Opinion of Advocate General Geelhoed delivered on 27 April 2004

Land Brandenburg v Ursula Sass

Reference for a preliminary ruling: Bundesarbeitsgericht - Germany

Social policy - Male and female workers - Article 141 EC - Equal pay - Directive 76/207/EEC - Equal treatment - Maternity leave - Passage to a higher salary grade - Failure to take account of the whole of a period of maternity leave taken under the legislation of the former German Democratic Republic

Case C-284/02

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I – Introduction

1. The question referred in this case arose against the background of the transition to a reunified Germany. In particular, it deals with the question whether the difference in treatment resulting from the difference between the legal regime governing maternity leave in the former German Democratic Republic and the corresponding legal arrangement in the Federal Republic of Germany amounts to discrimination based on sex.

A – Community law

2. Article 119(1) of the EC Treaty (now Article 141(1) EC) establishes the principle of equal pay for men and women for equal work. '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 (Article 119(2) of the EC Treaty, now the first sentence of Article 141(2) EC).

3. Directive 76/207 (2) establishes the principle of equal treatment of men and women for the purposes of access to employment and working conditions.

4. According to Article 3(1) of this Directive the application of this principle means that there is to be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

5. According to Article 5(1) of the same Directive the principle of equal treatment also implies that men and women are to be guaranteed the same working conditions without discrimination on grounds of sex.

6. Directive 92/85 (3) introduces a requirement of minimum protection by the Member States for pregnant workers, workers who have recently given birth, and workers who are breastfeeding. In that regard Article 8 stipulates that those workers are entitled to a continuous period of maternity leave of at least 14 weeks, including compulsory maternity leave of at least two weeks. In addition, Article 11 stipulates that the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers as well as the rights connected with their employment contract must be ensured during this period of maternity leave. (That Directive was to be transposed by 10 October 1994).

B – The national provisions

7. In the Federal Republic of Germany the position of women following confinement is governed by the Mutterschutzgesetz (Maternity Protection Law, hereinafter 'MuSchG'). In the then German Democratic Republic their position was governed by the Arbeitsgesetzbuch der Deutschen Demokratischen Republik (Labour Code of the German Democratic Republic, hereinafter 'AGB-DDR').

8. On that subject Paragraph 244 of the AGB-DDR stipulated that women are entitled to pregnancy leave for a period of six weeks before confinement and maternity leave for a period of 20 weeks after confinement. For the duration of their pregnancy and maternity leave women received a pregnancy and maternity allowance equivalent to their net average earnings from the social insurance fund.

9. In the Federal Republic of Germany the employment of women in the eight weeks following confinement was prohibited, as it is today, by the first sentence of Paragraph 6(1) of the MuSchG. During that period working mothers receive an allowance from their employers (Paragraphs 13 and 14 of the MuSchG) as well as a maternity allowance pursuant to the Reichsversicherungsordnung (Social Insurance Code). After this period of protection the employee is entitled to child-care leave until the child reaches the age of 10 months. During this period she receives child-care benefit, but no contributions from her employer.

10. Paragraph 23a of the collective agreement of 10 December 1990 for civil servants on a contractual basis in the public sector (Bundes-Angestelltentarifvertrag-Ost, hereinafter 'BAT-O') reads as follows:

'Classification in a higher salary grade after a qualifying period within the jurisdiction of the Federation and that of the Tarifgemeinschaft deutscher Länder (Financial Association of German Länder)

Employees complying with a job description marked with an asterisk in Annex 1a shall be classified in the next higher salary grade after completing the prescribed qualifying period.

The following shall apply to the completion of the qualifying period:

1. The qualification requirement shall be satisfied when employees show themselves capable of meeting the requirements occurring during the activity entrusted to them during the prescribed qualifying period. The relevant activity in this context is that which corresponds to the salary grade in which employees are classified.

2. ...

