Opinion of Advocate General La Pergola delivered on 20 February 1997

Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance.

Reference for a preliminary ruling: Labour Court, Dublin - Ireland

Equal treatment of men and women - National civil servants - Job-sharing scheme - Incremental credit determined on the basis of the criterion of actual time worked - Indirect discrimination

Case C-243/95

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Opinion of the Advocate-General

1 In this case, the Court is once more called upon to give a ruling on the compatibility with Article 119 of the Treaty of a system of remuneration applicable to civil servants. The point in issue here is whether the criteria set by the Irish rules for calculating job-sharing service for the purposes of pay when the employee concerned exercises the right to return to full-time employment, are consistent with the principle of equal treatment for men and women laid down in the Community legal order.

Facts

2 The facts underlying the dispute may be briefly recapitulated as follows: Kathleen Hill and Ann Stapleton (`the claimants') - recruited to the Irish civil service from open competitions for the grade of Clerical Assistant - were assigned to the office of the Revenue Commissioners.

3 Both claimants exercised their right under the Irish rules governing public service to work in a job-sharing capacity. (1) More specifically, Ms Hill, who was recruited in July 1981, began job-sharing in May 1988 when she was on the seventh point of the scale of pay for Clerical Assistant posts; Ms Stapleton, for her part, was directly recruited to a job-sharing post in April 1986.

The claimants each job-shared for two years (Ms Hill from May 1988 to June 1990; Ms Stapleton from April 1986 to April 1988). During that period of service they worked half full-time hours on a one week on/one week off basis. (2)

4 As regards pay, under instructions contained in a circular of 27 February 1984 issued by the Department of Finance, the scale of pay applicable to job-sharing staff is a scale each point of which represents 50% of the corresponding point on the scale of pay appropriate to full-time staff. (3) Employment while job-sharing is therefore paid on a strictly pro-rata basis.

5 The rules laid down in the administrative circular in question were incomplete. There was no provision concerning the criteria for calculating periods of service in a job-sharing capacity for the purposes of progression on the pay scale when the employee exercised the right to return to full-time work (or, in the case of employment in a job-sharing capacity ab initio, the right to take up full-time employment).

6 The competent administrative authority - the Department of Finance - addressed that question in a circular of 31 March 1987 which stated that `as each year's job-sharing service is reckonable as 6 months' full-time service, an officer who has served for two years in a job-sharing capacity should be placed on the second point of the full-time scale (equivalent to one year's full-time service)' (emphasis added). Where officers had been job-sharing for more than two years, their position on the full-time scale was to be adjusted on a strictly pro-rata basis. (4)

7 Those criteria for calculating years of service were not, however, immediately applied to the claimants. In calculating their point on the pay scale, the administration initially reckoned the period spent in job-sharing as if it had been full-time employment. On that basis, Ms Hill, who returned to full-time work in June 1990, was placed on the ninth point on the corresponding scale (that is to say, at the same point as she had reached on the job-sharing scale); Ms Stapleton, on the other hand, was placed when she secured full-time work - having completed two years' job-sharing service - on the third point of the pay scale and, since she worked satisfactorily throughout 1989 and 1990, moved up to the fifth grade of the `full-time' scale.

8 It was only subsequently that the administration realized its `mistake' and undertook the necessary adjustments. Ms Hill was `regressed' from the ninth to the eighth point on the pay scale. For her part, Ms Stapleton was not permitted to progress to the sixth point on the scale, even though from the point of view of the quality of her work, she satisfied the requirements for such advancement.

9 Under section 7(1) of the Anti-Discrimination (Pay) Act 1974, the claimants submitted a complaint to an Equality Officer in which they argued that the rules governing the recognition of pay increments accrued while job-sharing were unlawful as contrary to Article 119 of the Treaty and Directive 75/117/EEC on equal pay. (5)

10 The Equality Officer, relying on the 1974 Act and the Court's judgment in Nimz, (6) found in the claimants' favour. In his opinion, equating two years' job-sharing service to one year's full-time service for the purposes of progression on the incremental scale constituted discrimination against them.

11 Following the Recommendation of the Equality Officer, the Revenue Commissioners and the Department of Finance (`the appellants') appealed to the Labour Court. The claimants, for their part, also appealed to that court for an order requiring the administration to implement the Recommendation.

12 The Labour Court found that a case of direct discrimination was not made out. However, on the grounds that the majority of job-sharing staff are women and that the period of service spent job-sharing may give the officer experience equivalent to that gained by a full-time worker, (7) it has referred the following questions to the Court in order to ascertain whether indirect discrimination may be made out against female civil employees in this case.

