Judgment of the Court (Sixth Chamber) of 17 June 1998.

Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance.

Reference for a preliminary ruling: Labour Court, Dublin - Ireland.

Equal treatment of men and women - National civil servants - Job-sharing scheme - Incremental credit determined on the basis of the criterion of actual time worked - Indirect discrimination.

Case C-243/95.

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Keywords

Social policy - Men and women - Equal pay - Job-sharing scheme in the civil service - Incremental credit determined on the basis of the criterion of actual time worked - Regression on the pay scale for job-sharers entering or returning to full-time work - Job-sharers consisting mainly of women - Not permissible unless objectively justified

(EC Treaty, Art. 119; Council Directive 75/117)

Summary

Article 119 of the Treaty and Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women are to be interpreted as precluding legislation which provides that, where a much higher percentage of female workers than male workers are engaged in job-sharing, job-sharers who convert to full-time employment are given a point on the pay scale applicable to full-time staff which is lower than that which those workers previously occupied on the pay scale applicable to job-sharing staff due to the fact that the employer has applied the criterion of service calculated by the actual length of time worked in a post, unless such legislation can be justified by objective criteria unrelated to any discrimination on grounds of sex.

Parties

In Case C-243/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Labour Court (Ireland) for a preliminary ruling in the proceedings pending before that tribunal between

Kathleen Hill and Ann Stapleton

and

the Revenue Commissioners and the Department of Finance

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 (OJ 1975 L 45, p. 19),

THE COURT

(Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, R. Schintgen, G.F. Mancini, J.L. Murray (Rapporteur) and G. Hirsch, Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Kathleen Hill and Ann Stapleton, by Mary Redmond, Solicitor, and James O'Reilly, SC,

- the Revenue Commissioners and the Department of Finance, by Michael A. Buckley, Chief State Solicitor, Mary Finlay, SC, and Finola Flanagan, of the Office of the Attorney General, acting as Agents,

- the Commission of the European Communities, by Marie Wolfcarius and Christopher Docksey, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Kathleen Hill and Ann Stapleton, represented by Mary Redmond and James O'Reilly; the Revenue Commissioners and the Department of Finance, represented by Mary Finlay; the United Kingdom Government, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Clive Lewis, Barrister; and the Commission, represented by Marie Wolfcarius and Christopher Docksey, at the hearing on 10 December 1996,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1997,

gives the following

Judgment

Grounds

1 By order of 5 April 1995, received on 12 July 1995, the Labour Court referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three 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 (OJ 1975 L 45, p. 19) (`the Directive').

2 Those questions have arisen in a dispute between Ms Hill and Ms Stapleton, who had previously worked in a job-sharing capacity, and the Revenue Commissioners and Department of Finance concerning the latters' decision to place them, on their conversion to full-time employment, on a point of the full-time pay scale lower than that of the job-sharing pay scale which they had previously occupied.

3 Article 119 of the EC Treaty sets out the principle that men and women should receive equal pay for equal work. The second paragraph of Article 119 provides that: `For the purpose 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.'

4 Article 1 of the Directive 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 Job-sharing was introduced in Ireland by a Government decision in 1984, primarily with a view to creating employment.

6 Job-sharing, established by Circular 3/84, involved an arrangement under which two civil servants shared equally one full-time job, such that the benefits were shared equally by both persons concerned and the costs of the post to the administration remained the same. Staff recruited on a full-time basis could decide to participate in that scheme and retained the right to return to full-time employment at the end of the period for which they had opted to job-share, provided that suitable vacancies existed. Staff recruited on a job-sharing basis between 1986 and 1987 were entitled to be appointed to full-time positions within two years of appointment, again provided that suitable vacancies existed. Staff choosing to job-share were required to give a written undertaking that they would not engage in outside employment. This scheme was amended in 1988, and since then persons taken on to job-share are recruited on temporary contracts and have no entitlement to full-time employment.

7 Circular 3/84 provided that: `For each grade in which job-sharing arrangements operate, the scale of pay applicable to job-sharing staff shall be a scale each point of which shall represent 50% of the corresponding point on the scale of pay appropriate to full-time staff. Increments on this scale will be granted annually if the officer's services are satisfactory.'

8 Circular 3/84 did not define the rules regarding incremental credit for job-sharing service on conversion to full-time work. This matter was, however, clarified in a letter sent to Departments on 31 March 1987 by the Department of Finance, stating as follows: `The position is that, as each year's job-sharing service is reckonable as six months' full-time service, an officer who has served for two years in a job-sharing capacity should be placed on the second point of the full-time scale (equivalent to one year's full-time service). In cases where officers have been job-sharing for more than two years, the incremental date should be adjusted on a pro-rata basis.'