3. …

4. The qualifying period must be completed without interruption. Interruptions of not more than six months in each case shall not be detrimental; irrespective of this, interruptions on the following grounds shall also not have a detrimental effect:

(a) military service or alternative civilian service,

(b) incapacity for work within the meaning of Paragraph 37(1),

(c) periods of protection pursuant to the Mutterschutzgesetz,

(d) child-care leave pursuant to the Bundeserziehungsgeldgesetz (Federal Parental Allowance Law) and other leave granted for the care of children up to a total of five years,

(e) an activity as development volunteer as a substitute for military service for not more than two years.

However, the duration of interruptions, with the exception of

(a) leave pursuant to Paragraphs 47 to 49 and pursuant to the Law on the Severely Disabled,

(b) special leave pursuant to Paragraph 50(1) in the version applicable until 31 August 1995,

(c) leave of absence pursuant to Paragraph 52,

(d) incapacity for work within the meaning of Paragraph 37(1) for not more than 26 weeks or, in the cases referred to in the third subparagraph of Paragraph 37(4), for not more than 28 weeks,

(e) periods of protection pursuant to the Mutterschutzgesetz,

shall not count towards the qualifying period.

…'

11. The BAT-O has been amended by the Änderungstarifvertrag Nr. 1 zum BAT-O (First Collective Agreement Amending the BAT-O) of 8 May 1991. Paragraph 2 reads as follows:

'Incorporation of the BAT salary scale

Annex 1a – with the exception of the provisions concerning bonuses in Part II, section N, and of the corresponding rules in Part III, section L, subsection VII, in the areas of jurisdiction of the Federation and the Tarifgemeinschaft deutscher Länder – and Annex 1b to the Bundes-Angestelltentarifvertrag (Collective Agreement for Federal Employees, hereinafter "BAT") shall be applied with the following provisos:

1. Where job descriptions require qualifying periods, periods of activity, periods in which an occupation is pursued, etc., account shall be taken of those periods completed before 1 July 1991 and recognised as periods of employment pursuant to Paragraph 19(1) and (2) of the BAT-O and the pertinent transitional provisions which would have had to be taken into account if section VI and the BAT-O salary scale had already been in force before 1 July 1991. The first sentence shall apply *mutatis mutandis* to the account taken of periods completed before 1 July 1991 which, by virtue of transitional provisions in collective agreements amending Annex 1a or Annex 1b to the BAT which have been or will be concluded after 30 June 1991, must or may be counted in whole or in part towards the qualifying periods, periods of activity, periods in which an occupation is pursued, etc. required by job descriptions. Where job descriptions permit account to be taken of periods completed outside the scope of the BAT-O, account shall be taken of such periods if they would have had to be taken into account pursuant to the first subparagraph had they been completed within the scope of the BAT-O.

…'

II – The main proceedings

12. Mrs Ursula Sass has been employed as a production manager at the Hochschule für Film und Fernsehen 'Konrad Wolf 'in Potsdam since 1982.

13. At the time of the birth of her second child, on 27 January 1987, she lived in the then German Democratic Republic. Her employment relationship was therefore governed by the AGB-DDR. Following the birth, she took maternity leave of 20 weeks pursuant to Paragraph 244 of the AGB-DDR.

14. After the reunification of Germany her employment relationship was transferred to the Land Brandenburg. By virtue of an individual contract of employment her employment relationship was from then on governed by the BAT-O.

15. Until 7 May 1998 Mrs Sass received the salary commensurate with salary grade IIa of the BAT-O. With effect from 8 May 1998 she was reclassified in salary grade Ib, case 2 of the BAT-O having completed the qualifying period pursuant to Paragraph 23a of the BAT-O.

16. The Land counted the first eight weeks of the post-confinement maternity leave towards the qualifying period of 15 years required for classification in a higher salary grade, but not the subsequent 12 weeks. The Land takes the view that the collectively agreed provisions require only the periods of protection pursuant to the MuSchG to be counted towards the qualifying period, not the additional maternity leave under Paragraph 244 of the AGB-DDR.

