JUDGMENT OF THE COURT

22 April 1997 *

In Case C-180/95,

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

Nils Draehmpaehl

and

Urania Immobilienservice OHG

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),

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini (Rapporteur), J. C. Moitinho de Almeida and L. Sevón (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, G. Hirsch, H. Ragnemalm, M. Wathelet and R. Schintgen, Judges,

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Nils Draehmpaehl, by Klaus Bertelsmann, Rechtsanwalt, Hamburg, and Heide M. Pfarr, Professor,

— the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry for the Economy, and Gereon Thiele, Assessor at the same Ministry, acting as Agents,

— the Commission of the European Communities, by Marie Wolfcarius, of its Legal Service, and Horstpeter Kreppel, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Draehmpaehl, represented by Klaus Bertelsmann; of the German Government, represented by Ernst Röder; and of the Commission, represented by Bernhard Jansen, Legal Adviser, acting as Agent, and Marie Wolfcarius, at the hearing on 26 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 14 January 1997,

gives the following

Judgment

1 By order of 22 May 1995, received at the Court on 9 June 1995, the Arbeitsgericht (Labour Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Articles 2 and 3 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 proceedings between Nils Draehmpaehl and Urania Immobilienservice OHG (hereinafter 'Urania') for reparation of damage allegedly suffered by Mr Draehmpaehl as a result of discrimination on grounds of sex in the making of an appointment.

The Directive

3 The purpose of the Directive is, according to Article 1, 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.

4 To that end, Article 2(1) of the Directive provides that the principle of equal treatment for men and women is to mean that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.

5 According to Article 3(1) of the Directive, application of this principle means 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. Article 3(2)(a) provides that the Member States are to take the measures necessary to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished.

6 Finally, Article 6 of the Directive obliges the Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment to pursue their claims by judicial process after possible recourse to other competent authorities.

The relevant national legislation

7 The relevant provisions of national law concerning equal treatment of men and women in matters of employment are contained in the *Bürgerliches Gesetzbuch* (German Civil Code, hereinafter 'the BGB').

8 Paragraph 611a(1) of the BGB provides that an employer may not discriminate against any worker on grounds of sex in connection with an agreement or the adoption of a measure, particularly as regards establishment of the employment

relationship, promotion, the giving of instructions or dismissal. A difference in treatment on grounds of sex is, however, permissible if an agreement or the measure concerns an activity which, owing to its specific nature, can only be performed by workers of a particular sex. The burden of proving that the activity can be performed only by workers of a particular sex is on the employer.

9 Paragraph 611a(2) of the BGB provides that if, in the establishment of an employment relationship, an employer becomes liable for a breach of the prohibition of discrimination laid down in subparagraph (1), the applicant discriminated against may claim appropriate financial compensation not exceeding three months' earnings. A month's earnings is to be what the applicant would have been entitled to earn, in cash and in kind, by working normal hours in the month in which an employment relationship should have been established.

10 Paragraph 611b of the BGB provides that an employer may not offer a job only to workers of a particular sex except in the cases set out in the second sentence of Paragraph 611a(1).

11 Paragraph 61b(2) of the Arbeitsgerichtsgesetz (Law on the Organization of Labour Courts, hereinafter 'the ArbGG') provides that, if a number of persons who have been discriminated against in the establishment of an employment relationship claim in legal proceedings compensation pursuant to Paragraph 611a(2) of the BGB, the aggregate amount of the awards of compensation is to be limited, upon application by the employer, to six months' earnings or, when a single recruitment procedure was carried out by the employer with the aim of establishing several employment relationships, to 12 months' earnings. Where the employer has already satisfied claims for compensation, the maximum amount, as laid down in the first sentence, is to be reduced proportionately. If the compensation to which the plaintiffs would be entitled exceeds in total that maximum amount, the individual awards of compensation are to be reduced in the proportion which their aggregate bears to that maximum amount.

Background to the dispute

12 According to the case-file in the main proceedings, Mr Draehmpaehl applied by letter dated 17 November 1994 for a post advertised by Urania in the daily newspaper *Hamburger Abendblatt*. The advertisement was worded as follows:

'We are seeking an experienced female assistant in our sales management department. If you can get along with the chaotic members of a sales-orientated firm, are willing to make them coffee, get little praise and can work hard, you are the right person for us. We need someone who is able to work on the computer and think with and for others. If you can really face this challenge, we await your application with documents giving full information. But do not say we have not warned you ...'

Urania did not reply to Mr Draehmpaehl's letter, nor did it return the documents accompanying his application.

13 Claiming that he was the best qualified applicant for the position and that he had suffered discrimination on grounds of sex in the making of an appointment, Mr Draehmpaehl brought proceedings in the Arbeitsgericht Hamburg for reparation of damage by payment of compensation equal to three-and-a-half months' earnings.

14 It is also apparent from the national court's case-file that in parallel proceedings brought before another chamber of the same court another male candidate has also brought proceedings for compensation against Urania on similar grounds.