9 Circular 9/87, which is the first comprehensive circular on increments, replaces all previous circulars on the subject. Article 2 of Circular 9/87 provides as follows: `An increment is an increase in pay for which provision is made in a pay scale. As a general rule, increments are granted annually provided an officer's services are satisfactory.'

10 Ms Hill and Ms Stapleton were recruited to the Irish Civil Service through open competitions for the Grade of Clerical Assistant and were assigned to the office of the Revenue Commissioners. Ms Hill was recruited in July 1981 and began job-sharing in May 1988. Ms Stapleton was recruited in a job-sharing capacity in April 1986. Ms Hill and Ms Stapleton were employed in a job-sharing capacity for two years. They worked exactly half the time which a full-time employee would have worked, on a one week on/one week off basis. During their respective job-sharing periods of employment, each moved one point up the incremental scale with each year of service and was paid at the rate of 50% of the salary for clerical assistants, according to the point each had reached on the scale.

11 Ms Hill returned to full-time employment in June 1990. At that time she had reached the ninth point on the incremental job-sharing scale. Initially, on her return to full-time work, she was assimilated to the ninth point of the corresponding scale, but was subsequently placed on the eighth point, on the ground that two years' job-sharing were equivalent to one year's full-time service.

12 Ms Stapleton secured a full-time post in April 1988. She had at that time reached the third point on the incremental job-sharing scale. She continued to move up the scale in 1989 and 1990 to the fourth and fifth points respectively, but was informed in April 1991 that there had been a mistake in her classification, with the result that she was unable to progress to the sixth point. She was informed that her two years' job-sharing service should have been counted as one year's full-time service.

13 Ms Hill and Ms Stapleton challenged the decision reclassifying them before an Equality Officer, pursuant to section 7(1) of the Anti-Discrimination (Pay) Act 1974. Relying on the Court's judgment in Case C-184/89 Nimz v Freie und Hansestadt Hamburg [1991] ECR I-297, the Equality Officer found in their favour on the ground that their employer was precluded from applying a provision to the effect that only paid service should be taken into account for progression on the incremental scale.

14 The Revenue Commissioners and the Department of Finance appealed to the Labour Court against that recommendation. Ms Hill and Ms Stapleton appealed for the implementation of that recommendation.

15 Taking the view that the outcome of the dispute depended on the interpretation of Community law, the Labour Court, exercising the powers conferred on it by section 8 of the Anti-Discrimination (Pay) Act 1974, referred the following three questions to the Court for a preliminary ruling:

`In circumstances in which far more female workers than male workers spend part of their working lives in a job-sharing capacity,

(a) Does a prima facie case of indirect discrimination arise where job-sharing workers who convert to full-time work are given credit for incremental progression on the scale of pay for full-time staff by reference to actual time worked such that, while the benefits awarded to them are fully pro-rated to those awarded to staff who have always worked full-time, they are placed at lower points on the full-time scale than comparators who are in all respects similar to them except that they have worked continuously on a full-time basis?

In other words, is the principle of equal pay, as defined in Directive 75/117/EEC, contravened if employees, who convert from job-sharing to full-time work, regress on the incremental scale, and hence on their salary scale, due to the application by the employer of the criterion of service calculated by time worked in a job?

(b) If so, does the employer have to provide special justification for recourse to the criterion of service, defined as actual time worked, in awarding incremental credit?

(c) If so, can a practice of incremental progression by reference to actual time worked be objectively justified by reference to factors other than the acquisition of a particular level of skill and experience over time?'

16 By those three questions, which it is appropriate to examine together, the national tribunal is in substance asking whether there is discrimination in a case where workers who convert from job-sharing to full-time work regress on the incremental scale, and hence on their salary scale, due to the application by the employer of the criterion of service calculated by the length of time actually worked in a post. If application of that criterion gives rise to indirect discrimination, the national tribunal asks whether this can be justified.

17 It is apparent from the case-file that the national system in question places workers who convert from job-sharing to full-time work at a disadvantage compared with those who have worked on a full-time basis for the same number of years in so far as, when converting to full-time work, a job-sharing worker is placed, on the full-time pay scale, at a level below that which he or she previously occupied on the pay scale applicable to job-sharing staff and, consequently, at a level lower than that of a full-time worker employed for the same period of time.

18 It must be recalled at the outset that Article 119 of the Treaty sets out the principle that men and women should receive equal pay for equal work. As the Court has already held in Case 43/75 Defrenne v Sabena (Defrenne II) [1976] ECR 455, paragraph 12, that principle forms part of the foundations of the Community.