17. Mrs Sass, however, takes the view that she was already classified in a higher salary grade on 12 February 1998 because the collectively agreed provisions require all post-confinement maternity leave to be counted towards the qualifying period pursuant to Paragraph 23a of the BAT-O. She claims that the defendant's interpretation of the collectively agreed provisions leads to unlawful discrimination against women.

18. She brought an action before the national court of first instance, which allowed the claim. On appeal the Land upholds its contention that the action should be dismissed. Mrs Sass claims that the appeal should be dismissed.

19. According to the referring court the claim cannot be allowed on the basis of national law alone. The referring court explains that the very wording of the third sentence of Paragraph 23a(4), point (e), of the BAT-O leaves no doubt that the period of maternity leave beyond the period of protection of eight weeks following confinement under the first sentence of Paragraph 6(1) of the MuSchG is not to be counted towards the qualifying period. This is also the only conclusion to be drawn from the scheme of the collective agreement and the spirit and purpose of the provision to be deduced from it. A different conclusion does not follow from Paragraph 2(1) of Änderungstarifvertrag Nr 1. zum BAT-O. Furthermore, the referring court explains that the collectively agreed provision does not infringe higher-ranking national law. The referring court does not,

however, rule out the possible incompatibility of the collectively agreed provision with Article 119 of the EC Treaty (now Article 141 EC) and with Directive 76/207.

A – The preliminary question

20. The Bundesarbeitsgericht (Federal Labour Court) decided to refer the following question to the Court of Justice for a preliminary ruling:

'Do Article 119 of the EC Treaty (now Article 141 EC) and Directive 76/207/EEC prohibit, in a provision of a collective agreement under which periods during which an employment relationship is in abeyance do not count towards the qualifying period, the exclusion of the period during which the employment relationship was in abeyance because the employee concerned, on the expiry of the eligible eight-week period of protection pursuant to Paragraph 6 of the Mutterschutzgesetz (Maternity Protection Law), claimed maternity leave pursuant to Paragraph 244(1) of the Labour Code of the German Democratic Republic (AGB-DDR) of 16 June 1977 (GBl. I, p. 185) until the end of the 20th week after confinement?'

III – Assessment

21. Although the referring court considers the collectively agreed arrangements to be compatible with Article 3(1) and Article 5(1) of Directive 76/207 or with the principle of equal pay for equal work, since Paragraph 23a(4) of the BAT-O makes a distinction in the counting of interruptions in activity towards the qualifying period on the basis not of sex but of whether or not the employment relationship was in abeyance during the interruption, it does not exclude, as mentioned above, the possibility that the collective agreement infringes Community law, since, because she took post-confinement leave, to which only women were entitled, Mrs Sass was classified in a higher salary grade 12 weeks later than a man, who was not entitled to post-confinement leave.

22. The latter is the view of Mrs Sass. She claims that her classification in a higher salary grade 12 weeks later than a man, having the same post, working for the same employer and having started at the same date, is due to a difference in treatment because of sex and, therefore, is in breach of Article 141 EC.

23. In addition Mrs Sass invokes Directive 76/207. She argues that her later classification is due to the fact that only the eight weeks provided for in the MuSchG (but not the full 20 weeks under the AGB-DDR) are taken into account However, according to Mrs Sass, that is a breach of Article 3(1) and Article 5(1) of the Directive.

24. The Land and the Commission take the view that there is no infringement of Community law.

25. As will be explained below, I have reached the same conclusion.

26. First of all I think the question should be considered in the light of Directive 76/207, because the case concerns access to all levels of the occupational hierarchy within the meaning of Article 3(1) of that Directive. In that sense Directive 76/207, which deals specifically with the principle of equal pay, is the proper legal basis, rather than the provisions of Article 141(1) and (2) EC. The judgment in *Nimz* (4) does not apply in this case, because the issue is not a practically automatic promotion from one salary grade to another on the basis of length of service, but the interruptions towards the qualifying period for promotion.

