

Judgment of the Court (Fifth Chamber) of 13 March 1997.

**Commission of the European Communities v French Republic.
Failure of a Member State to fulfil its obligations
Equal treatment for men and women - Prohibition of nightwork**

Case C-197/96

European Court reports 1997 Page I-01489

In Case C-197/96,

Commission of the European Communities, represented by Marie Wolfcarius, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Claude Chavance, Secretary in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

defendant,

APPLICATION for a declaration that by maintaining in force Article L 213-1 of the Code du Travail prohibiting nightwork by women in industry whereas no such prohibition exists in relation to men, the French Republic has failed to fulfil its obligations under Article 5(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 (OJ 1976 L 39, p. 40),

THE COURT

(Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, L. Sevón, D.A.O. Edward (Rapporteur), J.-P. Puissechot and P. Jann, Judges,

Advocate General: G. Tesauro,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 January 1997,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 10 June 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that by maintaining in force Article L 213-1 of the Code du Travail (Employment Code) prohibiting nightwork by women in industry whereas no such prohibition exists in relation to men, the French Republic has failed to fulfil its obligations under Article 5(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 (OJ 1976 L 39, p. 40; 'the directive').

2 Pursuant to Article 5 of the directive, application of the principle of equal treatment with regard to working conditions means that men and women must be guaranteed the same conditions without discrimination on grounds of sex (paragraph 1). To that end, the Member States shall take the measures necessary to ensure that provisions contrary to the principle of equal treatment are abolished [paragraph 2(a)] or revised when the concern for protection which originally inspired them is no longer well founded [paragraph 2(c)]. Nevertheless, Article 2(3) provides that the directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

3 Under Article 9(1) of the directive, Member States were required to put into force the laws, regulations and administrative provisions necessary in order to comply with the directive within a period of 30 months of its notification and, with respect to Article 5(2)(c), within a period of four years. The latter period expired on 14 February 1980.

4 The Court held in this regard in Case C-345/89 Stoeckel [1991] ECR I-4047 that Article 5 of the directive is sufficiently precise to impose on Member States the obligation not to lay down by legislation the principle that nightwork by women is prohibited, even if that is subject to exceptions, where nightwork by men is not prohibited. Furthermore, it has repeatedly held that Article 5 is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any
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national provision not conforming to Article 5(1), which lays down the principle of equal treatment with regard to working conditions (Stoeckel, paragraph 12; Case 152/84 Marshall v Southampton and South-West Hampshire Health Authority [1986] ECR 723, paragraph 55).

5 Article L 213-1 of the French Code du Travail provides that women may not be employed for any nightwork, *inter alia*, in plants, factories and workshops, of any kind whatsoever. It does provide, however, for a number of exceptions in respect, for example, of women holding responsible positions of a managerial or technical character and in case of serious circumstances where the national interest demands that the prohibition on nightwork be suspended in the case of shift workers on the terms and in accordance with the procedure laid down by the Code. Fines may be imposed for infringements of those provisions.

6 The provisions in question were adopted in order to implement Convention No 89 of the International Labour Organization ('ILO') of 9 July 1948 concerning Nightwork of Women Employed in Industry. France ratified that convention by Law No 53-603 of 7 July 1953. That ratification was recorded by the Director General of the International Labour Office on 21 September 1953.

7 Following the judgment in Stoeckel, the French Government denounced ILO Convention No 89 on 26 February 1992, with effect from 26 February 1993.

8 In view of the judgment in Stoeckel and the French Republic's denunciation of ILO Convention No 89, the Commission took the view that the French legislation was incompatible with Article 5 of the directive and that the French Government was therefore bound to remedy that incompatibility. Consequently, by letter dated 2 March 1994, it put the French Government on notice to submit observations within two months pursuant to the first paragraph of Article 169 of the Treaty.

9 Not being satisfied with the French Government's response given on 10 May 1994, the Commission sent it a reasoned opinion on 8 November 1994 in which it requested the Government to take the necessary measures to make its legislation consistent with Article 5 of the directive within two months.

10 Since the French Government failed to comply with the reasoned opinion within the prescribed period, the Commission brought these proceedings.

11 In its defence the French Government submits that, at present, there is no longer any discrimination in law or in fact in France between nightwork by men or women. Since ILO Convention No 89 was denounced, Article L 213-1 of the Code du Travail has no longer been applicable in France because Article 5 of the directive has direct effect and consequently individuals are entitled to rely on it before national courts in order to have the contested provision set aside.

12 Accordingly, it refers, on the one hand, to a ministerial answer to a parliamentary question published in Journal Officiel de la République Française on 13 December 1993 (pp. 4517 and 4518), which clearly explained the significance of the Community case-law with regard to Article L 213-1 of the Code du Travail and national courts' obligation to set aside the application of that provision in the event of a dispute and, on the other, to the existence of agreements organizing nightwork by women in those sectors where it is most widespread. Such agreements have been concluded by a number of occupational bodies, which had been asked by the French Government to negotiate themselves the introduction of safeguards and offsetting arrangements. Moreover, the practice followed in this matter confirms that Article L 213-1 of the Code du Travail is in fact no longer applied.

13 It is undisputed that, following the French Government's denunciation of ILO Convention No 89, the French legislation is incompatible with Article 5 of the directive.

14 The Court has consistently held that the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty (see Case C-334/94 Commission v France [1996] ECR I-1307, paragraph 30).

15 Accordingly, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty, under which, in the case of a directive intended to confer rights on individuals, persons concerned must be enabled to ascertain the full extent of their rights (Case C-361/88 Commission v Germany [1991] ECR I-2567, paragraphs 15 and 24).

16 It should be noted in this case that, because Article L 213-1 of the Code du Travail has been retained, individuals are in a position of uncertainty as to their legal situation and exposed to unwarranted criminal proceedings. Neither the ministerial answer to the parliamentary question nor the obligation for national courts to secure the full effect of Article 5 of the directive by not applying any contrary national provision can have the effect of amending a statutory provision.

17 It must therefore be held that by maintaining in force Article L 213-1 of the Code du Travail prohibiting nightwork by women in industry whereas no such prohibition exists in relation to men, the French Republic has failed to fulfil its obligations under Article 5(1) of the directive.

Decision on costs

Costs

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18 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

(Fifth Chamber)

hereby:

1. Declares that by maintaining in force Article L 213-1 of the Code du Travail prohibiting nightwork by women in industry whereas no such prohibition exists in relation to men, the French Republic has failed to fulfil its obligations under Article 5(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;
2. Orders the French Republic to pay the costs.