JUDGMENT OF THE COURT
17 October 1989 *

In Case 109/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Faglige Voldgiftsret (Denmark) for a preliminary ruling in the proceedings pending before that Court between

Handels- og Kontorfunktionærernes Forbund i Danmark (Union of Commercial and Clerical Employees, Denmark)

and

Dansk Arbejdsgiverforening (Danish Employers' Association), acting on behalf of Danfoss A/S

on the scope of the principle of equal pay for men and women,

THE COURT

composed of: O. Due, President, M. Zuleeg (President of Chamber), T. Koopmans, R. Joliet, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Diez de Velasco, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Handels- og Kontorfunktionærernes Forbund i Danmark, by L. S. Andersen,

the Dansk Arbejdsgiverforening, by H. Werner

* Language of the case: Danish.

the Commission of the European Communities, by J. Currall and I. Langermann, members of its Legal Department, acting as Agents,

the Danish Government, by P. Vesterdorf, Legal Adviser, acting as Agent,

the United Kingdom, by S. J. Hay and D. Wyatt, acting as Agents,

the Italian Government, by P. G. Ferri, avvocato dello Stato,

the Portuguese Government, by Mr Fernandez and Mrs Leitao, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 10 May 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 31 May 1989,

gives the following

Judgment

1 By order of 12 October 1987, which was received at the Court on 5 April 1988, the Faglige Voldgiftsret (a Danish industrial arbitration board) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation 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 (Official Journal 1975, L 45, p. 19), hereinafter referred to as 'the Equal Pay Directive'.

2 Those questions were raised in proceedings between the Handels- og Kontorfunktionærernes Forbund i Danmark (Union of Commercial and Clerical Employees, Denmark, hereinafter referred to as 'the Employees' Union') and the Dansk

Arbejdsgiverforening (Danish Employers' Association on behalf of Danfoss, hereinafter referred to as 'the Employers' Association'), acting on behalf of Danfoss A/S. The Employees' Union maintains that Danfoss's practice in the matter of wages and salaries involves sexual discrimination and therefore infringes the provisions of Article 1 of the Danish Law No 237 of 5 May 1986 which implements the Equal Pay Directive.

3 Danfoss A/S pays the same basic wage to employees in the same wage group. Making use of the possibility open to it under Article 9 of the collective agreement made on 9 March 1983 between the Employers' Association and the Employees' Union it awards, however, individual pay supplements calculated, *inter alia*, on the basis of mobility, training and seniority.

4 In the main proceedings the Employees' Union had first brought Danfoss A/S before the Industrial Arbitration Board, basing its case on the principle of equal pay for the benefit of two female employees, one of whom worked in the laboratory and the other in the reception and despatch department. In support of its action it had shown that in these two wage groups a man's average wage was higher than that of a woman's. In its decision of 16 April 1985 the Industrial Arbitration Board had however considered that in view of the small number of employees on whose pay the calculations had been based the Employees' Union had not proved discrimination. The Employees' Union thereupon brought fresh proceedings in which it produced more detailed statistics relating to the wages paid to 157 workers between 1982 and 1986 and showing that the average wage paid to men is 6.85% higher than that paid to women.

5 In those circumstances the Industrial Arbitration Board stayed the proceedings and referred to the Court a number of questions for a preliminary ruling for the interpretation of the Equal Pay Directive. They are worded as follows:

'1 (a) Where it is established that a male and female employee do the same work of equal value, who, in the view of the Court of Justice, is the person

(employer or employee) on whom the burden lies of proving that a differentiation in pay between the two employees is attributable/not attributable to considerations determined by sex?

1 (b) Is it incompatible with the directive on equal pay to give higher pay to male employees, who do the same work as female employees or work of equal value, solely by reference to subjective criteria — for example, staff mobility?

2 (a) Is it contrary to the directive to give to employees of a different sex who do the same work or work of equal value, over and above the basic pay for the job, special supplements for length of service, training, etc.?

2 (b) If so, how can an undertaking, without infringing the directive, make a differentiation in pay between individual members of staff?

