

JUDGMENT OF THE COURT
2 August 1993 *

In Case C-271/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the House of Lords for a preliminary ruling in the proceedings pending before that court between

M. H. Marshall

and

Southampton and South West Hampshire Area Health Authority,

on the interpretation of Council Directive 76/207/EEC of 9 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),

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg, J. L. Murray (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, F. Grévisse, M. Diez de Velasco, P. J. G. Kapteyn and D. A. O. Edward, Judges,

Advocate General: W. Van Gerven,
Registrar: H. von Holstein, Deputy Registrar,

* Language of the case: English.

after considering the written observations submitted on behalf of:

- Miss M. H. Marshall, by Michael J. Beloff QC, and Stephen Grosz (Bindman & Partners), Solicitor,

- Southampton and South West Hampshire Area Health Authority, by Robert Webb QC, Andrew Lydiard, Barrister-at-law, and Le Brasseurs, Solicitors,

- the United Kingdom, by John Collins, Assistant Treasury Solicitor, assisted by Derrick Wyatt QC, acting as Agents,

- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, and Claus-Dieter Quassowski, Oberregierungsrat in the same Ministry, acting as Agents,

- the Commission of the European Communities, by Nicholas Kahn, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Miss M. H. Marshall, Southampton and South West Hampshire Area Health Authority, the United Kingdom, Ireland, represented by Feichin McDonagh, Barrister-at-law, acting as Agent, and the Commission at the hearing on 8 December 1992,

after hearing the Opinion of the Advocate General at the sitting on 26 January 1993,

gives the following

Judgment

- 1 By order of 14 October 1991, received at the Court on 17 October 1991, the House of Lords referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 6 of Council Directive 76/207/EEC of 9 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, hereinafter 'the Directive').
- 2 Those questions were raised in connection with a dispute between Miss Marshall and her former employer, Southampton and South West Hampshire Area Health Authority (hereinafter 'the Authority'), concerning a claim for compensation for damage sustained by Miss Marshall as a result of her dismissal by the Authority.
- 3 The claim is based on the illegality of that dismissal which is not contested in the main proceedings, the Court having held, in the judgment of 26 February 1986 in Case 152/84 *Marshall v Southampton and South West Area Health Authority* [1986] ECR 723, in reply to questions submitted for a preliminary ruling by the Court of Appeal, that Article 5(1) of the Directive is to be interpreted as meaning that a general policy of termination of employment whereby a woman's employment is terminated solely because she has attained or passed the qualifying age for a State pension, that age being different under national legislation for men and for women, constitutes discrimination on grounds of sex contrary to the Directive.
- 4 The dispute in the main proceedings arises because the Industrial Tribunal, to which the Court of Appeal remitted the case to consider the question of compensation, assessed Miss Marshall's financial loss at UKL 18 405, including UKL 7 710 by way of interest, and awarded her compensation of UKL 19 405, including a sum of UKL 1 000 compensation for injury to feelings.

5 It appears from the case-file that, according to section 65(1)(b) of the Sex Discrimination Act 1975 ('the SDA'), where an Industrial Tribunal finds that a complaint of unlawful sex discrimination in relation to employment is well founded, it shall, if it considers it just and equitable to do so, make an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a County Court to pay to the complainant. Under section 65(2) of the SDA, however, the amount of compensation awarded may not exceed a specified limit, which at the relevant time was UKL 6 250.

6 It also appears from the case-file that at that time an Industrial Tribunal had no power — or at least that the relevant provisions were ambiguous as to whether it had such a power — to award interest on compensation for an act of unlawful sex discrimination in relation to employment.

7 The Industrial Tribunal held that section 35 A of the Supreme Court Act 1981 entitled it to include in its award a sum in respect of interest. In its view, compensation was the only appropriate remedy in Miss Marshall's case, but the limit laid down by section 65(2) of the SDA rendered that compensation inadequate and in breach of Article 6 of the Directive.

8 Following the Industrial Tribunal's decision, the Authority paid Miss Marshall the sum of UKL 5 445 in addition to the UKL 6 250 corresponding to the abovementioned statutory limit which it had paid even before the case had been remitted to the Industrial Tribunal. However, it appealed against the inclusion in the award of UKL 7 710 in respect of interest.

