Opinion of Advocate General Fennelly delivered on 8 July 1999

Commission of the European Communities v Hellenic Republic

Failure by a Member State to fulfil its obligations - Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) - Directives 75/117/EEC and 79/7/EEC - Equal pay for men and women - Family and marriage allowances - Old-age pensions - Calculation - Failure to abolish discriminatory conditions retroactively

Case C-187/98

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Opinion of the Advocate-General

1 This is a contested infringement action in which the Commission claims that the Hellenic Republic is in breach of its obligations in respect of the equal treatment of men and women. It claims, in particular, that women continue to suffer discrimination in Greek law in so far as no retroactive effect was given to provisions which removed existing discrimination concerning the payment of certain marriage and family allowances with consequent effect on the calculation of social security pensions.

Community-law provisions

2 The material Community-law provisions should be briefly recalled. Article 119 of the EC Treaty (Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC) (1) enunciates `the principle that men and women should receive equal pay for equal work'. Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (`the Equal Pay Directive') (2) provides that:

`The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.'

Article 3 provides:

`Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.'

Article 4 provides:

`Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.'

The Treaty entered into force in Greece on 1 January 1981, by which date the Equal Pay Directive was also to be transposed into Greek law. Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (`the Social Security Directive'), (3) which fixed as the latest date for the adoption of transposition measures 23 December 1984, provides:

`I. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

- the scope of the schemes and the conditions of access thereto, - the obligation to contribute and the calculation of contributions,

- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

The facts and the present proceedings

3 As a result of its investigation of two complaints of discrimination made by women employed, respectively, in the national electricity undertaking (DEH) and in a psychiatric hospital, the Commission concluded that certain features of the Greek legislative provisions and administrative practices concerning the treatment of marriage and family allowances as elements of pay warranted the opening of the precontentious procedure provided by Article 169 of the EC Treaty (now Article 226 EC) which has led to the present application. Subject to one complaint of delay, the Greek Government (`the defendant') does not contest the regularity of this procedure.

4 Essentially, the Commission complains that a number of collective employment agreements having the force of law in Greece contained provisions discriminating against women in respect of the payment of marriage and family allowances, which constitute elements of pay. These discriminations were removed prospectively only, so that their discriminatory effects continue to affect women in two principal ways, to wit, difficulty in recovering arrears of pay and the effect of non-payment on calculation of social security pensions.

5 The Commission claims that the majority of national agreements, to which effect was given by ministerial decree, contained discriminations against married women in respect of the payment of family allowances. It instances the specific case of DEH, whose staff rules provided that married women workers had the right to receive the marriage allowance only if their husbands were unable to support themselves and to receive the family allowance only if the support of the children was the principal responsibility of the mother. These rules were contained in an agreement made binding by order of the Minister for Labour and approved by a decree law. (4)

6 The Commission also refers to a number of decisions of the competent administrative courts of arbitration, which, according to the Commission, have the effect of a general national collective agreement. The Defterovathmio Diikitiko Diaititiko Dikastirio (Second Level Administrative Court of Arbitration) of Athens delivered a number of decisions from 1976 to 1979, all to the effect that married women had the right to a marriage allowance when their husbands were not working, a condition not applied to men. These rulings remained effective pursuant to collective agreements until the end of 1988. By a decision concerning the conditions of remuneration of staff of State health establishments, public bodies and local authorities, the Defterovathmio Diaititiko Dikastirio (Second Level Court of Arbitration) of Piraeus decided in 1981 that the basic pay of male employees should be supplemented by ten per cent where a wife was employed or on pension but that there would be no family allowance. This decision was given effect by decree of the Minister for Labour and continued to be enforced until 1992.

7 The Commission notes that a general collective agreement of 1989 removes all discrimination with effect from 1 January 1989 in respect of these matters by providing for the payment of the relevant allowances to women subject to the same conditions as men. This agreement, however, had no retroactive effect. A collective agreement of 17 September 1983 (`the 1983 agreement') had removed discrimination in payment of the marriage allowance for workers at DEH, but, according to the Commission, expressly excluded retroactive payments.

8 In addition, the defendant, in response to the reasoned opinion of the Commission, drew attention inter alia to two laws, respectively Law 1414/1984 giving effect to the principle of equality of the sexes in employment, and Law 1483/1984 regarding the protection and assistance of workers with family obligations.

