JUDGMENT OF THE COURT (Sixth Chamber)
2 October 1997 *

In Case C-1/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bayerisches Verwaltungsgericht Ansbach (Germany) for a preliminary ruling in the proceedings pending before that court between

Hellen Gerster

and

Freistaat Bayern,

on the interpretation of Article 119 of the EC Treaty, 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) and 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),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J. L. Murray (Rapporteur), President of the Fourth Chamber, acting for the President of the Sixth Chamber, P. J. G. Kapteyn and G. Hirsch, Judges,

Advocate General: A. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mrs Gerster, by Martina Schilke, Rechtsanwalt, Nuremberg,

— Freistaat Bayern, by Walter Rzepka, Generallandesanwalt with the Landesanwaltschaft Bayern,

— the Irish Government, by Michael A. Buckley, Chief State Solicitor, acting as Agent, and Mary Finlay, Senior Counsel at the Bar of Ireland, and Finola Flanagan, Barrister,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitors' Department, acting as Agent, and David Pannick QC,

— the Commission of the European Communities, by Christopher Docksey, of its Legal Service, and Horstpeter Kreppel, a national civil servant seconded to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Gerster, represented by Martina Schilke; Freistaat Bayern, represented by Gerald Weber, Oberlandesanwalt with the Landesanwaltschaft Bayern; the Greek Government, represented by Vassileios Kontolaimos, Assistant Legal Adviser with the State Legal Service, acting as Agent; the Irish Government, represented by Mary Finlay and Finola Flanagan; the United Kingdom Government, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and David Pannick QC; and the Commission, represented by Marie Wolfcarius, of its Legal Service, acting as Agent, assisted by Klaus Bertelsmann, Rechtsanwalt, Hamburg, at the hearing on 13 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 22 October 1996,

gives the following

Judgment

1 By order of 23 November 1994, received at the Court on 5 January 1995, the Bayerisches Verwaltungsgericht (Bavarian Administrative Court), Ansbach, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 119 of the EC Treaty, 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) and 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).

2 Those questions were raised in proceedings between Mrs Gerster and Freistaat Bayern (Bavarian State) concerning its rejection of Mrs Gerster's candidature for a post to be filled by promotion.

3 Article 119 of the Treaty lays down the principle that men and women should receive equal pay for equal work. For such purposes, according to the second paragraph of Article 119, '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.

4 Article 1 of Directive 75/117 refers to the principle of equal pay, which 'means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration'.

5 Article 1(1) of Directive 76/207 states that the directive's purpose is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions. That principle is known as 'the principle of equal treatment'. Under Article 3(1), 'application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy'.

6 Article 3(2) of the German Basic Law provides that men and women are to have equal rights. Moreover, the State is to encourage the effective implementation of equal rights for men and women and to strive to bring existing inequalities to an end. As regards members of the public service — whether officials, employees or manual workers — Article 33(2) of the Basic Law provides that every German is

to be equally eligible for any public office according to his aptitude, qualifications and professional abilities.

7 The Beamtenrechtsrahmengesetz (Framework Law for legislation governing the public service, hereinafter 'the BRRG') requires the *Länder* to comply with certain rules when adopting laws, regulations or administrative provisions within their sphere of competence, thus leaving them a discretion in matters which are not binding. Accordingly, Paragraph 7 of the BRRG provides that appointments are to be made on the basis of the aptitude, qualifications and abilities of each candidate, irrespective of gender.

8 The public service is governed at both Federal and *Land* level by careers regulations which must comply with secondary legislation laid down by the Federal State or, in the case of the *Länder*, by the *Land* concerned. These regulations govern recruitment, qualifying periods and career development for each category of public servant.