`In circumstances in which far more female workers than male workers spend part of their working lives in a job-sharing capacity:

(a) Does a prima facie case of indirect discrimination arise where job-sharing workers who convert to full-time work are given credit for incremental progression on the scale of pay for full-time staff by reference to actual time worked such that, while the benefits awarded to them are fully prorated to those awarded to staff who have always worked full-time, they are placed at lower points on the full-time scale than comparators who are in all respects similar to them except that they have worked continuously on a full-time basis? In other words, is the principle of equal pay, as defined in Directive 75/117/EEC, contravened if employees who convert from job-sharing to full-time work, regress on the incremental scale and hence on their salary scale, due to the application by the employer of the criterion of service calculated by time worked in a job?

(b) If so, does the employer have to provide special justification for recourse to the criterion of service, defined as actual time worked, in awarding incremental credit?

(c) If so, can a practice of incremental progression by reference to actual time worked be objectively justified by reference to factors other than the acquisition of a particular level of skill and experience over time?'

Apart from the parties, the Commission has also submitted written observations. The parties, the United Kingdom Government and the Commission participated in the hearing.

The relevant provisions

13 The provisions quoted below are relevant to consideration of the case.

The second paragraph of Article 119 of the Treaty defines `pay' as follows:

`For the purpose of this Article, "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 1 of Directive 75/117/EEC provides:

`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.'

Legal analysis

14 Before examining the substance of the questions referred by the Labour Court, I shall start by tackling a matter which the Commission alone raised in its observations. May the Labour Court be regarded as a court or tribunal within the meaning of Article 177 of the Treaty? The Commission considers that it may. The other parties did not state any views in the written procedure. At the hearing, however, the representative of the appellant administrative authorities considered it necessary to state that the Labour Court may be regarded as a court or tribunal within the meaning of Article 177 solely in respect of certain areas of jurisdiction, including that involved in this dispute.

15 It seems to me that a few observations will suffice on this point. The Labour Court was first constituted by the Industrial Relations Act 1946, (8) which lays down detailed rules concerning its powers and procedure. Its members are appointed by the Minister for Trade and Industry on recommendations from trade union and employers' organizations. (9) Whilst its original jurisdiction was exclusively in the sphere of arbitration, the functions of the Labour Court have changed over time. The alteration introduced by the Anti-Discrimination (Pay) Act 1974 (10) is particularly significant for the purposes of this case. Section 8 of the Act provides that the Labour Court is to hear and determine appeals - as in this case - concerning Recommendations of the Equality Officer. In such cases there is provision on the one hand for a private or public hearing (section 8(1)(c)(i) and (ii)), and on the other hand for a possible appeal on a point of law to the High Court against the Labour Court's rulings, which does not exist for other cases within the Labour Court's jurisdiction (section 8(3)). (11)

16 To my mind, the requirements which a decision-making body must satisfy, according to the Court's case-law, in order to constitute a `court or tribunal' within the meaning of Article 177 are fulfilled in this case: it must be established by law and be independent, have a permanent existence, exercise binding jurisdiction, be bound by rules of adversary procedure and apply rules of law. (12) The Labour Court, which was established and is governed by law, is a permanent, independent body and also exercises `binding jurisdiction' inasmuch as it has sole jurisdiction to hear and determine equal-treatment disputes. (13) It takes its decisions in accordance with a procedure laid down by statute, with the safeguard of an inter partes hearing, and is called upon to apply rules of law. An appeal against its decisions can be brought before the High Court on a point of law. (14) Last, I would

point out that the Court held in Danfoss, a case much more open to doubt than this, that an industrial arbitration board was entitled to refer questions for a preliminary ruling under Article 177. (15)

17 I would ask the Court to bear with me while I make a few preliminary observations regarding this dispute. The case before the Court resembles those considered in Cases C-1/95 and C-100/95 - on which I delivered an Opinion on 22 October 1996 (16) - and in the case of Nimz. Yet this is true only in certain legal and factual respects. In other respects the case now before the Court differs.