9 Article 4(5) of Law 1414/1984 provides that `marriage allowance and child allowance which are established for the first time or are readjusted shall henceforth be granted in full to every working spouse or parent regardless of sex'. Article 15 provides for the abolition of `provisions of laws, of decrees, of collective labour agreements, of arbitration awards, of ministerial decrees, and of internal regulations or governing instruments of undertakings or businesses, terms of individual contracts and provisions governing the exercise of a profession ... in so far as they are contrary to the provisions of this Law'. As the Commission points out and the defendant does not appear to contest, none of these provisions has retroactive effect.

10 Law 1483/1984, though prohibiting all discrimination founded on sex concerning access to and protection of employment, does not deal with marriage or family allowances and also has no retroactive effect.

11 In these circumstances, the Commission claims that Greek legislative and administrative provisions, even after amendment to conform with the principle of equal treatment, remain discriminatory in the important respects that: firstly, there is no objective legal right to recover arrears of marriage and family allowances wrongly withheld from women; secondly, the national social security pension paid by the social security authority (IKA) fails to take account of arrears of those allowances for the simple reason that they were not paid.

12 The Commission, in its application, has also addressed an argument made by the defendant in response to the reasoned opinion. The defendant had relied on a number of judgments of Greek courts, in particular, judgment 3/95 of the Arios Pagos (Supreme Court), holding that provisions of regulatory decrees and collective agreements which discriminated between the sexes in the payment of family allowances were invalid since they were contrary to the Greek Constitution as well as to Article 119 of the Treaty and the Equal Pay Directive. The Commission points out that this and similar judgments enured for the benefit only of the successful plaintiffs in those legal proceedings. The fact that Greek courts decide such cases when called upon to do so does not absolve Greece of its obligation to conform with Community law. Therefore, in the interests of legal certainty, all existing legal provisions should be amended so as to provide for the retroactive payment of the allowances in question. (5)

13 As a result, the Commission seeks a declaration by the Court pursuant to Article 169 of the Treaty that the Hellenic Republic has failed to fulfil its obligations under Community law, in particular those under Article 119 of the Treaty, Article 3 of the Equal Pay Directive and Article 4(1) of the Social Security Directive, by not abolishing with retroactive effect, from the date of entry into force in Greece of these Community-law provisions, regulations which impose conditions on married female workers which are not imposed on their married male counterparts in respect of the grant to employees of family or marital allowances, which are taken into account in determining their income for the purposes of calculating pension rights.

Greece: the principal defence

14 In essence the defendant maintains that Greece possesses a complete system of constitutional and legal rules sufficiently guaranteeing equal treatment of the sexes and prohibiting discrimination. The general principle of equality is enunciated in Article 4 of the Constitution of 1975. Article 22(1) provides that `[a]ll workers, irrespective of their sex or other criteria of differentiation, have the right to equal pay for work of equal value'. Article 116(3) of the Constitution provides:

`Normative ministerial decisions and provisions of collective agreements or arbitration awards regulating pay which are contrary to Article 22(1) shall remain in force until their replacement, which shall take place no later than three years from the entry into force of the Constitution.'

The defendant, relying extensively on the legal literature, says that this provision is identical in all respects with Article 119 of the Treaty, whose provisions, along with those of Convention 100/51 of the International Labour Organisation, it was designed to put into effect, and that it has the like direct effect.

15 The defendant goes on, however, to acknowledge that it is not always possible, by means of general legislative prescription, to control behaviour in society or the pressure of collective groups. The autonomy of the social partners may possibly produce effects which are not in conformity with Community law or constitutional principles. At the oral hearing, counsel for the defendant, while accepting the regulatory character of certain provisions of collective agreements, argued that any attempt by the State to legislate retroactively would be objectively impossible by reason of infringement of this autonomy.

16 The defendant also asserts that the problem of the proper legal description of family allowances has not been resolved by the Greek courts. It raises questions such as whether they should be paid to one or other of the spouses or jointly to both. Legislative intervention has led to a large amount of litigation. The defendant draws attention to a number of judgments of Greek courts. In particular, the Council of State in judgment 520/83 held that the family allowance had lost its original character and that the failure to pay it to women employed by DEH amounted to unconstitutional discrimination. In one instance - the only such case cited - a single-judge court of first instance in Athens acceded to a claim for retrospective payment of allowances.