9 After the Employment Appeal Tribunal allowed the Authority's appeal and the Court of Appeal dismissed Miss Marshall's further appeal, she appealed to the House of Lords, which decided to stay the proceedings and to submit to the Court of Justice the following questions for a preliminary ruling:

- ‘1. Where the national legislation of a Member State provides for the payment of compensation as one remedy available by judicial process to a person who has been subjected to unlawful discrimination of a kind prohibited by Council Directive 76/207/EEC of 9 February 1976 (“the Directive”), is the Member State guilty of a failure to implement Article 6 of the Directive by reason of the imposition by the national legislation of an upper limit of UKL 6 250 on the amount of compensation recoverable by such a person?

2. Where the national legislation provides for the payment of compensation as aforesaid, is it essential to the due implementation of Article 6 of the Directive that the compensation to be awarded:
 - (a) should not be less than the amount of the loss found to have been sustained by reason of the unlawful discrimination, and

 - (b) should include an award of interest on the principal amount of the loss so found from the date of the unlawful discrimination to the date when the compensation is paid?

3. If the national legislation of a Member State has failed to implement Article 6 of the Directive in any of the respects referred to in Questions 1 and 2, is a person who has been subjected to unlawful discrimination as aforesaid entitled as against an authority which is an emanation of the Member State to rely on the provisions of Article 6 as overriding the limits imposed by the national legislation on the amount of compensation recoverable?’

¹⁰ Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant legislation and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Scope of the questions

- 11 In essence, the questions put by the House of Lords ask whether it follows from the Directive that a victim of sex discrimination on the part of an authority which is an emanation of the State is entitled to full reparation for the loss and damage he or she has sustained and whether Article 6 of the Directive enables such a person to contest the applicability of national legislation which is intended to give effect to the Directive but sets limits to the compensation recoverable. The fundamental problem is therefore to determine the meaning and scope of Article 6 having regard to the principles and aims of the Directive.
- 12 It should, however, be noted, given the tenor of those questions read in the light of the preceding judgments of the Court of Appeal and the Employment Appeal Tribunal, that the House of Lords has refrained from asking the Court to rule on the point, raised by the United Kingdom, as to whether a court or tribunal, such as an Industrial Tribunal, specially established to deal with employment disputes may, or must, disregard the statutory limits on its powers in order to satisfy the requirements of Community law.
- 13 The United Kingdom and Ireland also submitted that, even though the preliminary questions are concerned both with the statutory limit and the issue of interest, the Court should confine its reply to the latter issue, since the appeal brought by Miss Marshall before the House of Lords turns solely on whether the Industrial Tribunal has the power to grant interest and the role of the Court of Justice is to rule on real issues, not on hypothetical questions.
- 14 As to that, it is for the national court, subject to the Court's assessment of its own jurisdiction, to determine what points of Community law are to be put to the Court of Justice so it can rule upon all the points of interpretation necessary to resolve the dispute pending before the national court.

- 15 In this case, the House of Lords has made a point of stating at paragraph 12 of its order that, although the appeal concerns the power of the Industrial Tribunal to award interest in cases of unlawful sex discrimination in connection with an employment relationship, the limit on compensation imposed by section 65(2) of the SDA is also in issue and was in issue before the Court of Appeal. The House of Lords takes the view that, if that provision were applicable to the compensation awarded to Miss Marshall, the question of interest would thereby be resolved since the capital element of her loss exceeded the statutory limit.
- 16 In those circumstances, there is nothing to prevent all the aspects of the national court's questions from being considered.

Meaning and scope of Article 6 of Directive 76/207

- 17 As the Court has consistently held, the third paragraph of Article 189 of the Treaty requires each Member State to which a directive is addressed to adopt, in its national legal system, all the measures necessary to ensure that its provisions are fully effective, in accordance with the objective pursued by the directive, while leaving to the Member State the choice of the forms and methods used to achieve that objective.
- 18 It is therefore necessary to identify the objectives of the Directive and in particular to see whether, in the event of a breach of the prohibition of discrimination, its provisions leave Member States a degree of discretion as regards the form and content of the sanctions to be applied.
- 19 The purpose of the Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards the various aspects of employment, in particular working conditions, including the conditions governing dismissal.

