OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 13 November 1990 *

Mr President,
Members of the Court,

1. The question referred to the Court for a preliminary ruling by the Arbeitsgericht, Hamburg, invites the Court to recall the well established solutions it has arrived at as regards the situation of part-time workers in the light of the Community principle of equal treatment as between men and women.

2. The facts are known to the Court. Mrs Helga Nimz has been employed since 1 January 1977 in the public service of the Freie und Hansestadt Hamburg. Since 1 January 1983, she has worked 20 hours a week and is classified in salary grade V b, case 1 a, of the Bundesangestelltentarifvertrag (Collective Wage Agreement for Federal Employees) (hereinafter referred to as 'the BAT'). After six years' service in that grade, staff are reclassified in salary grade IV b, case 2. On 28 January 1988, the Hamburg authorities refused to allow her to pass to salary grade IV b, case 2, referring to the provisions of Paragraph 23 a of the BAT. It is provided therein that account is to be taken of the *full* duration of a period of service during which the employee was regularly employed for at least three-quarters of the normal working hours of a full-time employee but only *half* of that period is to be taken into account where the employee is employed for at least half of the working hours of a full-time employee but less than three-quarters of those working hours. Those provisions of the BAT were amended with effect from 1 January 1988 but without taking into account previous periods of service. Mrs Helga Nimz is therefore claiming before the Arbeitsgericht Hamburg that the provisions in question run counter to Article 119 of the EEC Treaty.

3. The Arbeitsgericht has referred to the Court for a preliminary ruling two questions which relate, on the one hand, to the compatibility with Article 119 of the EEC Treaty of a provision of a collective agreement such as the one in the present case, and, on the other hand, the consequences of any incompatibility in the light of the principle of autonomy of bargaining enjoyed by parties to a collective agreement.

4. The first question evokes what is now a consistent line of case-law established by the Court. [1] Where a measure discriminates against part-time workers, and it is established that that measure affects a much greater number of women than men or vice versa, it is contrary to the principle of equal treatment unless it can be demonstrated that it may be explained

'by objectively justified factors unrelated to any discrimination on grounds of sex'. [2]

* Original language: French.

1 — Judgment of 31 March 1981 in Case 96/80 *Jenkins* [1981] ECR 911; judgment of 13 May 1986 in Case 170/84 *Bilka* [1986] ECR 1607; judgment of 13 July 1989 in Case 171/88 *Rinner-Kühn* [1989] ECR 2743; judgment of 13 December 1989 in Case 102/88 *Ruzius-Wilbrink* [1989] ECR 4311; judgment of 27 June 1990 in Case C-33/89 *Kowalska* [1990] ECR I-2591.

2 — *Bilka* judgment, cited above, at paragraph 30 and the operative part.

Thus the Court has declared to be incompatible with the requirements of Community law the exclusion of part-time workers from a company pension scheme,[3] from the right to continued payment of wages in the event of illness[4] or from the grant of a temporary allowance in the case of termination of employment,[5] the difference in the hourly basis of remuneration in relation to full-time workers,[6] finally the difference in calculating allowances in the event of incapacity for work.[7]

5. That case-law is identical both as regards Article 119 of the Treaty,[8] which relates to equal treatment as regards remuneration and in regard to Council Directive 79/7/EEC of 19 December 1978[9] relating to social security benefits,[10] and it is difficult to see on what grounds it might not be extended to cover access to employment and working conditions where the principle of equal treatment has been introduced by Council Directive 76/207/EEC of 9 February 1976.[11] However, it is necessary to examine whether, in the present case, Paragraph 23 a of the BAT falls within the sphere of remuneration and, consequently, Article 119 of the Treaty, or within the sphere of working conditions and, consequently, within the terms of Directive 76/207 mentioned above.

3 — See *Bilka* judgment, mentioned above

4 — *Rinner-Kuhn* judgment, cited above. For a commentary on this judgment, see J. Shaw, *European Law Review*, December 1989, p. 428

5 — *Kowalska* judgment, cited above

6 — *Jenkins* judgment, cited above.