17 In essence, therefore, the defendant maintains that Greece complies with its obligations in Community law to ensure respect for the principle of equal pay by providing a complete legal framework of protection, fortified by constitutional guarantees laying down that principle and invalidating any contrary legislative, regulatory or contractual provisions, combined with access to the courts for any persons wishing to invoke them. In this way, individuals affected by the absence of legislative measures of any kind providing for retroactive payment of allowances wrongly withheld can obtain redress. Individuals may, therefore, bring legal action to recover arrears of the relevant allowances. The defendant relies, in particular, on the statement of the Court in Commission v Germany, (6) made in the context of access to the independent professions, that:

`In view of the guarantees provided by the Basic Law and by the existing system of judicial remedies as regards the freedom for all German nationals to take up an independent profession, ... it must be held that, ... the object of Directive No 76/207 had already been achieved in the Federal Republic of Germany at the time when that directive came into force, with the result that no further legislative measures were required for its implementation.'

18 The defendant, I should here note, has not addressed at any stage the question of the failure to take account of unpaid marriage or family allowance for the purposes of pension calculation. In reality, its entire case rests on whether failure to provide retrospectively for the payment of marriage and family allowances is an infringement of Community law. If it is, then the consequences for social security pensions are automatic. If not, that question does not arise.

Analysis

A preliminary point

19 The defendant makes a preliminary point that I should dispose of at once. It criticises the delay in the present procedure, stating that the initial communication from the Commission dates back to 1991. It does not, however, allege that the application is, for this reason, inadmissible and notes the decision in this respect in Commission v Netherlands where the Court dismissed an argument of inadmissibility. (7) It is true that there are delays between the different stages of the procedure, most notably between the defendant's reply to the reasoned opinion (6 October 1995) and the introduction of this action (11 May 1998), for which the Commission has offered no explanation. In an appropriate case, the Court may consider whether delay has been detrimental to a party's interests or, as in Commission v Netherlands, whether it has made it more difficult for the Member State to refute the Commission's arguments. (8) If it had, it would, in my view, be necessary also to consider the rights of nationals of Member States under Community law. The defendant has not sought to show that its capacity to defend the claim has been affected.

Substance

20 It is not disputed that the marriage and family allowances in question constitute elements of pay. The Court has consistently held that the concept of pay is wide enough to comprise any consideration, whether in cash or in kind, whether immediate or future, which the worker receives, even indirectly, in respect of his employment from his employer. (9) None the less, the defendant, particularly in its reply, describes as extreme the proposition that an allowance must be paid to two spouses, both working. It says that such an interpretation would lead to enormous cost for the Hellenic Republic, which might be obliged to seek additional contributions from employers and workers. Such arguments have long since been rejected where they have been used to justify equivalent discrimination in the field of social security. (10) The discrimination consists, not in the payment of an allowance designed to support a family, a household or children, but in providing for its payment to the spouse of one sex either exclusively or in circumstances where it is not payable to the other.

21 It must, in addition, be recalled that the Court has consistently held that the direct effect of the Social Security Directive means that, where there is delay in the adoption of national implementing measures, women

are entitled during the period of delay to have the same rules applied to them as are applied to men who are in the same position since those rules are the only valid point of reference. (11) That is so even if, by timely implementation, the Member State in question would have been in a position, without discrimination, to avoid double payment of the existing full amounts of family allowances. Moreover, the Court has long insisted that any such belated implementing measures respect the rights which the direct effect of Article 4 of the Directive has conferred on women in that interval. The same approach is implicit in the case-law on equal pay. As long ago as the second Defrenne case, (12) Advocate General Trabucchi explained that nullity of a discriminatory clause in a collective pay agreement `means that the rate of pay provided for by the clause which is void is automatically replaced by the higher rate of pay granted to male workers'. While the Court did not rule expressly on this point, its implicit acceptance emerges clearly from its decision to limit the temporal effects of its judgment. This was based on the reliance by some Member States on the alleged unforeseeable nature of the financial burden that would be imposed on undertakings by the full retrospective application of the principle that women had to receive the same pay as men.