18 The points of similarity with Cases C-1/95 and C-100/95 are as follows. In those proceedings it was alleged that the calculation method used by the German Government in regard to advancement - in terms of career in those cases as against in terms of pay scale in this case - gave rise to indirect discrimination against part-time workers. Having said that, it should be noted that the circumstances under consideration in Gerster and Kording fell within the ambit of Community rules different from those in point in this dispute. In the cases in question it was necessary to determine whether the German administration's conduct with regard to access to a post of higher grade was lawful under Directive 76/207/EEC as regards access to employment. (17)

19 In relation to Nimz, the similarity lies in the fact that, in that case and in this, what has to be determined is whether national rules laying down the criteria which part-time workers have to satisfy in order to acquire the right to pay increases are compatible with the principles of equal treatment. Unlike the provision at issue in Nimz, however, the Irish provision under consideration in this case evaluates work carried out over a reduced number of hours on the basis of strictly pro-rata parameters: there is a direct correlation between the work carried out and progression on the scale. (18)

20 To my mind, this case falls within the scope of the Community rules on equal pay: Article 119 of the Treaty and the relevant implementing provisions, especially those laid down in Directive 75/117. I have more than one reason for taking this view.

In its decisions the Court has repeatedly held that Article 119 is `mandatory' and applies to individual and collective agreements, as well as to laws, regulations and administrative provisions. (19)

On top of this, there is - as the Commission observes - specific clarification afforded by the judgment in Nimz, which is directly relevant to the subject-matter of this case: `the rules governing what is practically an automatic reclassification in a higher salary grade come in principle within the concept of pay as defined in Article 119 of the Treaty'. (20) In the case now before the Court, movement from one salary grade to another is automatic, which accords with the test laid down in Nimz. The question arises precisely because employees who initially worked in a job-sharing capacity automatically suffer a reduction in hourly pay at the time when they convert their employment relationship into a full-time arrangement.

The first question

21 As we know, two kinds of appraisal have to be carried out in discrimination cases. First of all, it must be ascertained whether discrimination is present and then whether it is objectively justified. (21) From the latter angle, the Labour Court asks in its second and third questions whether, in order for the employer to have recourse to the criterion of service, defined as actual time worked, it must provide special justification and, if so, whether it may do so by reference to factors other than the proven acquisition of a particular level of skill.

22 So, let us see whether discrimination is present in this case. One point is certain already: there is no direct discrimination. The national court itself has said so. The rules in question apply without distinction to men and women.

It must, however, be pointed out that the majority of officers in the grade of Clerical Assistant are women. What is more relevant for present purposes is that the overwhelming majority of job-sharers are women. (22) This explains why the question of possible discrimination between employees on the ground of sex came to be referred to the Court.

23 What arguments have been put before the Court concerning the hypothesis of indirect discrimination?

As I have said, under the calculation rules used in the Irish provisions, when workers who have exercised the right to job-share return to full-time work, their pay is less than that received by workers who have always worked full-time. In the claimants' view, this results in differential treatment which has no objective justification and is disadvantageous to women, who form the majority of job-sharers. The practical upshot is indirect discrimination contrary to the principles of Community law. Furthermore, the particular character of job-sharing distinguishes it from part-time work: job-sharing, they say, is the sharing of work and the related responsibilities between two employees. That difference in kind between job-sharing and part-time work provides justification for taking account of job-sharing for the purposes of calculating length of service in accordance with the same rules as apply to full-time work.

24 The Government concerned, and also that of the United Kingdom, consider that the present case does not exhibit the essential features of discrimination. They cite the Court's judgment in Helmig in order to argue that it is lawful for a job-sharer to be placed at a lower level on the pay scale on returning to full-time work. (23) They argue that such `regression' occurs as a result of the use of a strictly pro-rata criterion in reckoning service in a job-sharing capacity, and that that criterion is fully justified for the purposes also of progression on the pay scale: the claimants, they say, are placed, as regards pay, on a substantially equal footing with workers who have worked an equivalent number of hours. The Irish authorities maintain that that solution is not discriminatory. Conversely, the solution proposed by the claimants would be. Once equal treatment in terms of pay is claimed for classes of employees who have carried out quantitatively different work, those who have worked reduced hours will be unjustifiably advantaged over those who have worked full-time.

25 I shall now consider the arguments set out above. Under the rules governing job-sharing, just as under the rules for full-time work, progression on the pay scale depends on an assessment of both the quality and quantity of the work performed. (24) These are two inseparable assessment criteria, which operate together in forming the decision on advancement which the administration has to take. Given the same qualitative assessment of quality of two workers, the employee working in a job-sharing capacity will progress on the pay scale whilst he is job-sharing in parallel with the full-time worker. Each incremental step corresponds to half of the pay of the full-time employee. Accordingly, the hourly pay of the two categories of worker is the same at every level of the scale. Yet, when the job-sharer converts to full-time work, his position is automatically reviewed, with the result that he is placed at a lower level on the full-time scale than he occupied on the job-sharing scale.

