

In Case 43/75

Reference to the Court under [Article 267 TFEU] by the Cour du Travail (Labour Court), Brussels, for a preliminary ruling in the action pending before that court between

GABRIELLE DEFRENNE, former air hostess, residing in Brussels-Jette,

and

SOCIÉTÉ ANONYME BELGE DE NAVIGATION AERIENNE SABENA, the registered office of which is at Brussels,

on the interpretation of [Article 157 TFEU],

THE COURT

composed of: R. Lecourt, President, H. Kutscher and A. O'Keefe, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore and M. Sorensen, Judges,

Advocate-General: A. Trabucchi

Registrar: A. Van Houtte

gives the following

JUDGMENT

Law

- 1 By a judgment of 23 April 1975, received at the Court Registry on 2 May 1975, the Cour du travail, Brussels, referred to the Court under [Article 267 TFEU] two questions concerning the effect and implementation of [Article 157 TFEU] regarding the principle that men and women should receive equal pay for equal work.
- 2 These questions arose within the context of an action between an air hostess and her employer, Sabena SA., concerning compensation claimed by the applicant in the main action on the ground that, between 15 February 1963 and 1 February 1966, she suffered as a female worker discrimination in terms of pay as compared with male colleagues who were doing the same work as 'cabin steward'.
- 3 According to the judgment containing the reference, the parties agree that the work of an air hostess is identical to that of a cabin steward and in these circumstances the existence of discrimination in pay to the detriment of the air hostess during the period in question is not disputed.

The first question (direct effect of [Article 157 TFEU])

- 4 The first question asks whether [Article 157 TFEU] introduces 'directly into the national law of each Member State of the European [Union] the principle that men and women should receive equal pay for equal work and does it therefore, independently of any national provision, entitle workers to institute proceedings before national courts in order to ensure its observance?'
- 5 If the answer to this question is in the affirmative, the question further enquires as from what date this effect must be recognized.

- 6 The .reply to the final part of the first question will therefore be given with the. reply to the second question.
- 7 The question of the direct effect of [Article 157 TFEU] must be considered in the light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty.
- 8 [Article 157 TFEU] pursues a double aim.
- 9 First, in the light of the different stages of the development of social legislation in the various Member States, the aim of [Article 157 TFEU] is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-[Union] competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.
- 10 Secondly, this provision forms part of the social objectives of the [Union], which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.
- 11 This aim is accentuated by the insertion of [Article 157 TFEU] into the body of a chapter devoted to social policy whose preliminary provision, [Article 151 TFEU], marks 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'.
- 12 This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the [Union].

- 13 Furthermore, this explains why the Treaty has provided for the complete implementation of this principle by the end of the first stage of the transitional period.
- 14 Therefore, in interpreting this provision, it is impossible to base any argument on the dilatoriness and resistance which have delayed the actual implementation of this basic principle in certain Member States.
- 15 In particular, since [Article 157 TFEU] appears in the context of the harmonization of working conditions while the improvement is being maintained, the objection that the terms of this article may be observed in other ways than by raising the lowest salaries may be set aside.
- 16 Under the terms of [Article 157(1) TFEU], the Member States are bound to ensure and maintain 'the application of the principle that men and women should receive equal pay for equal work'.
- 17 [The first and second] paragraphs of the same article add a certain number of details concerning the concepts of pay and work referred to in the first paragraph.
- 18 For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of [Article 157 TFEU] between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a [Union] or national character.
- 19 It is impossible not to recognize that the complete implementation of the aim pursued by [Article 157 TFEU], by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at [Union] and national level.

- 20 This view is all the more essential in the light of the fact that the [Union] measures on this question, to which reference will be made in answer to the second question, implement [Article 157 TFEU] from the point of view of extending the narrow criterion of 'equal work', in accordance in particular with the provisions of Convention No 100 on equal pay concluded by the International Labour Organization in 1951, Article 2 of which establishes the principle of equal pay for work 'of equal value'.
- 21 Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by [Article 157 TFEU] must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.
- 22 This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.
- 23 As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.
- 24 In such situation, at least, [Article 157 TFEU] is directly applicable and may thus give rise to individual rights which the courts must protect.
- 25 Furthermore, as regards equal work, as a general rule, the national legislative provisions adopted for the implementation of the principle of equal pay as a rule merely reproduce the substance of the terms of [Article 157 TFEU] as regards the direct forms of discrimination.
- 26 Belgian legislation provides a particularly apposite illustration of this point, since Article 14 of Royal Decree No 40 of 24 October 1967 on the employment of women merely sets out the right of any female worker to institute proceedings

before the relevant court for the application of the principle of equal pay set out in [Article 157 TFEU] and simply refers to that article.

