether the second subparagraph of Article 141(2) EC requires that overtime worked by a part-time teacher up to the point where the number of hours worked overall matches the normal hours for a full-time teacher must not be less well paid than the same number of hours worked by a full-time teacher in the course of his normal working hours.

20 In those circumstances, the Bundesverwaltungsgericht decided to stay proceedings and to refer the following question to the Court of Justice 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 civil servants and that rate is lower than the pro-rata remuneration allotted to full-time civil servants as regards a period of equal length within normal working hours where it is predominantly women who are employed part-time?'

## The question referred for a preliminary ruling

21 By its question the national court asks, in essence, whether Article 141 EC is to be interpreted as precluding — in situations where the majority of the part-time civil servants concerned are women — national legislation on the remuneration of civil servants, such as that at issue in the main proceedings, which defines overtime, for both full-time civil servants and part-time civil servants, as hours worked over and above their normal working hours, and which remunerates those additional hours at a rate lower than the hourly rate applied to their normal working hours, so that part-time civil servants are less well paid than full-time civil servants in respect of hours which are worked over and above their normal working hours, but which are not sufficient to bring the number of hours worked overall above the level of normal working hours for full-time civil servants.

22 Ms Voß and the Commission of the European Communities submit that, in so far as the remuneration for that overtime is lower than the remuneration received for hours worked in the course of normal working hours, it gives rise to indirect

discrimination since, as a result, when part-time teachers (most of whom are women) work over and above their normal working hours — up to the point that the number of hours worked overall matches the normal hours for a full-time teacher — they receive less pay than full-time teachers for the same number of hours worked.

23 The German Government contends that, in the case before the referring court, there is no unequal treatment with regard to overtime, as full-time teachers and part-time teachers have the same hourly rate of pay, as laid down in Paragraph 4(3) of the MVergV, for the overtime they work.

24 In that regard, it should be borne in mind that Article 141 EC lays down the principle of equal pay for male and female workers for equal work. That principle forms part of the foundation of the European Community (see Case 43/75 *Defrenne* [1976] ECR 455, paragraph 12).

25 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 wholly unrelated to sex discrimination (Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, paragraphs 29 and 30, Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig and Others* [1994] ECR I-5727, paragraph 20, and Case C-285/02 *Elsner-Lakeberg* [2004] ECR I-5861, paragraph 12).

26 As regards the legislation at issue in the main proceedings, it is common ground that it does not establish any direct discrimination based on sex. It is therefore necessary to check whether such legislation is likely to lead to indirect discrimination contrary to Article 141 EC.

27 To do that, it is necessary initially to determine, first, whether that legislation establishes a difference in treatment between part-time workers and full-time workers, and, secondly, whether that difference in treatment affects a considerably higher number of women than men.

28 If there is an affirmative answer to those two questions, it must be asked whether there are objective factors wholly unrelated to sex discrimination which can justify the difference in treatment found.

29 In that regard, it must be noted that 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 (*Helmig and Others*, paragraph 26).

30 The Court has already, on two previous occasions, ruled on the question whether part-time workers and full-time workers received different treatment as regards remuneration for overtime.

31 At paragraphs 26 to 30 of *Helmig and Others*, the Court held that there is no difference in treatment between part-time workers and full-time workers where the

relevant national provisions provide for overtime supplements only in respect of hours worked in addition to normal working hours as fixed by collective agreement, and not in respect of those worked in addition to the normal working hours fixed for an individual. The Court found that, in those circumstances, part-time employees do, in fact, receive the same overall pay as full-time employees for the same number of hours worked, and that is so both where the hours worked by the part-time employee do not exceed the normal working hours as fixed by collective agreement and where they do, since the overtime supplements provided for in the latter situation are payable to both categories of worker.

32 By contrast, at paragraph 17 of *Elsner-Lakeberg*, the Court held that there is a difference in treatment between part-time and full-time workers where the applicable national provisions provide that all workers are required to work a minimum of three hours per month over and above their own normal working hours in order to be able to claim an overtime supplement.

33 In that case, Ms Elsner-Lakeberg, who was a teacher, taught for 15 hours per week, while full-time teachers taught for 24.5 hours per week. Ms Elsner-Lakeberg had worked 2.5 hours overtime during one month. Accordingly, she was not entitled to remuneration for that overtime. As a result, she was paid on the basis of 15 teaching hours even though she had worked 17.5 hours. By contrast, a full-time teacher who had worked 17.5 teaching hours was paid for 17.5 teaching hours, given that he had not exceeded his normal weekly working hours. The Court held that there was a difference in treatment as regards remuneration since, for an equal number of teaching hours worked, part-time workers were less well paid than full-time workers.