26 That method of calculation is based on the number of hours actually worked and on strictly pro-rata criteria. Can this constitute indirect discrimination? In my view, it can. The `regression' provided for in the rules has direct effects on pay. Workers receive less, in real terms, than twice what they would have earned job-sharing: they therefore suffer a reduction in their hourly rate of pay. (25) On close consideration, this situation is the mirror-image of that created by the German rules in issue in Nimz. In that case, by providing that account should be taken of only half of the hours worked, the national legislation prevented (or, more properly, delayed) part-time workers from gaining access to a higher level in the pay scale. By contrast, in this case, under the rules in question workers returning to full-time work are unable to preserve the level on the pay-scale which they had reached while job-sharing. In both cases, therefore, employees working part-time (here the expression is to be understood in the broad sense) are denied pay benefits which are, however, granted to those doing the same work full-time. (26) This difference of treatment in terms of pay within the category of full-time workers affects those who have previously worked in a job-sharing capacity and are regressed in relation to the position which they had already achieved on the pay scale.

On examination, this difference in treatment is based solely on the mechanism provided in order for the time work variable to be taken into account in calculating pay when the job-sharer converts to full-time work. I cannot but conclude, if I may paraphrase Advocate General Darmon, that there can be `no doubt': employees converting from job-sharing are subject to discrimination in relation to full-time employees; they require twice the length of service in order to remain, on moving to full-time work, at the level of pay which they had reached on the scale for part-time work. (27)

27 In my view, this first conclusion is not contradicted by the Court's decision in Helmig. (28) In that case the issue was the right of part-time workers to overtime payments on the same basis as full-time workers when they had completed hours in excess of the set part-time working hours. The Court found that the rules in question were not discriminatory. Part-time workers could not claim the right to overtime supplements except under conditions in substance equal to the conditions applicable to full-time workers, and provided always that they had actually worked in excess of the normal full-time working hours. As is evident, the dispute then concerned the possibility of treating employees assigned to the same work in a different manner for the purposes of calculating pay. Giving part-time workers the right to overtime supplements as from the first hour worked over and above their working hours would have led to the unacceptable result of paying full-time workers proportionately less than part-timers. The Court held that there is unequal treatment wherever the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked on the basis of an employment relationship. (29) That is the correct view, which holds good, as the Commission notes, in this case as far as concerns the amount of pay due to the employee while job-sharing. As long as the persons concerned are employed in a job-sharing capacity, their pay is calculated on the basis of the work actually performed, and in no other way.

28 In the case now before the Court, however, the pay aspect is different. On close study, the Court is not faced, as it then was, with the calculation of pay for employees required to work according to different systems. In our case, the Court is called upon to ascertain whether or not persons working in a job-sharing capacity have the right to preserve their hourly rate of pay, once they have exercised their right to return to full-time work. In essence, if the strictly pro-rata criterion adopted in Helmig were to apply in the case in point, as the Irish and United Kingdom Governments propose, that would signify, to all intents and purposes, calling in question workers' hourly pay, thus making some of their financial rights nugatory. (30) For my part, I do not believe that I can accept such a result.

Let me dwell on this point. If it is held to be lawful to reduce the hourly pay of workers moving from job-sharing, this will be tantamount to reducing ex post the pay they received during the years in which they worked reduced hours. (31) To my mind, this disparity in the hourly pay of a full-time worker compared with a part-time worker is directly contrary to the principle of equal treatment upon which the judgment in Helmig is based.

29 Similar kinds of objections are encountered by the Irish administration's argument that if full-time employees who had formerly chosen to share jobs were to be treated in the same way as those who have always worked full-time, the first category of workers would be unjustifiably advantaged in relation to the second category. That is not in fact the case. I repeat: we are talking about calculating pay when someone leaves job-sharing; that method of calculation incorporates as a variable the fact that the person employed in a job-sharing capacity has worked for double the period required of a full-time worker. That is where the discrimination is to be found. In order to refute the Governments' argument suffice it to observe that workers who work, and while they work, in a job-sharing capacity, are paid in proportion to the work actually performed. That is not treating different situations in the same way: pay for job-sharing is different from pay for full-time work.