- 20 To that end, Article 2 establishes the principle of equal treatment and its limits, whilst Article 5(1) defines the scope of that principle with regard specifically to working conditions, including conditions governing dismissal, to the effect that men and women are to be guaranteed the same conditions without discrimination on grounds of sex.
- 21 As the Court held in Case 152/84 *Marshall*, cited above, since Article 5(1) prohibits generally and unequivocally all discrimination on grounds of sex, in particular with regard to dismissal, it may be relied upon as against a State authority acting in its capacity as an employer, in order to avoid the application of any national provision which does not conform to that article.
- 22 Article 6 of the Directive puts Member States under a duty to take the necessary measures to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. Such obligation implies that the measures in question should be sufficiently effective to achieve the objective of the Directive and should be capable of being effectively relied upon by the persons concerned before national courts.
- 23 As the Court held in the judgment in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, at paragraph 18, Article 6 does not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but leaves Member States free to choose between the different solutions suitable for achieving the objective of the Directive, depending on the different situations which may arise.
- 24 However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. As the Court stated in paragraph 23 of the judgment in *Von Colson and Kamann*, cited above, those measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.

- 25 Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal contrary to Article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained.
- 26 Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.

The first and second questions

- 27 In its first question, the House of Lords seeks to establish whether it is contrary to Article 6 of the Directive for national provisions to lay down an upper limit on the amount of compensation recoverable by a victim of discrimination.
- 28 In its second question, the House of Lords asks whether Article 6 requires (a) that the compensation for the damage sustained as a result of the illegal discrimination should be full and (b) that it should include an award of interest on the principal amount from the date of the unlawful discrimination to the date when compensation is paid.
- 29 The Court's interpretation of Article 6 as set out above provides a direct reply to the first part of the second question relating to the level of compensation required by that provision.

30 It also follows from that interpretation that the fixing of an upper limit of the kind at issue in the main proceedings cannot, by definition, constitute proper implementation of Article 6 of the Directive, since it limits the amount of compensation *a priori* to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.

31 With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.

32 Accordingly, the reply to be given to the first and second questions is that the interpretation of Article 6 of the Directive must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed *a priori* or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid.

The third question

33 In its third question, the House of Lords seeks to establish whether a person who has been injured as a result of discriminatory dismissal may rely, as against an authority of the State acting in its capacity as employer, on Article 6 of the Directive in order to contest the application of national rules which impose limits on the amount of compensation recoverable by way of reparation.

34 It follows from the considerations set out above as to the meaning and scope of Article 6 of the Directive, that that provision is an essential factor for attaining the

fundamental objective of equal treatment for men and women, in particular as regards working conditions, including the conditions governing dismissal, referred to in Article 5(1) of the Directive, and that, where, in the event of discriminatory dismissal, financial compensation is the measure adopted in order to restore that equality, such compensation must be full and may not be limited *a priori* in terms of its amount.

- 35 Accordingly, the combined provisions of Article 6 and Article 5 of the Directive give rise, on the part of a person who has been injured as a result of discriminatory dismissal, to rights which that person must be able to rely upon before the national courts as against the State and authorities which are an emanation of the State.
- 36 The fact that Member States may choose among different solutions in order to achieve the objective pursued by the Directive depending on the situations which may arise, cannot result in an individual's being prevented from relying on Article 6 in a situation such as that in the main proceedings where the national authorities have no degree of discretion in applying the chosen solution.
- 37 It should be pointed out in that connection that, as appears in particular from the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italian Republic* [1991] ECR I-5357, at paragraph 17, the right of a State to choose among several possible means of achieving the objectives of a directive does not exclude the possibility for individuals of enforcing before national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone.
- 38 Accordingly, the reply to be given to the third question is that a person who has been injured as a result of discriminatory dismissal may rely on the provisions of

Article 6 of the Directive as against an authority of the State acting in its capacity as an employer in order to set aside a national provision which imposes limits on the amount of compensation recoverable by way of reparation.

Costs

- ³⁹ The costs incurred by the United Kingdom, the Federal Republic of Germany, Ireland 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,

in answer to the questions referred to it by the House of Lords, by order of 14 October 1991, hereby rules:

1. The interpretation of Article 6 of Council Directive 76/207/EEC of 9 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 must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed *a priori* or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid.

2. A person who has been injured as a result of discriminatory dismissal may rely on the provisions of Article 6 of the Directive as against an authority of the State acting in its capacity as an employer in order to set aside a national provision which imposes limits on the amount of compensation recoverable by way of reparation.

Due	Kakouris	Rodríguez Iglesias	Zuleeg
	Murray	Mancini	Schockweiler
Grévisse	Diez de Velasco	Kapteyn	Edward

Delivered in open court in Luxembourg on 2 August 1993.

J.-G. Giraud	O. Due
Registrar	President