34 In the main proceedings, it is clear from the order for reference that Ms Voß, who works part-time, receives remuneration which, for an equal number of hours worked, is lower than that paid to a full-time teacher, in respect of the hours which she has worked over and above her normal working hours but which are insufficient to bring the hours worked overall above the level of normal working hours for full-time teachers.

35 Thus, a part-time teacher whose normal weekly working hours are 23 teaching hours per week and who works 3.5 hours over and above those normal working hours receives less pay than that received by a full-time teacher for 26.5 teaching hours.

36 An examination of the components of the remuneration shows that that situation arises because overtime hours, which are less well paid than 'normal' hours, are defined as hours worked over and above the normal working hours fixed for the individual teacher, a number which obviously varies according to whether the employee works part-time or full-time. It follows that the lower rate of remuneration for overtime applies to full-time teachers only in respect of hours worked over and above 26.5 teaching hours per week, while, in the case of part-time teachers, that rate is applied when they exceed their own normal working hours, the number of which is, by definition, lower than 26.5 hours. In the case of Ms Voß, the lower rate of remuneration is applied for hours worked over and above 23 teaching hours per week.

37 It must therefore be concluded that the national legislation at issue in the main proceedings, under which the remuneration for hours worked by part-time civil servants over and above their normal working hours — up to the point where the number of hours worked overall matches the normal hours for a full-time civil servant — is lower than the remuneration for hours worked by full-time civil servants, gives rise to a difference in treatment between the two categories of civil servant, to the detriment of those who work part-time.

38 In a situation where that difference in treatment affects a considerably higher number of women than men and to the extent that there are no objective factors wholly unrelated to sex discrimination which might justify such a difference in treatment, Article 141 EC precludes the relevant national legislation.

39 According to the referring court, approximately 88% of the teachers employed part-time by Land Berlin in the spring of 2000 were women.

40 Nevertheless, in order to ascertain whether the difference in treatment found between full-time workers and part-time workers affects a considerably higher number of women than men, the national court must take into account all those workers subject to the national legislation in which the difference in treatment, established at paragraph 37 of the present judgment, has its origin. For that purpose, it is for the national court to determine whether that difference in treatment originates in the BBesG and/or in the MVergV, since, in principle, it is the scope of the legislation at issue which determines the category of persons who may be included in the comparison (Case C-256/01 *Allonby* [2004] ECR I-873, paragraph 73).

41 It must also be recalled, as the Court held at paragraph 59 of the judgment in Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, that the best approach to the comparison of statistics is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are so affected.

42 If the statistics available indicate that, of the workforce, the percentage of part-time workers who are women is considerably higher than the percentage of part-time workers who are men, it will be necessary to hold that such a situation is evidence of

apparent sex discrimination, unless the legislation at issue in the main proceedings is justified by objective factors wholly unrelated to any discrimination based on sex (see, to that effect, *Seymour-Smith and Perez*, paragraphs 60 to 63).

43 In the case before the referring court, it is not clear from the order for reference that the lower remuneration for overtime worked by part-time workers is based on objective factors justified by reasons wholly unrelated to discrimination based on sex. It is for the national court, however, to check that point.

44 Consequently, the reply to the question referred must be that Article 141 EC is to be interpreted as precluding national legislation on the remuneration of civil servants, such as that at issue in the main proceedings — which defines overtime, for both full-time civil servants and part-time civil servants, as hours worked over and above their normal working hours, and which remunerates those additional hours at a rate lower than the hourly rate applied to their normal working hours, so that part-time civil servants are less well paid than full-time civil servants in respect of hours which are worked over and above their normal working hours, but which are not sufficient to bring the number of hours worked overall above the level of normal working hours for full-time civil servants — where:

— in the group of workers subject to that legislation, a considerably higher percentage of women is affected as compared with the percentage of men so affected;

and

— the difference in treatment is not justified by objective factors wholly unrelated to discrimination based on sex.

## Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Article 141 EC is to be interpreted as precluding national legislation on the remuneration of civil servants, such as that at issue in the main proceedings — which defines overtime, for both full-time civil servants and part-time civil servants, as hours worked over and above their normal working hours, and which remunerates those additional hours at a rate lower than the hourly rate applied to their normal working hours, so that part-time civil servants are less well paid than full-time civil servants in respect of hours which are worked over and above their normal working hours, but which are not sufficient to bring the**

**number of hours worked overall above the level of normal working hours for full-time civil servants — where:**

— **in the group of workers subject to that legislation, a considerably higher percentage of women is affected as compared with the percentage of men so affected;**

**and**

— **the difference in treatment is not justified by objective factors wholly unrelated to discrimination based on sex.**

[Signatures]