15 The Arbeitsgericht took the view that the plaintiff had been discriminated against by Urania on the grounds of his sex since its job advertisement was formulated in terms which were not neutral and was clearly addressed to women. It also found that there were no clear grounds which would justify an exception, within the meaning of Paragraph 611a(1) of the BGB, and concluded that Urania was in principle bound to pay compensation to the plaintiff. However, it also took the view that the outcome of the proceedings depended on interpretation of Community law. It therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a statutory provision which makes it a condition for an award of compensation for discrimination on grounds of sex in the making of an appointment that there must be fault on the part of the employer conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions?

2. Does a statutory provision which prescribes an upper limit of three months' salary as compensation for discrimination on grounds of sex in the making of an appointment — in contrast to other provisions of domestic civil and labour law — for applicants of either sex who have been discriminated against in the procedure, but who would not have obtained the position to be filled even in the event of non-discriminatory selection by reason of the superior qualifications of the applicant appointed, conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC 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?

3. Does a statutory provision which prescribes an upper limit of three month's salary as compensation for discrimination on grounds of sex in the making of an appointment — in contrast to other domestic provisions of civil and labour

law — for applicants of either sex who, in the event of non-discriminatory selection, would have obtained the position to be filled, conflict with Articles 2(1) and 3(1) 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?

4. Does a statutory provision which, where compensation is claimed by several parties for discrimination on grounds of sex in the making of an appointment, prescribes an upper limit of the aggregate of six months' salary for all persons who have suffered discrimination — in contrast to other provisions of domestic civil and labour law — conflict with Articles 2(1) and 3(1) 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?'

The first question

16 By its first question the national court asks in substance whether the Directive and, in particular, Articles 2(1) and 3(1) thereof, preclude provisions of domestic law which make reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment subject to the requirement of fault.

17 In paragraph 22 of its judgment in Case C-177/88 *Dekker* [1990] ECR I-3941 the Court held that the Directive does not make liability on the part of the person guilty of discrimination conditional on proof of fault or on the absence of any ground discharging such liability.

18 In paragraph 25 of that judgment the Court also stated that, when the sanction chosen by the Member State is provided for in rules governing employers' civil liability, any breach of the prohibition of discrimination must, in itself, be sufficient to render the employer fully liable, without there being any possibility of invoking the grounds of exemption provided for by domestic law.

19 It must therefore be concluded that the Directive precludes provisions of domestic law which, like Paragraph 611a(1) and (2) of the BGB, make reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment subject to the requirement of fault.

20 That conclusion cannot be affected by the German Government's argument that proof of such fault is easy to adduce since, in German law, fault entails liability for deliberate or negligent acts.

21 It must be pointed out in this regard that, as was stated in paragraph 25 of the judgment in *Dekker*, the Directive does not provide for any ground of exemption from liability on which the person guilty of discrimination could rely and does not make reparation of such damage conditional on the existence of fault, no matter how easy if would be to adduce proof of fault.

22 The answer to the first question must therefore be that when a Member State chooses to penalize, under rules governing civil liability, breach of the prohibition of discrimination, the Directive and, in particular, Articles 2(1) and 3(1) thereof, preclude provisions of domestic law which make reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment subject to the requirement of fault.

The second and third questions

23 By these questions, which should be examined together, the Arbeitsgericht asks in substance whether the Directive precludes provisions of domestic law which place a ceiling of three months' salary on the amount of compensation which may be claimed by applicants discriminated against on grounds of their sex in the making of appointments. It also asks whether the answer to that question applies equally to applicants who were discriminated against in the recruitment procedure but who, owing to the superior qualifications of the applicant engaged, would not have obtained the position even if the selection process had been free of discrimination and to those who were discriminated against in the recruitment procedure and who would have obtained the position to be filled if selection had been carried out without discrimination.

24 In this regard, it must be pointed out first of all that, even though the Directive does not impose a specific sanction on the Member States, nevertheless Article 6 obliges them to adopt measures which are sufficiently effective for achieving the aim of the Directive and to ensure that those measures may be effectively relied on before the national courts by the persons concerned (Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 18).

25 Moreover, the Directive requires that, if a Member State chooses to penalize breach of the prohibition of discrimination by the award of compensation, that compensation must be such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained. Purely nominal compensation would not satisfy the requirements of an effective transposition of the Directive (*Von Colson and Kamann*, paragraphs 23 and 24).

26 Similarly, the German Government's argument that compensation consisting of a maximum of three months' salary is more than nominal and represents an appreciable, considerable and dissuasive financial burden, thus awarding the person discriminated against appreciable compensation, cannot be regarded as well founded.

27 As the Court held in paragraph 23 of its judgment in *Von Colson and Kamann*, once the Member States choose to make good damage suffered as a result of discrimination prohibited by the Directive pursuant to rules governing employers' civil liability, the compensation awarded must be adequate in relation to the damage sustained.

28 Moreover, it is clear from the order for reference, from the answers given to the questions put by the Court and from the explanations given at the hearing that the provisions of German law applicable in the case before the national court place on compensation a specific ceiling which is not provided for by other provisions of domestic civil and labour law.

29 In choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, the Member States must ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance (Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 24).