2 (c) Is it contrary to the directive for employees of different sex who do the same work or work of equal value to be paid differently by reference to different training?

3 (a) Can an employee or an employees' organization, by proving that an undertaking with a large number of employees (e. g. at least 100) engaged in work of the same nature or value pays on average the women less than the men, establish that the directive is thereby infringed?

3 (b) If so, does it follow that the two groups of employees (men and women) must on average receive the same pay?

4 (a) In so far as it may be found that a difference in pay for the same work is attributable to the fact that the two employees are covered by different collective agreements, will it follow from that finding that the directive does not apply?

4 (b) Is it of importance in considering that question whether the two agreements in each case cover, exclusively or to an overwhelming degree, male and female employees respectively?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The judicial nature of the Industrial Arbitration Board

7 As regards the question whether the Industrial Arbitration Board is a court or tribunal of a Member State within the meaning of Article 177 of the Treaty, it should first be pointed out that, according to Article 22 of the Danish Law No 317 of 13 June 1973 on the Labour Court, disputes between parties to collective agreements are, in the absence of special provisions in such agreements, subject to the Agreed Standard Rules adopted by the Employers' Association and Employees' Union. An industrial arbitration board then hears the dispute at last instance. Either party may bring a case before the board irrespective of the objections of the other. The board's jurisdiction thus does not depend upon the parties' agreement.

8 The same provision of the aforementioned law governs the composition of the board and in particular the number of members who must be appointed by the parties and the way in which the umpire must be appointed in the absence of agreement between them. The composition of the industrial arbitration board is thus not within the parties' discretion.

9 In those circumstances the Industrial Arbitration Board must be regarded as a court or tribunal of a Member State within the meaning of Article 177 of the Treaty.

The burden of proof (Questions 1 (a) and 3 (a))

10 It is apparent from the documents before the Court that the issue between the parties to the main proceedings has its origin in the fact that the system of individual supplements applied to basic pay is implemented in such a way that a woman is unable to identify the reasons for a difference between her pay and that of a man doing the same work. Employees do not know what criteria in the matter of supplements are applied to them and how they are applied. They know only the amount of their supplemented pay without being able to determine the effect of the individual criteria. Those who are in a particular wage group are thus unable to compare the various components of their pay with those of the pay of their colleagues who are in the same wage group.

11 In those circumstances the questions put by the national court must be understood as asking whether the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.

12 In that respect it must first be borne in mind that in its judgment of 30 June 1988 in Case 318/86 *Commission* v *France* [1988] ECR 3559, paragraph 27, the Court condemned a system of recruitment, characterized by a lack of transparency, as being contrary to the principle of equal access to employment on the ground that the lack of transparency prevented any form of supervision by the national courts.

13 It should next be pointed out that in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees can establish differences only so far as average pay is concerned. They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.

14 Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed. The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality.

15 To show that his practice in the matter of wages does not systematically work to the disadvantage of female employees the employer will have to indicate how he has applied the criteria concerning supplements and will thus be forced to make his system of pay transparent.

16 In those circumstances the answers to Questions 1 (a) and 3 (a) must be that the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.

The lawfulness of the contested criteria relating to the supplements in question (Questions 1 (b) and 2 (a) and (c))

17 These questions ask in essence whether the directive must be interpreted as meaning that where it appears that the application of the criteria relating to

supplements, such as mobility, training or length of service, systematically works to the disadvantage of female employees, the employer may, none the less, and if so on what conditions, justify its use. To answer that question it is necessary to consider each of the criteria separately.

18 As regards, in the first place, the criterion of mobility, the documents before the Court do not clearly disclose what is to be meant by this. At the hearing the Employers' Association stated that willingness to work different hours did not in itself justify a wage supplement. In applying the criterion of mobility the employer makes a global assessment of the quality of work done by his employees. For that purpose he takes account, in particular, of their enthusiasm for their work, their sense of initiative and the amount of work done.

19 In those circumstances a distinction must be made according to whether the criterion of mobility is employed to reward the quality of work done by the employee or is used to reward the employee's adaptability to variable hours and varying places of work.