9 The rules applicable to the Bavarian State civil service are set out in the Laufbahnverordnung (hereinafter 'the LBV'). This provides that promotion to a higher grade is to be based on merit and length of service. On the strength of a performance rating from his immediate superior, a civil servant is assigned a 'minimum qualifying period' which runs from the date of his last promotion and at the end of which he may be promoted to a higher grade. Thus a civil servant assessed as 'very good' may be promoted to a higher grade after serving at least three and a half years in his current post. If, however, the rating were 'broadly satisfactory', that qualifying period would instead be of five years' duration. On completion of the minimum qualifying period, a civil servant may (as from the theoretical date of promotion) actually be promoted if a post is available. At the end of the initial

qualifying period, the official is placed on a 'list of persons eligible for promotion'. The civil servants concerned are listed in the same order as the dates on which, in theory, they became eligible for promotion.

10 Section 13(2) of the LBV, as applicable at the material time, provides that 'periods of employment during which the hours worked are less than half normal working hours are not to be taken into account for the purposes of calculating length of service; periods of employment during which the hours worked are at least half of normal working hours are treated as equivalent to two-thirds for the purposes of calculating length of service; periods of employment during which the hours worked exceed two-thirds of normal working hours are deemed equivalent to periods of full-time employment for the purposes of calculating length of service'.

11 Section 13(2) of the LBV was amended in 1995 to the effect that, as from 17 October 1995, for the purposes of calculating length of service in promotion procedures, part-time and full-time workers are to be treated alike. It further provides that, in determining to what extent lesser periods of employment must be taken into account for such calculations, it is necessary to have regard to all the circumstances in each individual case. The amendment does not apply in Mrs Gerster's case, however, because of the timing of her complaint against the decision rejecting her candidature.

12 Mrs Gerster entered the service of the Bavarian State finance administration on 1 August 1966. She was made a probationary official on 1 May 1968 and given a permanent appointment on 27 June 1977. Mrs Gerster took unpaid leave between 7 September 1984 and 6 September 1987, since when she has worked part-time — one-half of normal working hours — at the local office of the Bavarian State finance administration.

13 By letter of 2 December 1993, Mrs Gerster applied for a vacancy with the Finanzamt Nürnberg West (Nuremberg-West Tax Office). In her letter she asked for her

part-time employment since September 1987 to be treated as full-time employment for the purpose of calculating length of service when it came to assessing her candidature.

14 The Oberfinanzdirektion (Principal Revenue Office), Nuremberg, rejected Mrs Gerster's application by decision of 5 January 1994 on the ground that the vacant post should be filled by a civil servant placed higher than Mrs Gerster on 'the list of persons eligible for promotion'. By decision of 25 April 1994 this same administration dismissed Mrs Gerster's complaint against its decision as unfounded.

15 On 20 May 1994 Mrs Gerster brought proceedings before the Bayerisches Verwaltungsgericht, arguing that the decision rejecting her candidature was contrary to Community law and, more specifically, that it infringed Article 119 of the Treaty and Directives 75/117 and 76/207.

16 It was in those circumstances that the Bayerisches Verwaltungsgericht stayed proceedings and referred the following three questions to the Court for a preliminary ruling:

'(1) Is Article 119 of the EC Treaty applicable to public servants?

(2) If Question 1 is to be answered in the affirmative, is there an infringement of Article 119 of the EC Treaty and of Council Directive 75/117/EEC in the form of indirect discrimination against women where Section 13(2), second sentence, of the Laufbahnverordnung (regulations on career structure) provides that, for the purpose of calculating the length of service of public servants, periods of employment involving working hours of at least one-half to two-thirds of normal working hours are counted only as two-thirds of normal working hours?

(3) If Question 1 is to be answered in the affirmative, is there an infringement of Council Directive 76/207/EEC in the form of indirect discrimination against women in regard to access to career progression (promotion), where Section 13(2), second sentence, of the Laufbahnverordnung provides that, for the purpose of calculating the length of service of public servants, periods of employment involving working hours of at least one-half to two-thirds of normal working hours are counted only as two-thirds of normal working hours?'

Question 1

17 Article 119 of the Treaty lays down the principle that men and women should receive equal pay for equal work. As the Court has already pointed out in *Defrenne II* (Case 43/76 *Defrenne* v *Sabena* [1976] ECR 455), paragraph 12, this principle forms part of the foundations of the Community.