19 Furthermore, the Court also held in Case 96/80 Jenkins v Kingsgate [1981] ECR 911 that Article 1 of the Directive, which is essentially designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty, in no way alters the scope or content of that principle as defined in the latter provision.

20 In order to provide the national tribunal with a helpful answer, it is necessary first of all to ascertain whether the system for classifying workers converting from job-sharing to full-time employment comes within the scope of Article 119 of the Treaty and, consequently, within the scope of the Directive.

21 It should be noted in this regard that the system in question determines the progression of pay due to those workers. It follows that the system comes within the concept of pay for the purposes of Article 119 of the Treaty.

22 As the Court held in Case C-279/93 Finanzamt Köln-Altstadt v Schumacker [1995] ECR I-225, paragraph 30, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.

23 It should be noted in that regard, as indeed the Labour Court has found, that it has not been established that the unfavourable treatment applied to Ms Hill and Ms Stapleton constitutes direct discrimination on grounds of sex. It is thus necessary to examine whether that treatment may amount to indirect discrimination.

24 According to settled case-law, Article 4(1) of the Directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex (see, to that effect, Case C-343/92 De Weerd, née Roks, and Others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others [1994] ECR I-571, paragraph 33, and Case C-444/93 Megner and Scheffel v Innungskrankenkasse Rheinhessen-Pfalz [1995] ECR I-4741, paragraph 24).

25 It is apparent from the case-file that 99.2% of clerical assistants who job-share are women, as are 98% of all civil servants employed under job-sharing contracts. In those circumstances, a provision which, without objective justification, adversely affects the legal position of those workers coming within the category of job-sharers has discriminatory effects based on sex.

26 The Labour Court takes the view that job-sharing is in a unique category as it does not involve a break in service. The specific feature which distinguishes part-time work from job-sharing is that in the case of the latter the work and responsibilities are shared between two employees. According to the case-file, full-time commitment and coordination of responsibilities related to the job being shared can be required of job-sharers.

27 It must be borne in mind that the Labour Court found that Ms Hill and Ms Stapleton were doing the same work as their colleagues who were working on a full-time basis and were in a situation comparable to theirs. As has been pointed out in

paragraph 6 of the present judgment, staff choosing to job-share were required to give a written undertaking that they would not engage in outside employment. The Labour Court is satisfied that a job-sharer can acquire the same experience as a full-time worker. The only difference between a job-sharer and a colleague working full-time lies in the time actually worked during the period of job-sharing.

28 It should also be remembered that, during the entire period for which they job-shared, Ms Hill and Ms Stapleton progressed by one incremental point each year and were paid at the rate of 50% of the salary for clerical assistants, according to the point each had reached on the scale.

29 Under the rules applicable to job-sharing, as well as those applicable to the scheme for full-time workers, incremental pay progression depends on an assessment of both the quality and quantity of the work performed. On the basis that the qualitative assessment of the two categories of worker in question is identical, job-sharers, when performing their work in a job-sharing capacity, progress along the pay scale in parallel to full-time workers. A figure equivalent to one-half of the pay provided for full-time workers corresponds to each point of incremental progression. The hourly pay for the two categories of worker is thus identical at each point along the scale.

30 In those circumstances, when workers convert from job-sharing, under which they will have worked for 50% of full time, receiving 50% of the salary corresponding to that point on the pay scale for full-time work, they should expect both their hours of work and the level of their pay to increase by 50%, in the same way as workers converting from full-time work to job-sharing would expect those factors to be reduced by 50%, unless a difference in treatment can be justified.

31 However, there is no such progression in this case. When job-sharing workers convert to full-time work, their situation is automatically reviewed in such a way that they are placed, on the full-time pay scale, at a level lower than that which they occupied on the pay scale applicable to job-sharing.

32 The regression to which workers are subject when entering or returning to full-time work directly affects their pay. They are in fact paid less than double what they would have earned had they been job-sharing. Consequently, their hourly rate of pay is reduced. Reference to the criterion of hours worked during the period of job-sharing employment, as provided for under the scheme applicable here, fails to take account either of the fact that job-sharing, as pointed out in paragraph 26 of the present judgment, is in a unique category as it does not involve a break in service, or of the fact, stated in paragraph 27 of the present judgment, that a job-sharer can acquire the same experience as a full-time worker. Furthermore, a disparity is retroactively introduced into the overall pay of employees performing the same functions so far as concerns both the quality and the quantity of the work performed. The result of this disparity is that employees working full time but who previously job-shared are treated differently from those who have always worked on a full-time basis.