- 27 The terms of [Article 157 TFEU] cannot be relied on to invalidate this conclusion.
- 28 First of all, it is impossible to put forward an argument against its direct effect based on the use in this article of the word 'principle', since, in the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions, as is shown, for example, by the heading of the first part of the Treaty which is devoted to 'Principles' and by [Article 207 TFEU], according to which the commercial policy of the [Union] is to be based on 'uniform principles'.
- 29 If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the [Union] and the coherence of its external relations would be indirectly affected.
- 30 It is also impossible to put forward arguments based on the fact that [Article 157 TFEU] only refers expressly to 'Member States'.
- 31 Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.
- 32 The very wording of [Article 157 TFEU] shows that it imposes on States a duty to bring about a specific result to be mandatorily achieved within a fixed period.
- 33 The effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.
- 34 To accept the contrary view would be to risk raising the violation of the right to the

status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by [the second sentence of Article 19(1) TEU].

- 35 Finally, in its reference to 'Member States', [Article 157 TFEU] is alluding to those States in the exercise of all those of their functions which may usefully contribute to the implementation of the principle of equal pay.
- 36 Thus, contrary to the statements made in the course of the proceedings this provision is far from merely referring the matter to the powers of the national legislative authorities.
- 37 Therefore, the reference to 'Member States' in [Article 157 TFEU] cannot be interpreted as excluding the intervention of the courts in direct application of the Treaty.
- 38 Furthermore it is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying independent agreements concluded privately or in the sphere of industrial relations such as individual contracts and collective labour agreements.
- 39 In fact, since [Article 157 TFEU] is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.
- 40 The reply to the first question must therefore be that the principle of equal pay contained in [Article 157 TFEU] may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

The second question (implementation of [Article 157 TFEU] and powers of the [Union] and of the Member States)

- 41 The second question asks whether [Article 157 TFEU] has become 'applicable in the internal law of the Member States by virtue of measures adopted by the authorities of the European Economic [Union]', or whether the national legislature must 'be regarded as alone competent in this matter'.
- 42 In accordance with what has been set out above, it is appropriate to join to this question the problem of the date from which [Article 157 TFEU] must be regarded as having direct effect.
- 43 In the light of all these problems it is first necessary to establish the chronological order of the measures taken on a [Union] level to ensure the implementation of the provision whose interpretation is requested.
- 44 [Article 157 TFEU] itself provides that the application of the principle of equal pay was to be uniformly ensured by the end of the first stage of the transitional period at the latest.
- 45 The information supplied by the Commission reveals the existence of important differences and discrepancies between the various States in the implementation of this principle.
- 46 Although, in certain Member States, the principle had already largely been put into practice before the entry into force of the Treaty, either by means of express constitutional and legislative provisions or by social practices established by collective labour agreements, in other States its full implementation has suffered prolonged delays.
- 47 In the light of this situation, on 30 December 1961, the eve of the expiry of the time-limit fixed by [Article 157 TFEU], the Member States adopted a Resolution

concerning the harmonization of rates of pay of men and women which was intended to provide further details concerning certain aspects of the material content of the principle of equal pay, while delaying its implementation according to a plan spread over a period of time.

- 48 Under the terms of that Resolution all discrimination, both direct and indirect, was to have been completely eliminated by 31 December 1964.
- 49 The information provided by the Commission shows that several of the original Member States have failed to observe the terms of that Resolution and that, for this reason, within the context of the tasks entrusted to it by [the first paragraph of Article 17 TEU], the Commission was led to bring together the representatives of the governments and the two sides of industry in order to study the situation and to agree together upon the measures necessary to ensure progress towards the full attainment of the objective laid down in [Article 157 TFEU].
- 50 This led to the drawing up of successive reports on the situation in the original Member States, the most recent of which, dated 18 July 1973, recapitulates all the facts.
- 51 In the conclusion to that report the Commission announced its intention to initiate proceedings under [Article 258 TFEU], for failure to take the requisite action, against those of the Member States who had not by that date discharged the obligations imposed by [Article 157 TFEU], although this warning was not followed by any further action.
- 52 After similar exchanges with the competent authorities in the new Member States the Commission stated in its report dated 17 July 1974 that, as regards those States, [Article 157 TFEU] had been fully applicable since 1 January 1973 and that from that date the position of those States was the same as that of the original Member States.
- 53 For its part, in order to hasten the full implementation of [Article 157 TFEU], the

Council on 10 February 1975 adopted Directive No 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 (OJ L 45, p. 19).