7 — *Ruzius-Wilbrink* judgment, cited above

8 — Cases 96/80, 170/84, 171/88, C-33/89, cited above.

9 — Directive on the progressive implementation of the principle of equal treatment between men and women as regards social security (OJ 1979 L 6, p. 24).

10 — Case 102/88, cited above

11 — Directive 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).

6. The first solution appears to me to be appropriate. The provision in question is solely intended to determine the remuneration payable to the employee during the course of his or her career. It does not determine the grant of other benefits, such as additional paid holidays, the grant of loans at preferential rates or the access to higher ranking posts which form part of working conditions. Since it is solely intended to provide for a salary increase in favour of employees having a certain length of service it falls, it seems to me, exclusively within the sphere of remuneration. It is therefore in the light of Article 119 that the situation in the present case must be examined. The solution to the present case would moreover not be different on the basis of Directive 76/207, of which Article 3(1) could usefully have been relied on in this case by Mrs Nimz.

7. In that connection there can be no doubt that part-time workers are subject to discrimination in relation to full-time employees since they require *twice the length of service* in order to move to the higher salary grade.

8. Furthermore, according to the order for reference, more than 90% of employees working less than three-quarters of the normal working hours of a full-time employee are women whereas the proportion goes down to 55% when the working hours are greater than three-quarters of the working hours of a full-time worker.

9. It remains to examine whether that difference may be explained by 'objectively justified factors unrelated to any discrimi-

nation on grounds of sex'. On that point the German Government, the United Kingdom and the City of Hamburg are unanimous in urging the Court not to examine that question since, it is said, in accordance with the Court's case-law, to fall within the competence of the national court.

10. That case-law appears to me to be less categorical. Certainly in the *Bilka* judgment, the Court held that:

'it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice . . . may be regarded as objectively justified economic grounds'. [12]

Nevertheless, in the *Rinner-Kühn* judgment the Court itself refuted the argument of the German Government that

'workers whose period of work amounted to less than 10 hours a week or 45 hours a month were not as integrated in, or as dependent on, the undertaking employing them as other workers'. [13]

by replying that

'those considerations, in so far as they are only generalizations about certain categories of workers, do not enable criteria which are both objective and unrelated to any discrimination on grounds of sex to be identified'. [14]

11. Although it is not for the Court to appraise the facts, it seems to me that there is nothing to prevent the Court from stating, if necessary, that arguments which are too general may not be regarded as objective criteria.

12. In the present case, the City of Hamburg claims that full-time workers acquire skills and abilities more quickly on account of their work than part-time workers. [15] The German Government stresses the greater experience of full-time workers. [16]

13. Yet, as the Commission rightly points out, [17] the BAT does not establish a progressive relationship between length of service and remuneration since employees working at least three-quarters of the normal working hours of full-time workers are assimilated to the latter. Moreover, as far as the criterion of length of service is concerned, the Court held in the *Danfoss* judgment [18] that

'it is also not to be excluded that . . . it may involve less advantageous treatment of women than of men in so far as women have entered the labour market more recently than men or more frequently suffer an interruption of their career. Nevertheless, since length of service goes hand in hand

12 — *Bilka* judgment, paragraph 36.

13 — *Rinner-Kühn* judgment, paragraph 13.

14 — *Rinner-Kühn* judgment, paragraph 14.

15 — Written observations, p. 13.

16 — At p. 7 of the observations.

17 — P. 11 of the observations.

18 — Judgment of 17 October 1989 in Case 109/88 *Danfoss* [1989] ECR 3199.

with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward it without having to establish the importance it has in the performance of specific tasks entrusted to the employee'.[19]

14. Certainly it could be deemed necessary to take account of length of service not in years but in hours of work performed, as proposed by the United Kingdom, but on condition that that is to facilitate progression to *different duties*, entailing new responsibilities and consequently presupposing a certain amount of experience. In the present case, the length of service required is merely intended to enable access to be gained to a higher wage grade without any alteration in the nature of the duties performed. Accordingly, the taking into account of experience in terms of actual hours of work does not appear to be an objective justification.