20 In the first case the criterion of mobility is undoubtedly wholly neutral from the point of view of sex. Where it systematically works to the disadvantage of women that can only be because the employer has misapplied it. It is inconceivable that the quality of work done by women should generally be less good. The employer cannot therefore justify applying the criterion of mobility, so understood, where its application proves to work systematically to the disadvantage of women.

21 The position is different in the second case. If it is understood as covering the employee's adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly.

22 In its judgment of 13 May 1986 in Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607, the Court took the view that an undertaking's policy of generally paying full-time employees more than part-time employees who were excluded from the undertaking's pension scheme, could affect far more women than men in view of the difficulties which women encountered in working full-time. It nevertheless held that the undertaking might show that its wages practice was based on objectively justified factors unrelated to any discrimination on grounds of sex and if the undertaking did so there was no infringement of Article 119 of the Treaty. Those considerations also apply in the case of a wages practice which specially remunerates the employee's adaptability to variable hours and varying places of work. The employer may therefore justify the remuneration of such adaptability by showing it is of importance for the performance of specific tasks entrusted to the employee.

23 In the second place, as regards the criterion of training, it is not be excluded that it may work to the disadvantage of women in so far as they have had less opportunity than men for training or have taken less advantage of such opportunity. Nevertheless, in view of the considerations set out in the aforementioned judgment of 13 May 1986 the employer may justify remuneration of special training by showing that it is of importance for the performance of specific tasks entrusted to the employee.

24 In the third place, as regards the criterion of length of service, it is also not to be excluded, as with training, that it may involve less advantageous treatment of women than of men in so far as women have entered the labour market more recently than men or more frequently suffer an interruption of their career. Nevertheless, since length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward it without having to establish the importance it has in the performance of specific tasks entrusted to the employee.

25 In those circumstances the answer to Questions 1 (b) and 2 (a) and (c) must be that the Equal Pay Directive must be interpreted as meaning that where it appears that the application of criteria, such as the employee's mobility, training or length

of service, for the award of pay supplements systematically works to the disadvantage of female employees:

(i) the employer may justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee, but not if that criterion is understood as covering the quality of the work done by the employee;

(ii) the employer may justify recourse to the criterion of training by showing that such training is of importance for the performance of the specific tasks which are entrusted to the employee;

(iii) the employer does not have to provide special justification for recourse to the criterion of length of service.

The manner in which an employer may lawfully differentiate the pay of his employees (Question 2 (b))

26 Since the answers to the questions on the lawfulness of the criteria for the supplements in issue (Questions 1 (b) and 2 (a) and (c)) have shown the manner in which the lawfulness of such criteria for supplements should be appraised under Community law, the question of a way in which an employer may lawfully differentiate the pay of his employees (Question 2 (b)) does not call for an answer.

The effect of the existence of two separate collective agreements (Question 4)

27 With this question the national court asks whether the fact that two separate collective agreements applying essentially to male and female employees respectively excludes the application of the Equal Pay Directive.

28 In that respect it is to be observed that the order making the reference itself shows that the aforementioned collective agreement of 9 March 1983 is the only one at issue in the present case. The parties to the main proceedings moreover confirmed

at the hearing that this is the case. In those circumstances it is not necessary to answer Question 4 put by the national court.

Costs

29 The costs incurred by the Danish, Italian, Portuguese and United Kingdom Governments and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the Industrial Arbitration Board, by order of 12 October 1987, hereby rules:

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 must be interpreted as meaning that:

(1) where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men;

(2) where it appears that the application of criteria for additional payments such as mobility, training or the length of service of the employee systematically works to the disadvantage of female employees:

(i) the employer may justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee, but not if that criterion is understood as covering the quality of the work done by the employee;

(ii) the employer may justify recourse to the criterion of training by showing that such training is of importance for the performance of the specific tasks which are entrusted to the employee;

(iii) the employer does not have to provide special justification for recourse to the criterion of length of service.

Due Zuleeg Koopmans

Joliet Moitinho de Almeida Rodríguez Iglesias Diez de Velasco

Delivered in open court in Luxembourg on 17 October 1989.

J.-G. Giraud
Registrar

O. Due
President