30 Extension of such different treatment, still on account of the pro-rata criterion, to employees moving from job-sharing to full-time work results in a downward valuation of the work they previously did when they were employed part-time. To my mind, that cannot be squared with the judgment of the Court in Nimz. The important thing to consider is the effect of such a valuation. Recourse to the criterion of hours worked during the period of part-time employment, as provided for by the Irish rules, introduces a retrospective disparity in the overall pay of workers performing the same duties in their employment both in terms of quality and quantity: workers are

treated as belonging to different categories. Hence the conclusion that there is unequal treatment. It is apparent from the order for reference that the majority of the employees concerned are women: the calculation criterion used by the Irish Government does therefore constitute discrimination against them. (32)

The second question

31 I must now begin to consider the second question. The national court asks the Court to specify whether the employer is required to provide special justification for recourse to the criterion of service, defined as actual time worked.

32 In essence, the Court is called upon to clarify what it held in its judgment in Danfoss. (33) There, it laid down the principle that `since length of experience goes hand in hand with experience and since experience generally enables the employee to perform his duties better', the employer need not provide special justification for recourse to the criterion of length of service.

33 To my way of thinking, such a statement can only be considered in the light of the facts of the case then before the Court. Let me briefly recall them. Under a clause in a collective employment agreement, Danfoss paid individual supplements to employees to reward flexibility, training and length of service. (34) The system used by the employer to calculate those supplements was absolutely lacking in transparency, with the result that it was impossible for employees to find out the actual break-down of the supplements paid to them. Recognizing the need for workers to know the detailed break-down of their pay, the Court went on to assess the individual criteria for the supplements, and in respect of the criterion of length of service it made the statement quoted above.

34 That judicial opinion, the meaning of which the national court now wishes the Court to define, cannot be understood in isolation from the facts set out above. Some analysis is called for here. When the employer takes an individual decision it is certainly lawful to take length of service into account as one factor in granting the employee a differential pay supplement. It may be that greater experience in the post enables the employee to work more efficiently. What does, however, give rise to doubts is the use of a criterion which generalizes recourse to length of service, so as to extend it indiscriminately even to cases in which it may be unjustified.

This is an idea which I have already discussed in my Opinion in Gerster and Kording but to which I believe I must now return. The criterion of length of service must be supported by adequate justification where it is applied to a series of work relationships in respect of which it is far from proved that length of service can be equated with competence. Different treatment of part-time and full-time workers is not justified where it is assumed, in a general way and merely on the basis of strictly proportional criteria, that workers in the first category are per se less deserving of pay supplements. Thus it is in our case. The result is the discrimination we have just seen between men and women, given the fact that the great majority of part-time workers are women. (35)

35 I must now consider whether the solution adopted by the Court in Danfoss may profitably be transposed to the case in point. I do not think it can. Indeed, it seems clear to me that the principle laid down in that case must not only be construed having regard to the abovementioned caveats but must also apply only to length of service reckoned in terms of years and not of hours actually worked. In that decision the Court gave an important explanation of the way in which the criterion of length of service must be used in order to avoid unlawful discrimination between men and women: `(...) as regards the criterion of length of service, it is also not to be excluded (...) that it may involve less advantageous treatment of women than of men in so far as women have entered the labour market more recently than men or more frequently suffer an interruption of their career' (emphasis added). (36) To my mind, this explanation leads us to draw a distinction between length of service reckoned in years - which the employer can take into consideration in deciding on promotions `without having to establish the importance it has in the performance of specific tasks entrusted to the employee' (paragraph 24) - and length of service reckoned in hours worked, whose relevance for the purposes of progression to a higher rate of pay must, in contrast, be proved by objective evidence.

36 To round off this reasoning, and the better to explain it, I shall add a few other observations which will help to distinguish this case from Nimz and to bear out the conclusion I have proposed. The job-sharing scheme undoubtedly possesses specific features differentiating it from part-time work. Each of the workers who `share' the job is responsible for the work carried out by the entire `team' - if I may so describe it - made up of the two officers sharing the job. (37) In addition, employees who have opted for job-sharing may not perform any work other than their work for the administration.