22 I also reject the defendant's suggestion that the autonomy of the social partners, in the particular circumstances of this case, absolves Greece as a Member State from its responsibility for discriminatory provisions of collective agreements. As the Commission points out in its reply, all the collective agreements and arbitration awards to which it refers were given binding effect by decrees of the Minister for Labour, thus acquiring the character of regulatory or administrative acts. The fact that the Minister was not party to the negotiations of the social partners or the initiator of the introduction of these discriminatory features, a circumstance relied upon by the defendant at the hearing, does not change the legal result once it is established that his decision has legal effect.

23 Article 4 of the Equal Pay Directive, which has not been relied upon by either party (see paragraph 2 above), envisages action by Member States to ensure that discriminatory provisions in collective agreements `shall be, or may be declared, null and void ...'. This clearly does not suffice to comply with the obligation imposed by Article 3 where such provisions are transformed into regulatory provisions by government order.

24 In the case of those State acts which approved collective agreements terminating discrimination without retroactive effect, the Greek State was giving implicit continuing approval and legal effect to that earlier discrimination, to which it had itself initially given effect. The two Laws of 1984 are vitiated with the same defect.

25 Finally, and decisively, the State bears direct responsibility for the organisation and supervision of the State social security pension. It has not been contested that pension calculations continue to fail to take account of marriage and family allowances wrongly withheld from women prior to the adoption of amending provisions. In this way the State is directly responsible for discrimination against women contrary to Community law. As I have observed at paragraph 18 above, this discrimination in social security pensions is consequential and thus dependent on a finding of discrimination in respect of arrears of pay (i.e. the two allowances). In the event of such a finding, it relates to a continuing discriminatory treatment which is the direct responsibility of Greece.

26 The defendant cites Commission v Germany (13) in support of its argument that individuals in Greece have available to them a sufficient constitutional and legal framework consisting of rights of access to the courts and the direct effect of Community and national constitutional norms to guarantee the application of the principle of equal treatment. The defendant relies particularly on paragraph 30 of that judgment, which deals with the position in respect of access to the independent professions. Citation of paragraph 18, dealing with access to employment in the public service, might have been even more plausible, since the Court accepted that the `categorical affirmation by the Basic Law of the equality of men and women before the law, and the express exclusion of all discrimination on grounds of sex and the guarantee of equal access to employment in the public service for all German nationals, in provisions that are intended be [sic] directly applicable, constitute, in conjunction with the existing system of judicial remedies, including the possibility of instituting proceedings before the Constitutional Court, an adequate guarantee of the implementation, in the field of the public administration, of the principle of equal treatment ...'. It is true that this language could well be used, particularly in the light of the legal literature interpreting it which is cited by the defendant, in respect of the guarantees provided by the Constitution of Greece.

27 None the less, the legal situation at issue in the Federal Republic of Germany, as it emerges from a study of the aforementioned judgment, is sharply distinguishable from that in Greece as described in the present proceedings. Germany had introduced comprehensive implementing legislation affecting employment governed by private law, about which the Commission had no complaint. For present purposes, the relevant parts of that case are those concerning the complaints of the Commission regarding the inadequacy of implementing measures affecting employment in the public service and access to the independent professions. In the first case, the Court made the statement quoted in the preceding paragraph, having noted the absence of any attempt by the Commission to establish `that discrimination on grounds of sex exists, either in law or in fact, in the public service of the Federal Republic of Germany ...'. (14) In the second case, the Court made the statement cited by the defendant (see paragraph 17 above) but also noted that `[e]xamination of the rules of the various professions concerned reveals the absence in the Federal Republic of any provisions which are contrary to the requirements of the directive'. (15)

28 I do not think these statements can truly be made of the legal situation in Greece as I have summarised it in paragraph 21 above. In so far as women were unable to secure payment of marriage or family allowance by reason of their inability to meet conditions contained in collective agreements which were not applied to men, they were not treated equally for substantial periods after 1 January 1981. In so far as they remain unable to secure payment retroactively, discrimination continues. This, unlike the situation in Germany, amounts to discrimination in fact, if not also in law.

29 Apart from distinguishing the judgment in Commission v Germany, I must also consider whether the direct effect which Greek courts must apparently give to constitutional provisions so as to annul discriminatory

administrative acts constitutes adequate protection of the principle of equal pay. A first approach to this argument is to ask whether a Member State could rely on the direct effect of Community law to escape responsibility for the continued existence of discriminatory provisions.