- 54 This Directive provides further details regarding certain aspects of the material scope of [Article 157 TFEU] and also adopts various provisions whose essential purpose is to improve the legal protection of workers who may be wronged by failure to apply the principle of equal pay laid down by [Article 157 TFEU].
- 55 Article 8 of this Directive allows the Member States a period of one year to put into force the appropriate laws, regulations and administrative provisions.
- 56 It follows from the express terms of [Article 157 TFEU] that the application of the principle that men and women should receive equal pay was to be fully secured and irreversible at the end of the first stage of the transitional period, that is, by 1 January 1962.
- 57 Without prejudice to its possible effects as regards encouraging and accelerating the full implementation of [Article 157 TFEU], the Resolution of the Member States of 30 December 1961 was ineffective to make any valid modification of the time-limit fixed by the Treaty.
- 58 In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with [Article 48 TEU].
- 59 Moreover, it follows from the foregoing that, in the absence of transitional provisions, the principle contained in [Article 157 TFEU] has been fully effective in the new Member States since the entry into force of the Accession Treaty, that is, since 1 January 1973.
- 60 It was not possible for this legal situation to be modified by Directive No 75/117, which was adopted on the basis of [Article 115 TFEU] dealing with the

approximation of laws and was intended to encourage the proper implementation of [Article 157 TFEU] by means of a series of measures to be taken on the national level, in order, in particular, to eliminate indirect forms of discrimination, but was unable to reduce the effectiveness of that article or modify its temporal effect.

- 61 Although [Article 157 TFEU] is expressly addressed to the Member States in that it imposes on them a duty to ensure, within a given period, and subsequently to maintain the application of the principle of equal pay, that duty assumed by the States does not exclude competence in this matter on the part of the [Union].
- 62 On the contrary, the existence of competence on the part of the [Union] is shown by the fact that [Article 157 TFEU] sets out one of the 'social policy' objectives of the Treaty which form the subject of Title [X], which itself appears in Part Three of the Treaty dealing with the 'Policies and Internal Actions of the Union'.
- 63 In the absence of any express reference in [Article 157 TFEU] to the possible action to be taken by the [Union] for the purposes of implementing the social policy, it is appropriate to refer to the general scheme of the Treaty and to the courses of action for which it provided, such as those laid down in [Article 115 TFEU], [the first paragraph of Article 17 TEU] and, where appropriate, [the first sentence of Article 352(1) TFEU].
- 64 As has been shown in the reply to the first question, no implementing provision, whether adopted by the institutions of the [Union] or by the national authorities, could adversely affect the direct effect of [Article 157 TFEU].
- 65 The reply to the second question should therefore be that the application of [Article 157 TFEU] was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty.
- 66 The first of these time-limits was not modified by the Resolution of the Member States of 30 December 1961.

67 As indicated in reply to the first question, Council Directive No 75/117 does not prejudice the direct effect of [Article 157 TFEU] and the period fixed by that Directive for compliance therewith does not affect the time-limits laid down by [Article 157 TFEU] and the Accession Treaty.

68 Even in the areas in which [Article 157 TFEU] has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be relieved by a combination of [Union] and national measures.

The temporal effect of this judgment

69 The Governments of Ireland and the United Kingdom have drawn the Court's attention to the possible economic consequences of attributing direct effect to the provisions of [Article 157 TFEU], on the ground that such a decision might, in many branches of economic life, result in the introduction of claims dating back to the time at which such effect came into existence.

70 In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.

71 Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision.

72 However, in the light of the conduct of several of the Member States and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take exceptionally into account the fact that, over a

prolonged period, the parties concerned have been led to continue with practices which were contrary to [Article 157 TFEU], although not yet prohibited under their national law.

- 73 The fact that, in spite of the warnings given, the Commission did not initiate proceedings under [Article 258 TFEU] against the Member States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of [Article 157 TFEU].
- 74 In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past.
- 75 Therefore, the direct effect of [Article 157 TFEU] cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.

Costs

- 76 The costs incurred by the Commission of the European [Union], which has submitted observations to the Court, are not recoverable.
- 77 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Cour du travail, Brussels, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Cour du travail, Brussels, by judgment dated 23 April 1975 hereby rules:

1. The principle that men and women should receive equal pay, which is laid down by [Article 157 TFEU], may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.
2. The application of [Article 157 TFEU] was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty. The first of these time-limits was not modified by the Resolution of the Member States of 30 December 1961.
3. Council Directive No 75/117 does not prejudice the direct effect of [Article 157 TFEU] and the period fixed by that Directive for compliance therewith does not affect the time-limits laid down by [Article 157 TFEU] and the Accession Treaty.
4. Even in the areas in which [Article 157 TFEU] has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be achieved by a combination of [Union] and national provisions.
5. Except as regards those workers who have already brought legal proceedings or made an equivalent claim, the direct effect of [Article 157 TFEU] cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment.

Lecourt

Kutscher

O'Keefe

Donner

Mertens de Wilmars

Pescatore

Sorensen

Delivered in open court in Luxembourg on 8 April 1976.

A. Van Houtte
Registrar

R. Lecourt
President

Robert Schütze European Union Law Lisbonised Cases