In the light of both those aspects of job-sharing, the employment relationship can be seen to have special characteristics different from those of full-time work. Employees working in a job-sharing capacity are in a position halfway between part-time and full-time work. Their employment presents features of both categories: it resembles full-time work from the point of view of the responsibility for the work in its entirety and part-time work because the hours to be worked are half the full-time hours. In my view, all of this must necessarily be taken into account in the assessment required as to the work performed and experience acquired by those who have worked as job-sharers. That is one more reason for considering that in the circumstances of this case it is unjustifiable to have recourse to length of service reckoned in hours worked. (38) Moreover, that argument of mine is indirectly, but significantly, confirmed by the statements of the national court itself. It says that it has found that `the job-sharing period may give the employee the equivalent experience of a full-time employee'. (39)

37 It follows that the criterion of length of service, defined as time actually worked, needs objective justification. The criterion will be justified where it is clear that full-time employment is the only solution to be adopted in order for the employee to obtain the requisite experience for his intended duties. Otherwise, a different sort of justification will have to be found that will in any event satisfy the criteria laid down by the Court in Bilka. It is

clear from that judgment, as far as concerns this dispute, that the objective pursued by the administration in regulating its employees' incremental steps must correspond to a real need on its part. Moreover, the means chosen with a view to achieving it must be appropriate and necessary. (40)

The third question

38 That last area of inquiry is precisely that raised by the national court's third and last question. Is it, or is it not, possible to regard the practice of making incremental steps depend on time actually worked as objectively justified on the basis of factors other than the acquisition over time of a given level of skills and experience?

39 With regard to that question, the claimants argue that there is no justification whatsoever which is both objective and necessary as required by the Court's case-law. For its part, the administration argues that the Irish system is objectively justifiable on an implied series of grounds which satisfy the requirements set out in the case-law of the Court. (41)

40 It must be stated that the Court has consistently held that `it is for the national court (...) to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice (...) may be regarded as objectively justified economic grounds'. It is therefore for the national court to assess the grounds adduced in support of the criteria adopted by the administration in the case pending before it. Once more referring to settled case-law, the Court may, however, supply general and other more specific relevant guidance concerning the reasons put forward by the administration during the proceedings. (42)

41 With regard to the first justification relied on - that it is standard practice in the Irish civil service to `credit' only actual paid service - I fail to see how it can serve in the circumstances of the case. As the Court has held, generalizations about certain categories of workers are unacceptable unless they are supported by objective criteria and are unrelated to any discrimination on grounds of sex. (43) The argument put forward by the Irish Government has already been refuted, in substance, in the judgment in Nimz. (44) There the Court rejected the proposition that classification of part-time workers in a higher salary grade should depend solely on the number of hours worked. That argument did not prevail in Nimz and it does not deserve to be upheld in this case.

42 To my mind, the second reason given by the administration is equally unconvincing. It argues that the need to give staff sufficient incentives is objective justification. To maintain motivation and a sense of vocation in the long term, or to raise the morale of staff, is a valid and laudable aim. All the more so when, as the representative of the appellant administration observed at the hearing, the career of Clerical Assistants is long and needs, if I may so express it, to be `invigorated' by continuing stimuli. However, it seems to me that such an objective could be pursued even if the disparity in pay were abolished and workers converting from job-sharing to full-time work could claim the length of service they had acquired in their previous work experience. While it is of course for the national court to make a definitive determination with regard to that point, I for one cannot see how the equal treatment as regards pay claimed by the workers concerned can possibly conflict with the administration's declared purpose. Nor, therefore, do I understand how the requirement of need laid down in the case-law referred to can be regarded as satisfied in order to justify the discriminatory measure adopted in this case. In any event, it is for the authority concerned to supply actual proof that there is a basis for the alleged justification.

43 What is to be said of the discriminatory consequences which, according to the administration, would be produced by the adoption of an ad hoc solution for a group, such as that of job-sharers, the majority of whom are women? I have already explained that there is no discrimination in favour of women. On the contrary. Those who have worked, and continue to work, full-time - a group of which women do not form the majority - receive twice the pay. The disadvantaged group is the group, notable for the preponderance of women over men, of those who have job-shared and move on to full-time work. The disadvantage can only be removed by recognizing their right to the incremental steps which they have previously accrued while job-sharing, as I have already explained.

44 Nor, lastly, am I persuaded by the justification concerning the administration's financial needs. That, under the present system, the incremental cost of job-sharers is equal to that of full-time employees does not strike me as a meritorious argument. It does not prove that the means chosen is necessary in order to satisfy a real need on the authority's part, as required by the judgment in Bilka. I cannot for my part discover any reasons why the economic needs which the administration asserts cannot be appropriately satisfied in a different manner, without discrimination as regards pay between one group and the group of full-time workers. In short, the authority concerned must prove that the criterion adopted is justified, in preference to and to the exclusion of that put forward by the claimants, by the expenditure effects of the claimants' increments.