33 Within the category of full-time workers, therefore, there is unequal treatment, as regards pay, of employees who previously job-shared, and who regress in relation to the position which they already occupied on the pay scale.

34 In such a case, provisions of the kind at issue in the main proceedings result in discrimination of female workers vis-à-vis male workers and must in principle be treated as contrary to Article 119 of the Treaty and therefore contrary to the Directive. It would be otherwise only if the difference of treatment found to exist between the two categories of worker were justified by objective factors unrelated to any discrimination based on sex (see, along these lines, 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; Case C-457/93 Kuratorium für Dialyse und Nierentransplantation v Lewark [1996] ECR I-243, paragraph 31).

35 It is for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision which, though applying independently of the sex of the worker, actually affects a greater number of women than men is justified by objective reasons unrelated to any discrimination on grounds of sex (Jenkins, paragraph 14; Bilka, paragraph 36; and Rinner-Kühn, paragraph 15).

36 However, although in preliminary-ruling proceedings it is for the national court to establish whether such objective factors exist in the particular case before it, the Court of Justice, whose task is to provide the national court with helpful answers, may provide guidance based on the documents in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (Case C-328/91 Secretary of State for Social Security v Thomas and Others [1993] ECR I-1247, paragraph 13, and Lewark, cited above, paragraph 32).

37 In the view of the Revenue Commissioners and the Department of Finance, a method of pay progression based on the duration of work actually performed is objectively justified by criteria which satisfy the conditions laid down by the Court in its case-law.

38 In this connection, neither the justification provided by the Revenue Commissioners and the Department of Finance to the effect that there is an established practice within the Civil Service of `crediting' only actual service, nor that stating that this practice establishes a reward system which maintains staff motivation, commitment and morale, is relevant. The first justification is no more than a general assertion unsupported by objective criteria. With regard to the second, the system of remuneration for employees working on a full-time basis cannot be influenced by the job-sharing scheme.

39 So far as concerns the justification that, if an exception were to be made in favour of job-sharing, this would result in arbitrary or inequitable situations or would amount to impermissible discrimination in favour of women, it should be pointed out, as is clear from paragraph 29 of the present judgment, that to grant to workers who convert to full-time employment the same point as that which they had under their job-sharing contract does not constitute discrimination in favour of female workers.

40 So far as the justification based on economic grounds is concerned, it should be noted that an employer cannot justify discrimination arising from a job-sharing

scheme solely on the ground that avoidance of such discrimination would involve increased costs.

41 It must be borne in mind that all the parties to the main proceedings, and the national tribunal, agree that almost all job-sharing workers in the Irish public sector are women. It is apparent from the case-file that approximately 83% of those who chose that option did so in order to be able to combine work and family responsibilities, which invariably involve caring for children.

42 Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community law.

43 The onus is therefore on the Revenue Commissioners and the Department of Finance to establish before the Labour Court that the reference to the criterion of service, defined as the length of time actually worked, in the assessment of the incremental credit to be granted to workers who convert from job-sharing to full-time work is justified by objective factors unrelated to any discrimination on grounds of sex. If such evidence is adduced by those authorities, the mere fact that the national legislation affects far more women than men cannot be regarded as constituting a breach of Article 119 of the Treaty and, consequently, a breach of the Directive.

44 The answer to the questions submitted must therefore be that Article 119 of the Treaty and the Directive are to be interpreted as precluding legislation which provides that, where a much higher percentage of female workers than male workers are engaged in job-sharing, job-sharers who convert to full-time employment are given a point on the pay scale applicable to full-time staff which is lower than that which those workers previously occupied on the pay scale applicable to job-sharing staff due to the fact that the employer has applied the criterion of service calculated by the actual length of time worked in a post, unless such legislation can be justified by objective criteria unrelated to any discrimination on grounds of sex.

Decision on costs

Costs

45 The costs incurred by the United Kingdom Government and the Commission, 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 action pending before the national tribunal, the decision on costs is a matter for that tribunal.

Operative part

On those grounds,

THE COURT

(Sixth Chamber)

in answer to the questions referred to it by the Labour Court by order of 5 April 1995, hereby rules:

Article 119 of the EC Treaty and 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 are to be interpreted as precluding legislation which provides that, where a much higher percentage of female workers than male workers are engaged in job-sharing, job-sharers who convert to full-time employment are given a point on the pay scale applicable to full-time staff which is lower than that which those workers previously occupied on the pay scale applicable to job-sharing staff due to the fact that the employer has applied the criterion of service calculated by the actual length of time worked in a post, unless such legislation can be justified by objective criteria unrelated to any discrimination on grounds of sex.