30 It follows from the foregoing that provisions of domestic law which, unlike other provisions of domestic civil law and labour law, prescribe an upper limit of three months' salary for the compensation which may be obtained in the event of discrimination on grounds of sex in the making of an appointment do not fulfil those requirements.

31 The question which must therefore be considered is whether that answer applies equally to job applicants who, because the successful applicant had superior qualifications, would not have obtained the position, even if the selection process had been free of discrimination, and to those who would have obtained the position if selection process had been carried out without discrimination.

32 In this regard, it must be borne in mind that, as paragraphs 25 and 27 of this judgment make clear, reparation must be adequate in relation to the damage sustained.

33 Nevertheless, such reparation may take account of the fact that, even if there had been no discrimination in the selection process, some applicants would not have obtained the position to be filled since the applicant appointed had superior qualifications. It is indisputable that such applicants, not having suffered any damage through exclusion from the recruitment procedure, cannot claim that the extent of the damage they have sustained is the same as that sustained by applicants who would have obtained the position if there had been no discrimination in the selection process.

34 Consequently, the only damage suffered by an applicant belonging to the first category mentioned in paragraph 31 above is that resulting from the failure, as a result of discrimination on grounds of sex, to take his application into consideration, whereas an applicant belonging to the second category has suffered damage as a result of a refusal to engage him, owing, specifically, to the objectively erroneous assessment of his application, as a result of discrimination on grounds of sex, made by the employer.

35 Having regard to those considerations, it does not seem unreasonable for a Member State to lay down a statutory presumption that the damage suffered by an applicant belonging to the first category may not exceed a ceiling of three months' salary.

36 In this regard, it must be made clear it is for the employer, who has in his possession all the applications submitted, to adduce proof that the applicant would not have obtained the vacant position even if there had been no discrimination.

37 The answer to be given to the second and third questions must therefore be that Directive 76/207 does not preclude provisions of domestic law which prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant where the employer can prove that, because the applicant engaged had superior qualification, the unsuccessful applicant would not have obtained the vacant position, even if there had been no discrimination in the selection process. In contrast, the Directive precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant discriminated against on grounds of sex in the making of an appointment where that applicant would have obtained the vacant position if the selection process had been carried out without discrimination.

The fourth question

38 By its fourth question the Arbeitsgericht asks in substance whether the Directive precludes provisions of domestic law imposing a ceiling on the aggregate amount of compensation payable to several applicants discriminated against on the grounds of their sex in the making of an appointment.

39 As the Court held in paragraph 23 of its judgment in *Von Colson and Kamann*, the Directive entails that the sanction chosen by the Member States must have a real dissuasive effect on the employer and must be adequate in relation to the damage sustained in order to ensure real and effective judicial protection.

40 It is clear that a provision such as Paragraph 61b(2) of the ArbGG, which places a ceiling of six months' salary on the aggregate amount of compensation for all applicants harmed by discrimination on grounds of sex in the making of an appointment, where several applicants claim compensation, may lead to the award of reduced compensation and may have the effect of dissuading applicants so harmed from asserting their rights. Such a consequence would not represent real and effective judicial protection and would have no really dissuasive effect on the employer, as required by the Directive.

41 Moreover, it is clear from the order for reference, from the answers to the questions put by the Court and from the explanations given at the hearing that such a ceiling on the aggregate compensation is not prescribed by other provisions of domestic civil law or labour law.

42 However, as the Court has already held, the procedures and conditions governing a right to reparation based on Community law must not be less favourable than those laid down by comparable national rules (Case 68/88 *Commission* v *Greece*, paragraph 24).

43 The answer to the question must therefore be that the Directive precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, impose a ceiling of six months' salary on the aggregate amount of compensation which, where several applicants claim compensation, may be claimed by applicants who have been discriminated against on grounds of their sex in the making of an appointment.

Costs

44 The costs incurred by the German Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, 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 Arbeitsgericht Hamburg by order of 22 May 1995, hereby rules:

1. **When a Member State chooses to penalize, under rules governing civil liability, breach of the prohibition of discrimination, 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, and, in particular, Articles 2(1) and 3(1) thereof, preclude provisions of domestic law which make reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment subject to the requirement of fault.**

2. **Directive 76/207 does not preclude provisions of domestic law which prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant where the employer can prove**

that, because the applicant engaged had superior qualifications, the unsuccessful applicant would not have obtained the vacant position even if there had been no discrimination in the selection process. In contrast, the Directive precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant discriminated against on grounds of sex in the making of an appointment where that applicant would have obtained the vacant position if the selection process had been carried out without discrimination.

3. Directive 76/207 precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, impose a ceiling of six months' salary on the aggregate amount of compensation which, where several applicants claim compensation, may be claimed by applicants who have been discriminated against on grounds of their sex in the making of an appointment.

Rodríguez Iglesias Mancini Moitinho de Almeida

Sevón Kakouris Kapteyn

Gulmann Hirsch Ragnemalm

Wathelet Schintgen

Delivered in open court in Luxembourg on 22 April 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President