45 For the reasons set out above I propose that the Court should reply as follows to the questions referred by the national court:

(1) Article 119 of the Treaty and the rules regarding equal pay must be interpreted as meaning that, where a greater percentage of women than men are employed on a job-sharing basis, the pay increments awarded by reference to time actually worked to those exercising the right to move from job-sharing to full-time work may not be organized in such a way that the individuals concerned are placed at a lower grade in the pay scale than other workers on full time who have the same length of service measured in years.

(2) Where an employer awards a pay increment on the basis of hours actually worked, it must prove that that criterion corresponds to a real need on its part and is effective, necessary and appropriate with a view to achieving the objectives pursued by the employer.

(3) It is for the national court to determine whether the practice of correlating pay increments with time actually worked is objectively justified.

(1) - As the national court makes clear (order for reference, p. 3), the job-sharing scheme was introduced in 1984 as a job-creation measure. Two officers share one full-time job: since the salary is divided, the cost to management remains the same. Under the rules, staff recruited on a full-time basis may participate in the scheme, in which case they retain the right to return to full-time work (Ms Hill's position); staff recruited on a job-sharing basis are entitled to be appointed to full-time positions provided that suitable vacancies exist (Ms Stapleton's position).

(2) - This is one of four job-sharing options operated under the Irish system. The others are: day on/day off; morning/afternoon, and alternate three day/two day week.

(3) - It seems worth adding a few brief comments on the pay classification system used in the Irish administration. There are two different scales, subdivided into eleven salary grades: one for full-time employees and the other for job-sharers. The salaries in the second scale represent, at each grade, half of the corresponding point on the scale of pay appropriate to full-time staff. Under the rules governing employment within the administration, increments on that scale are granted annually if the officer's services are considered satisfactory by the head of the department.

(4) - Circular of 31 March 1987 from the Civil Service Training Centre of the Department of Finance.

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

(6) - Case C-184/89 Nimz v Freie und Hansestadt Hamburg [1991] ECR I-297.

(7) - See paragraph 27 of the order for reference.

(8) - Acts of the Oireachtas, 1946, No 26, p. 1019, sections 10 to 25.

(9) - The procedure for appointing the Chairman does not involve consultation with employers' and workers' representatives, but is a matter for the Minister alone. See section 10(3) of the 1946 Act.

(10) - Acts of the Oireachtas, 1974, No 15, p. 211.

(11) - See section 17 of the Industrial Relations Act 1946. It is to be noted that section 8(4) of the 1974 Act lays down the procedure to be followed where the employer fails to implement a decision of the Labour Court. In that case, there is a second stage before that court, at the end of which the employer may be ordered to take certain action. If the employer fails to comply, fines may be imposed.

(12) - See, most recently, Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609; Case C-393/92 Almelo [1994] ECR I-1477, paragraph 21; Case C-24/92 Corbiau [1993] ECR I-1277; Case 109/88 Danfoss [1989] ECR 3199 and Case 338/85 Pardini [1988] ECR 2041.

(13) - See section 7(1) of the 1974 Act.

(14) - Case 61/65 Vaassen (née Göbbels) [1966] ECR 261.

(15) - I would point out that in that case neither the establishment of the board nor the procedure to be observed was determined in detail by statute; the arbitration board was in general composed on an ad hoc basis, so that doubts arose as to its nature as a permanent body; finally, the legal rules which it had to apply were those of collective agreements. On this point, see the Opinion of Advocate General Lenz in Danfoss [1989] ECR 3209, at points 16 to 24.

(16) - Opinion in Cases C-1/95 Gerster v Freistaat Bayern and C-100/95 Kording v Senator für Finanzen [1996] ECR I-5253.

(17) - 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).

(18) - I note that the provisions of Bundesangestelltentarifvertrag (`the BAT', the collective wage agreement scale (see footnote 34 and Nimz, paragraph 3) for federal employees) which were at issue in Nimz provided that full account should be taken of the period of service of workers employed for at least three-quarters of normal working time, but that only one-half of such period of service should be taken into account in the case of workers whose working hours were between one-half and three-quarters of normal working time.

(19) - Case 171/88 Rinner-Kühn [1989] ECR 2743; Case C-33/89 Kowalska [1990] ECR I-2591; and Case C-127/92 Enderby [1993] ECR I-5535, paragraph 21.

(20) - Nimz, paragraph 10.