15. Doubtless the situation would be different if it was a question of granting promotion and thus ensuring access to a higher post entailing different duties or new responsibilities. Even in such a case, it seems to me that it would be necessary to take into consideration the nature of the post in question — experience is not as decisive a criterion for the post of maintenance worker as it is for that of the head of an administrative department — and that in such matters it is not possible to accept a general and abstract rule. It would therefore be for the national court to examine, in accordance with the principle of proportionality, whether it is actually necessary to take into account the experience gained by length of service, regard being had to the nature of the duties performed.

16. Finally, it should be recalled that the difference in treatment was brought to an end by an amendment, with effect from 1 January 1988, to the provisions at issue and the fact that that amendment was not made retroactive may be explained, as the German Government itself states in its written observations,[20] by financial considerations. The latter are certainly not negligible but they cannot prevail over the principle of the equal treatment of men and women.

17. In any event the 1988 amendment render irrelevant the arguments put forward by the German Government[21] to the effect that experience is acquired more rapidly by full-time workers.

18. I therefore propose that the Court should not merely recall the principles of its existing case-law but should also point out that general considerations based on the fact that full-time workers are said to have more experience than part-time workers do not constitute sufficiently specific and objective criteria unrelated to any discrimination on grounds of sex.

19. The second question is in its content identical to that which the same court raised in the *Kowalska* case.[22] I stated then in my

19 — At paragraph 24

20 — P. 4 of the observations.

21 — P. 6 of the written observations

22 — Case C-33/89, cited above

Opinion [23] that the *Defrenne II* judgment, [24] by stating that Article 119 applies both to legislative provisions and to the provisions of collective bargaining agreements and by limiting *ratione temporis* the direct effect of that article, necessarily meant that national courts had to apply to the disadvantaged group the provisions of collective agreements the benefit of which had hitherto been withheld from it. The Court followed my opinion on this point by holding that

'where there is indirect discrimination in a provision of a collective agreement the members of the group disadvantaged as a result of that discrimination must be treated in the same manner and must have the same arrangements applied to them as to other employees'. [25]

20. As I pointed out then, [26] the parties to the collective agreement are free to amend the provisions at issue, even by removing a benefit from all employees, provided there is no discrimination between full-time and part-time staff. Autonomy of bargaining is not affected in any way. It is simply exercised having regard to the need to observe the requirements of the Community law principle of equal treatment.

21. I would also like to make some brief observations on the question whether the Court should, as in the *Defrenne II* judgment, limit the temporal effects of the judgment to be delivered in this case. I would advise the Court against this. The direct effect of Article 119 of the EEC Treaty has been acknowledged in Community law since 1976. The social partners are therefore not exempt from taking into account the requirements of that provision when they negotiate collective agreements. Accordingly, it does not seem that the Court is required on grounds of legal certainty to limit the effects *ratione temporis* of the judgment to be given. That, moreover, was the decision of the Court in the aforementioned *Kowalksa* judgment.

22. I therefore conclude that the Court should hold as follows:

(1) Article 119 of the EEC Treaty must be interpreted as meaning that it precludes the application of a provision of a collective agreement which withholds from part-time workers alone the possibility of full account being taken of their

23 — At paragraph 20.

24 — Judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

25 — *Kowalska* judgment, cited above, at paragraph 20.

26 — Opinion in the *Kowalska* case, cited above, at paragraph 23.

length of service for the purpose of progression to a higher salary grade, where it is found that a much lower percentage of men than women work part-time, unless the employer can establish that such provision is justified by objective factors unrelated to any discrimination on grounds of sex.

(2) Where there is indirect discrimination in a provision of a collective agreement, the members of the group which is disadvantaged as a result of that discrimination must be treated in the same manner and must have the same arrangements applied to them as to other employees, arrangements which, failing the correct application of Article 119 of the EEC Treaty, remain the only valid system of reference.