18 To exclude the public service from the scope of Article 119 would run counter to that provision's objective. Moreover, the Court stated in Case 248/83 *Commission* v *Germany* [1985] ECR 1459, paragraph 16, that both Directive 76/207 and Directive 75/117 apply to employment in the public service. It further stated that those directives — like Article 119 — are of general application, a factor inherent in the very nature of the principle which they lay down.

19 The answer to the first question must therefore be that Article 119 of the Treaty is to be interpreted as applying to employment relationships arising in the public service.

Question 2

20 By its second question, the Bayerisches Verwaltungsgericht asks whether Article 119 of the Treaty and Directive 75/117 preclude a measure which requires that, for the purpose of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours.

21 First of all, the Court emphasized in *Defrenne III* (Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365), paragraph 20, that the scope of Article 119 cannot be extended to aspects of the employment relationship other than those expressly referred to.

22 Mrs Gerster argues that, since the case before the Bayerisches Verwaltungsgericht — like the situation which gave rise to the judgment in Case C-148/89 *Nimz* [1991] ECR I-297 — concerns a system for the classification of salaries which is practically automatic, it falls within the scope of the term 'pay' as used in Article 119 of the Treaty and infringes Directive 75/117.

23 It should be emphasized that where, as in the present case, a civil servant is placed on the list of candidates eligible for promotion, his progression to a higher grade, and accordingly to a higher level of remuneration, is not a right but a mere possibility. Actual promotion depends on various factors such as, first, the availability of a post in the higher grade and, secondly, the maintenance of his position on the list of persons eligible for promotion. A provision such as Section 13(2), second sentence, of the LBV is thus primarily designed to lay down the conditions, in terms of length of service, for a civil servant's inclusion on the list of persons eligible for promotion and thus for access to a higher grade. Accordingly, it only affects indirectly the level of pay to which the person concerned is entitled upon completion of the promotions procedure.

24 *Nimz* concerned progression to a higher grade upon completion of a qualifying period, on the basis of a specified length of service. Such a move was practically automatic where the person concerned had completed the period prescribed and had not been dismissed. The rules which apply in the present case, albeit indirectly linked to pay, concern access to career advancement. Inequality in this context does not therefore fall within the scope of Article 119 of the Treaty or of Directive 75/117.

25 The answer to the second question must therefore be that a provision of national law which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours does not fall with the scope of Article 119 of the Treaty or of Directive 75/117.

Question 3

26 By the third question, the Bayerisches Verwaltungsgericht essentially asks whether Directive 76/207 precludes a provision of national law requiring that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours.

27 It should be recalled that Directive 76/207, according to Article 1 thereof, concerns the implementation in the Member States of the principle of equal treatment for men and women as regards access to employment, including promotion.

28 Article 3 of Directive 76/207 states that there is to be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

29 The provision of national law at issue in the main proceedings does not discriminate directly, since the method of calculating length of service in the case of part-time employees is not determined by gender. It is therefore necessary to consider whether such a provision may constitute indirect discrimination.

30 According to settled case-law, indirect discrimination arises where a national measure, although formulated in neutral terms, works to the disadvantage of far more women than men (see, to that effect, Case C-444/93 *Megner and Scheffel* v *Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741, paragraph 24; and Case C-343/92 *De Weerd (née Roks) and Others* [1994] ECR I-571, paragraph 33).

31 According to Section 13(2) of the LBV, part-time employees whose working hours exceed two-thirds of normal working hours are deemed to have worked full-time for the purposes of calculating their length of service. Likewise, part-time employees whose working hours amount to at least one-half of normal working hours are regarded as working two-thirds of normal working hours. On the other hand, if the proportion of hours worked is any lower, those hours are totally disregarded for the purposes of calculating length of service.

32 Accordingly, it is common ground that the provision of national law at issue in the main proceedings treats part-time employees less favourably than full-time employees in so far as, since the former accrue length of service more slowly, they perforce gain promotion later.