27. Secondly, it seems that the referring court only addresses the situation of Mrs Sass, in which a woman took maternity leave based on the then applicable Code of labour law in East Germany. As the Commission correctly pointed out in its written observations, the referring court did not raise the more general question as to whether the fact that the period of leave in excess of the eight weeks provided for in the MuSchG is not taken into account for the qualifying period amounts to discrimination. In that connection it should be mentioned that women in West Germany could similarly take longer leave than that provided for in the MuSchG at that time. That extra leave was not taken into account for the qualifying period under Article 23a(4) of the BAT-O.

28. Therefore the question raised seems to concern not discrimination between men and women in general but the treatment of a particular group of women, namely women from the former German Democratic Republic.

29. That, however, is not an aspect of Community law. The principle of equal treatment as laid down Article 2(1) of Directive 76/207 entails no discrimination whatsoever on grounds of sex. The Directive does not cover discrimination on other grounds. Therefore, possible discrimination between women from East and West Germany cannot be dealt with under this Directive.

30. It is evident that the provision of the BAT-O at issue only affects women, since only women can give birth and take maternity leave under the AGB-DDR. As such that does not preclude a finding of unlawful discrimination, since the Court has held that the refusal of a pregnant candidate can amount to unlawful discrimination, even if all other applicants are women. (5)

31. However, the origin of the difference in treatment is not the pregnancy or the fact of being a woman who has recently given birth, but the fact that, at that time, the rules regarding maternity leave/post-confinement leave for East German and West German women were enshrined in different legal regimes.

32. In West Germany women were obliged to take eight weeks' maternity leave. During this period the main obligations for both employee (to work) and employer (to pay) were suspended. Instead, the employer was obliged to supplement the social security benefits, in order to guarantee that women continued to receive the same income. None the less, this period was taken into account for the qualifying period for a higher salary level. Women could opt for longer leave. After the expiry of the eight-week protective period for working mothers following childbirth, they were entitled to maternity leave from the end of this protective period until the day the child attained the age of 10 months. That supplementary period, however, was not taken into account with respect to the qualifying period, nor was there an obligation on the employer to supplement the social security benefits a mother received.

33. In East Germany the main obligations for the employer and employee were also suspended during maternity leave. During this period a woman received a maternity allowance, equivalent to net average earnings, from the social security fund. The German Government has stated in reply to written questions put by this Court that under the AGB-DDR there was not an absolute prohibition on working after confinement, but a recovery period of six weeks was considered normal. Women were not obliged to take 20 weeks' maternity leave but in

practice almost every woman exercised her right to take this 20 weeks' maternity leave. A tariff system of promotion, subject to certain qualifications, like that in the West did not exist at that time in East Germany.

34. In fact it follows from the information given by the German Government and Mrs Sass that the eight weeks provided for by the MuSchG and, in any case, the first six weeks provided for by the AGB-DDR serve the same purpose: the recovery of the mother and the opportunity to care for the child personally in the period immediately following confinement. After this period the mother could opt for extra leave in order to care for the child (West Germany) or exercise the right to use the full period of 20 weeks (East Germany). Although not an issue in this case, it seems that in both West and East Germany there was a possibility for mothers and fathers to take some form of parental leave afterwards. In West Germany, this period did not count towards the qualifying period. As mentioned above, East Germany did not have a comparable tariff system of promotion.

35. After reunification it was settled in the collective agreement that only the eight weeks provided for in the MuSchG could be taken into account for the qualifying period. It is clear that the different legal regimes applicable before reunification might entail some friction and that it is not possible to eliminate all possible historical differences. On the other hand one could argue that the transitional provisions in the collective agreement were intended precisely to ensure equal treatment between employees of the Federal Republic of Germany and the former East Germany. If the claim of Mrs Sass were allowed, that, too, would give rise to unequal treatment.

36. I am aware that the fact that all women of the former East Germany took 20 weeks' maternity leave could create legal expectations. However, that is not a question of Community law, but a question that should be resolved according to national law.

