

In Case 14/83

REFERENCE to the Court under [Article 267 TFEU] by the Arbeitsgericht [Labour Court] Hamm for a preliminary ruling in the action pending before that court between

SABINE VON COLSON AND ELISABETH KAMANN

and

LAND NORDRHEIN-WESTFALEN [North-Rhine Westphalia],

on the interpretation of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regard access to employment, vocational training and promotion, and working conditions (Official Journal 1976, L 39, p. 40).

THE COURT

composed of: J-Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keefe, G. Bosco, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: S. Razes

Registrar: H. A. Ruhl, Principal Administrator

gives the following

## JUDGMENT

### **Decision**

- 1 By order of 6 December 1982, which was received at the Court on 24 January 1983, the Arbeitsgericht [Labour Court] Hamm referred to the Court for a preliminary ruling pursuant to [Article 267 TFEU] several questions on the interpretation of Council Directive No 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 (Official Journal 1976, L 39, p. 40).
- 2 Those questions were raised in the course of proceedings between two qualified social workers, Sabine van Colson and Elisabeth Kamann, and the Land Nordrhein-Westfalen. It appears from the grounds of the order for reference that Werl prison, which caters exclusively for male prisoners and which is administered by the Land Nordrhein-Westfalen, refused to engage the plaintiffs in the main proceedings for reasons relating to their sex. The officials responsible for recruitment justified their refusal to engage the plaintiffs by citing the problems and risks connected with the appointment of female candidates and for those reasons appointed instead male candidates who were however less well-qualified.
- 3 The Arbeitsgericht Hamm held that there had been discrimination and took the view that under German law the only sanction for discrimination in recruitment is compensation for "Vertrauensschaden", namely the loss incurred by candidates who are victims of discrimination as a result of their belief that their would be no discrimination in the establishment of the employment relationship. Such compensation is provided for under Paragraph 611a (2) of the Bürgerliches

Gesetzbuch.

- 4 Under that provision, in the event of discrimination regarding access to employment, the employer is liable for "damages in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by such a breach [of the principle of equal treatment]". That provision purports to implement Council Directive No 76/207.
- 5 Consequently the Arbeitsgericht found that, under German law, it could order the reimbursement only of the travel expenses incurred by the plaintiff van Colson in pursuing her application for the post (DM 7.20) and that it could not allow the plaintiffs' other claims.
- 6 However, in order to determine the rules of [Union] law applicable in the event of discrimination regarding access to employment, the Arbeitsgericht referred the following questions to the Court of Justice:
  - "1. Does Council Directive No 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 imply that discrimination on grounds of sex in relation to access to employment (failure to conclude a contract of employment on account of the candidate's sex; preference given to another candidate on account of his sex) must be sanctioned by requiring the employer in question to conclude a contract of employment with the candidate who was discriminated against?
  2. If Question 1 is answered in the affirmative, in principle:
    - (a) Is the employer required to conclude a contract of employment only if, in

addition to the finding that he made a subjective decision on the basis of criteria relating to sex, it can be established that the candidate discriminated against is objectively - according to acceptable selection criteria - better qualified for the post than the candidate with whom a contract of employment was concluded?

(b) Or, is the employer also required to engage the candidate discriminated against if, although it can be established that the employer made a subjective decision on the basis of criteria relating to sex, the candidate discriminated against and the successful candidate are objectively equally well qualified ?

(c) Finally, does the candidate discriminated against have the right to be engaged even if objectively he is less well qualified than the successful candidate, but it is established that from the outset the employer, on account of the sex of the candidate discriminated against, disregarded that candidate in making his decision on the basis of acceptable criteria?

3. If the essential issue is the objective assessment of the candidate's qualifications within the meaning of Questions 2 (a), (b) and (c) :

Is that issue to be decided wholly by the court and what criteria and procedural rules relating to evidence and burden of proof are applicable in that regard?

4. If Question 1 is answered in the affirmative, in principle:

Where there are more than two candidates for a post and from the outset more than one person is on the ground of sex disregarded for the purposes of the decision made on the basis of acceptable criteria, is each of those persons entitled to be offered a contract of employment?

Is the court in such a case obliged to make its own choice between the candidates discriminated against?

If the question contained in the first paragraph is answered in the negative, what other sanction of substantive law is available?

5. If Question 1 is answered in the negative, in principle:

Under the provisions of Directive No 76/207/EEC what sanction applies where there is an established case of discrimination in relation to access to employment?

In that regard must a distinction be drawn between the situations described in Question 2 (a), (b) and (c)?

6. Does Directive No 76/207/EEC as interpreted by the Court of Justice in its answers to the questions set out above constitute directly applicable law in the Federal Republic of Germany?"

7 Those questions are intended primarily to establish whether Directive No 76/207 requires Member States to lay down legal consequences or specific sanctions in the event of discrimination regarding access to employment (Questions 1 to 5) and whether individuals may, where appropriate, rely on the provisions of the directive before the national courts where the directive has not been transposed into the national legal order within the periods pre- scribed (Question 6).