30 In this connection, it is established case-law that, as the Court observed in Commission v Italy, (16) direct effect `is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty'. The Court then stated:

`[I]f a provision of national law that is incompatible with a provision of the Treaty, even one directly applicable in the legal order of the Member States, is retained unchanged, this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law and ... maintaining such a provision in force therefore amounts to a failure by the State in question to comply with its obligations under the Treaty.'

In Commission v Denmark, (17) speaking of non-union workers whose rights were not covered by collective agreements, the Court held that:

`[...] principles of legal certainty and the protection of individuals ... require an unequivocal wording which would give the persons concerned a clear and precise understanding of their rights and obligations and would enable the courts to ensure that those rights and obligations are observed.'

31 In effect, the measures adopted to eliminate discrimination from Greek law have continued to have discriminatory effects in the two ways which I have described. A woman seeking to have her pension calculated so as to take account of allowances she should have received can achieve this result, as was admitted on behalf of the Greek Government at the hearing, only by bringing an action in the courts. I agree with the Commission that this situation is incompatible with the principle of legal certainty, all the more so in the light of the divergent decisions of the Greek courts and the inconsistent actions of the Greek executive. Furthermore, the defendant's arguments appear at least ambiguous on the issue of the obligation of the courts to ensure that a marriage or family allowance is paid to women under the same conditions as they are paid to men. This ambiguity appears, as the Commission has observed, to be represented in practice by a certain divergence between Greek literature and the decisions of the courts. The generally applicable provisions of the Greek Constitution have not had the universal effect, analogous with the direct effect of Community law, which has been claimed for them but have left a situation of legal uncertainty crucially in respect of the rights of women to claim the relevant allowances.

32 In all the circumstances, I believe that Greece continues to be in breach of its obligations under Community law in so far as Greece has failed to eliminate retroactively the discriminatory provisions and effects of collective agreements and arbitral awards, which also have consequences for the calculation of social security pensions.

Conclusion

33 In the light of the foregoing, I recommend that the Court rule as follows:

The Hellenic Republic has failed to fulfil its obligations under Community law, in particular those under Article 119 of the EC Treaty (Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC), Article 3 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women and Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, by not abolishing with retroactive effect, from the date of entry into force in Greece of these Community-law provisions, regulations which impose conditions on married female workers which are not imposed on their married male counterparts in respect of the grant to employees of family or marital allowances, allowances which are taken into account in determining their income for the purposes of calculating pension rights.

(1) - The content of Article 119 of the Treaty is essentially reproduced in Article 141 EC.

(2) - OJ 1975 L 45, p. 19.

(3) - OJ 1979 L 6, p. 24.

(4) - Special collective agreement of 4 October 1973 declared binding by Decree No 2842/442/1973 of the Minister for Labour (FEK B 1274/25.10.1973) and approved by Decree Law 210/1974 (FEK A 364/7.12.1974).

(5) - Case C-334/94 Commission v France [1996] ECR I-1307.

(6) - Case 248/83 Commission v Germany [1985] ECR 1459, paragraph 30. The Court was concerned with the application 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.

(7) - Case C-96/89 Commission v Netherlands [1991] ECR I-2461.

(8) - Compare Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-0000, where the Court reduced a fine imposed by the Commission, though the delay complained of in that case was in respect of the proceedings before the Court of First Instance.

(9) - Case 12/81 Garland v British Rail Engineering [1982] ECR 359, paragraph 5, and Case C-262/88 Barber [1990] ECR I-1889, paragraph 12.

(10) - For example, in Case C-377/89 Cotter v McDermott [1991] ECR I-1115, paragraphs 20 to 22.

(11) - Case 71/85 Netherlands v Federatie Nederlandse Vakbeweging [1986] ECR 3855, paragraphs 22 and 23; Case 286/85 McDermott and Cotter v Minister for Social Welfare and Attorney-General [1987] ECR 1453, paragraph 18.

(12) - Case 43/75 Defrenne v Sabena [1976] ECR 455, p. 490.

(13) - Cited at footnote 5 above.

(14) - Ibid., paragraph 17.

(15) - Ibid., paragraph 26.

(16) - Case 168/85 Commission v Italy [1986] ECR 2945, paragraph 11.

(17) - Case 143/83 Commission v Denmark [1985] ECR 427, paragraph 10.