33 Mrs Gerster maintains that, in the department where she completed her period of service, 87% of part-time employees are women. According to the national court's findings, this percentage reflects the situation across the board in the Bavarian civil service.

34 In a situation of that kind, it must be concluded that in practice provisions such as those at issue in the main proceedings result in discrimination against women employees as compared with men and must in principle be regarded as contrary to Directive 76/207. The position would be different only if the distinction between those two categories of employee were justified by factors unrelated to any discrimination on grounds of sex (see *inter alia* Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607, paragraph 29; Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2743, paragraph 12; and Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation* v *Lewark* [1996] ECR I-243, paragraph 31).

35 The Court has consistently held that it is for the national court, which alone has jurisdiction to assess the facts and interpret the national legislation, to determine in the light of all the circumstances whether, and to what extent, a legislative provision which, although applying irrespective of gender, actually affects a greater number of women than men, is justified by objective reasons unrelated to any discrimination on grounds of sex (see Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911, paragraph 14; *Bilka*, paragraph 36, and *Rinner-Kühn*, paragraph 15).

36 According to the Bavarian State, the discrimination is objectively justified since the system is based on the administration's need to establish a general yardstick in terms of length of service against which the professional experience of employees can be assessed before they can be regarded as eligible for promotion to a higher grade. The Bavarian State maintains that civil servants who work part-time need to complete longer periods of service than those who work full-time, if they are to acquire the professional skills and abilities necessary for duties at a higher level.

37 Mrs Gerster, on the other hand, argues that in her capacity as a part-time employee she has performed, in the course of the last 10 years of her professional life, duties attaching to the grade to which she aspired to be promoted.

38 On that point, it should first be noted that, according to the Bayerisches Verwaltungsgericht, the defendant stated that the amendment made to the LBV in 1995 was 'intended to assist in making working life more compatible with family life'. The protection of women — and men — both in family life and in the workplace is a principle broadly accepted in the legal systems of the Member States as a natural corollary of the fact that men and women are equal, and is upheld by Community law.

39 In *Nimz*, moreover, the Court took the view that it is impossible to identify objective criteria unrelated to any discrimination on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalization concerning certain categories of worker. Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours.

40 If the Bayerisches Verwaltungsgericht finds — despite the fact that Mrs Gerster has already carried out on a part-time basis the duties attaching to the grade to which she aspires to be promoted, and that length of service was not calculated in accordance with a criterion of strict proportionality — that part-time employees are generally slower than full-time employees in acquiring job-related abilities and skills, and that the competent authorities are in a position to establish that the measures chosen reflect a legitimate social policy aim, are an appropriate means of achieving that aim and are necessary in order to do so, the mere fact that the legislative provision affects far more women than men cannot be regarded as an infringement of Directive 76/207.

41 If the Bayerisches Verwaltungsgericht concludes that there is no special link between length of service and acquisition of a certain level of knowledge or experience, the requirement laid down in Section 13(2), second sentence, of the LBV to the effect that part-time employees must complete a period of service more than

one-third longer than that completed by a full-time official in order to have approximately the same chance of promotion must be regarded as contrary to the provisions of Directive 76/207.

42 The answer to the third question must therefore be that Directive 76/207 precludes national legislation which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours, save where such legislation is justified by objective criteria unrelated to any discrimination on grounds of sex.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bayerisches Verwaltungsgericht Ansbach by order of 23 November 1994, hereby rules:

1. Article 119 of the EC Treaty is to be interpreted as applying to employment relationships arising in the public service.

2. **A provision of national law which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours does not fall with the scope of Article 119 of the Treaty or 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.**

3. **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 precludes national legislation which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours, save where such legislation is justified by objective criteria unrelated to any discrimination on grounds of sex.**

Murray Kapteyn Hirsch

Delivered in open court in Luxembourg on 2 October 1997.

R. Grass J. L. Murray

Registrar For the President of the Sixth Chamber