(a) Question 1

- 8 In its first question the Arbeitsgericht asks essentially whether Directive No 76/207 requires discrimination on grounds of sex in the matter of access to employment to be penalized by an obligation, imposed on an employer who is guilty of discrimination to conclude a contract of employment with the candidate who was the victim of discrimination.
- 9 According to the Arbeitsgericht, it is clear from the recitals in the preamble to and from the actual provisions of the directive that the directive requires Member States to adopt legal provisions which provide effective sanctions. In its view only compensation in kind, entailing the appointment of the persons who were the victims of discrimination, is effective.
- 10 According to the plaintiffs in the main action, by restricting the right to compensation solely to "Vertrauensschaden", Paragraph 611a (2) of the Bürgerliches Gesetzbuch excluded the possibilities of compensation afforded by the general rules of law. Directive No 76/207 requires Member States to introduce appropriate measures with a view to avoiding discrimination in the future. It should, therefore, be accepted that Paragraph 611 a (2) must be left out of account. The result of that would be that the employer would be required to conclude a contract of employment with the candidate discriminated against.
- 11 The Government of the Federal Republic of Germany is aware of the need for an effective transposition of the directive but stresses the fact that, under the third paragraph of [Article 288 TFEU], each Member State has a margin of discretion as regards the legal consequences which must result from a breach of the principle of equal treatment. The German Government submits, moreover, that it is possible for the German courts to work out, on the basis of private national law and in conformity with the substance of the directive, adequate solutions which satisfy both the principle of equal treatment and the interests of all the parties. Finally an appreciable legal consequence is in its view sufficient to ensure compliance with the principle of equal treatment and that consequence should follow only if the victim of discrimination was better qualified for the post than the other candidates; it should not apply where the candidates' qualifications were equal.

- 12 The Danish Government considers that the directive deliberately left to Member States the choice of sanctions, in accordance with their national circumstances and legal systems. Member States should penalize breaches of the principle of equal treatment in the same way as they penalize similar breaches of national rules in related areas not governed by [Union] law.
- 13 The United Kingdom is also of the opinion that it is for Member States to choose the measures which they consider appropriate to ensure the fulfillment of their obligations under the directive. The directive gives no indication as to the measures which Member States should adopt and the questions referred to the Court themselves clearly illustrate the difficulties encountered in laying down appropriate measures.
- 14 The Commission considers that although the directive is intended to leave to Member States the choice and the determination of the sanctions, the transposition of the directive must nevertheless produce effective results. The principle of the effective transposition of the directive requires that the sanctions must be of such a nature as to constitute appropriate compensation for the candidate discriminated against and . for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses actually incurred through reliance on a expectation ("Vertrauensschaden") is not sufficient to ensure compliance with that principle.
- 15 According to the third paragraph of [Article 288 TFEU]: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities . the choice of form and methods". Although that provision leaves Member States to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues.

- 16 It is therefore necessary to examine Directive No 76/207 in order to determine whether it requires Member States to provide for specific legal consequences or sanctions in respect of a breach of the principle of equal treatment regarding access to employment.
- 17 The object of that directive is to implement in the Member States the principle of equal treatment for men and women, in particular by giving male and female real equality of opportunity as regards access to employment. With that end in view, Article 2 defines the principle of equal treatment and its limits, while Article 3 (1) sets out the scope of the principle specifically as regards access to employment. Article 3 (2) (a) provides that Member States are to take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.
- 18 Article 6 requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination "to pursue their claims by judicial process". It follows from the provision that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective.
- 19 The reply to the first question should therefore be that Directive No 76/207 does not require discrimination on grounds of sex regarding access to employment to be made the subject of a sanction by way of an obligation imposed upon the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against.

(b) Questions 2, 3 and 4

- 20 It is not necessary to answer the second, third and fourth questions since they are put only on the supposition that an employer is required to offer a post to the candidate discriminated against.

(c) Questions 5 and 6 1

- 21 In its fifth question the Arbeitsgericht essentially asks whether it is possible to infer from the directive any sanction in the event of discrimination other than the right to the conclusion of a contract of employment. Question 6 asks whether the directive, as properly interpreted, may be relied on before national courts by persons who have suffered injury.
- 22 It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.
- 23 Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.
- 24 In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access

to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.

- 25 The nature of the sanctions provided for in the Federal Republic of Germany in respect of discrimination regarding access to employment and in particular the question whether the rule in Paragraph 611a (2) of the Bürgerliches Gesetzbuch excludes the possibility of compensation on the basis of the general rules of law were the subject of lengthy discussion before the Court. The German Government maintained in the oral procedure that that provision did not necessarily exclude the application of the general rules of law regarding compensation. It is for the national court alone to rule on that question concerning the interpretation of its national law.
- 26 However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under [the second and third paragraphs of Article 4(3) TEU] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of [Article 288 TFEU].
- 27 On the other hand, as the above considerations show, the directive does not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.
- 28 It should, however, be pointed out to the national court that although Directive No 75/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between

the different solutions suitable for achieving its objective, it nevertheless requires that if a Member States chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of [Union] law, in so far as it is given discretion to do so under national law.

### Costs

- 29 The costs incurred by the Governments of Denmark and the Federal Republic of Germany, by the United Kingdom and by the Commission of the European [Union], which have submitted observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of 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 Hamm, by order of 6 December 1982, hereby rules:

- 1. Directive No 76/207/EEC does not require discrimination on grounds of sex regarding access to employment to be made the subject of a sanction by way of an obligation imposed on the employer who is the author of the discrimination to conclude a contract of employment with the candidate.**

discriminated against.

2. As regards sanctions for any discrimination which may occur, the directive does not include any unconditional and sufficiently precise obligation which, in the absence of implementing measures adopted within the prescribed time-limits may be relied on by an individual in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.
  
3. Although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of [Union] law, in so far as it is given discretion to do so under national law.

Mertens de Wilmars	Koopmans	Bahlmann
Galmot	Mackenzie Stuart	O'Keefe
	Everling	Kakouris
Bosco	Due	

Delivered in open court in Luxembourg on 10 April 1984.

P. Heim  
Registrar

J. Mertens de Wilmars  
President