37. As a final remark I would like to mention that the question of equal treatment between inhabitants of the former West and East Germany does not arise only in connection with the protection of mothers. For example, men performing military service can also be affected by the difference in past legal regimes. These are not issues which can be dealt with in an appropriate way by invoking the principle of equal treatment of men and women under Community law.

38. To conclude, a possible difference in treatment between those two groups of women cannot be dealt with by reference to the principle of equal treatment of men and women.

39. Is there equal treatment of men and women from the former East Germany?

40. As mentioned in point 30, only women can be pregnant and therefore take maternity leave pursuant to the AGB-DDR. However, that does not automatically mean that this difference amounts to discrimination. Pregnancy is a special situation justifying special protection. Therefore Article 2(3) of Directive 76/207 stipulates that the Directive is to be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. I also refer to the *Hofmann* case (6) in which the Court ruled that measures such as maternity leave granted to a woman on expiry of the statutory protective period fall within the scope of Article 2(3) of Directive 76/207 and that such leave may legitimately be reserved to mothers and does not amount to discrimination.

41. Although not applicable to this case, Directive 92/85 can serve as a source of inspiration. That Directive only lays down minimum rules as regards the duration of maternity leave, meaning that Member States are free to adopt legislation in which longer periods of maternity leave before or after confinement are granted.

42. As regards the consequences of this longer leave on the rights of women with respect to their employment relationship, Directive 92/85 only stipulates that during the minimum period prescribed in Article 8 of that Directive the rights connected with the employment contract must be guaranteed. Thus, the Directive does not regulate the consequences of a period of maternity leave which goes beyond the prescribed minimum period. In that regard the Court ruled in its judgment in *Boyle*(7) that it is permissible for annual leave to cease to accrue during the period of unpaid maternity leave given by the employer in addition to the period of protection guaranteed by Article 8 of Directive 92/85.

43. According to the written reply from the German Government, mentioned in points 33 and 34, women of the former East Germany were not obliged to take the full 20 weeks' maternity leave. In other words it is a special right in favour of women, they were free to choose. Mrs Sass states that at the time she gave birth the MuSchG was irrelevant. All women in the former GDR exercised their right to take 20 weeks' maternity leave. There might even have been repercussions had they not done so. She also points out that to a greater extent than in the FRG, after this period of leave mothers returned to work and put their child in a crèche. Also, it was open to them to put their child in a crèche during those 20 weeks, but if they did so after their six weeks' maternity leave they were supposed to go back to work again, as they would then no longer receive maternity allowance. Be that as it may, this can hardly be decisive for the question at issue. With respect to possible legal expectations I refer to my remark made in point 35. Although these practices might have created some legal expectations, in the sense that women might not have realised that there could be a negative effect on their classification in a higher salary grade, it is not a question of Community law, but a question that should be resolved according to national law.

44. The referring court also raised the question of indirect discrimination. Paragraph 244 of the AGB-DDR, which only concerns women, cannot amount to an indirect discrimination.

IV – Conclusion

45. In the light of the foregoing observations, I am of the opinion that the Court of Justice should reply to the question referred to the Court for a preliminary ruling by the Bundesarbeitsgericht, as follows:

46. A provision of a collective agreement under which periods during which an employment relationship is in abeyance do not count towards the qualifying period and under which only the eight-week period of protection pursuant to Paragraph 6 of the Mutterschutzgesetz counts towards the qualifying period, but not the longer period of maternity leave provided for in the Labour Code of the German Democratic Republic, does not amount to discrimination on the basis of sex.

1 – Original language: Dutch.

2 – Council Directive 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).

3 – Council Directive 92/85/EEC of 10 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

4 – Case C-184/89 *Nimz* [1991] ECR I-297.

5 – Case C-177/88 *Dekker* [1990] ECR I-3941.

6 – Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 26.

7 – Case C-411/96 *Boyle* [1998] ECR I-6401.