(21) - Case 96/80 Jenkins v Kingsgate [1981] ECR 911, paragraphs 10 and 11.

(22) - From this point of view, the figures supplied during the proceedings speak for themselves. Of Clerical Assistants working in a job-sharing capacity, 99.2% are women; more generally, 98% of Irish Civil Servants who have chosen to job-share are women. The claimants' assertion, made both in their observations (point 1.2) and at the hearing, that workers choose that scheme in order `to combine work and family responsibilities', seems to be borne out by the experience of the Civil and Public Service Union that 83% of job-sharers `do so to combine family and work responsibilities. This invariably involves caring for children' (quoted in point 2.9 of the claimants' observations).

(23) - Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 Stadt Lengerich and Others v Helmig and Others [1994] ECR I-5727.

(24) - See, to this effect, Circular No 9/87 of the Department of Finance.

(25) - In this regard it might be interesting to note the figures supplied by the claimants in their observations for loss of hourly pay. As a result of regression Ms Hill's hourly pay went down from IRL 6.18 at the ninth level to

IRL 6.00 at the eighth level; in Ms Stapleton's case, the hourly loss was the 18 pence difference between the rates at the second and third levels (see the claimants' observations, points 5.5 and 5.6).

(26) - See, to this effect, the Commission's observations, point 3.12.

(27) - See point 7 of Advocate General Darmon's Opinion in Nimz.

(28) - Cited in footnote 23.

(29) - Helmig, cited in footnote 23, paragraphs 26 to 30.

(30) - Here, I consider it useful to recall a subsequent measure which bears out the `confusion' created in this area of the Irish system: the circular of the Department of Finance of 14 July 1994 dealing with `Job-Sharing Staff and Increments'. In paragraphs 3 and 4 the circular tackled various problems connected with the system of calculation which had arisen where a person returned to job-sharing after resuming full-time duties for a period (paragraph 3) and where a person was requested to resume full-time work for a period (paragraph 4). In both cases, the administration found it necessary to adopt `mark-time' provisions to ensure that the workers preserved their financial entitlements. This is a significant example of the consequences for workers' rights which may ensue from the rules.

(31) - An example in figures: a worker job-sharing at the first level earns IRL 4.47 an hour; at the second level IRL 4.68 an hour and at the third level IRL 4.86 an hour. Her average hourly pay over three years is IRL 4.67 an hour; by contrast, if the Irish Government's calculation method is used, her average pay per hour is IRL 4.60. It can therefore be seen that the calculation used leads to an ex post reduction in the worker's hourly earnings.

(32) - Judgment cited in footnote 6, paragraph 12.

(33) - Case 109/88 Danfoss, cited in footnote 12, paragraph 24.

(34) - Under the collective agreement the employer was free to grant supplements on the basis of certain individual characteristics of the employee (see points 42 and 43 of Advocate General Lenz's Opinion in Danfoss [1989] ECR 3209).

(35) - On the other hand, I must indicate the lines along which some learned writers have interpreted the relationship between Danfoss and Nimz. In particular, G. More: Seniority pay for part-time workers, European Law Review 1991, has written : `This (the finding on that point in Nimz) appears to contradict the view expressed by the Court of Justice in Danfoss in 1989, when (...) it stated that "seniority goes hand in hand with experience which generally places a worker in a better position to carry out his duties" and that "it was permissible for an employer to reward seniority without having to establish the importance which it takes on for the performance of the specific duties to be entrusted to the worker". The latter statement, in particular, appears to be at variance with the view of the Court in Nimz that there should be identifiable connection between rewarding seniority and an improved performance of the task in hand. This suggests that the Court's view of justifying seniority payments as expressed in Danfoss can no longer be regarded as valid. This is a welcome development and can, perhaps, be regarded as the major contribution of the Nimz judgment', p. 826.

(36) - Danfoss, cited above, paragraph 24.

(37) - See, to this effect, the analysis of the tasks performed by the claimants as set out in their observations, highlighting `the high degree of integration and communication (...) in both job-sharing partners' (point 3.7). More generally, compare the statements in point 2.3 of the observations concerning the fact that the job-sharers were not on fixed-term contracts: `There are no part-timers in the [Irish] Civil Service (...) and no job-sharers on temporary contracts'.

(38) - On this point it would be apt to recall the words of Advocate General Darmon in his Opinion in Nimz, cited above, where, when considering the United Kingdom's argument, he stated that: `Certainly it could be considered necessary to take account of length of service not in years but in hours of work performed, as proposed by the United Kingdom, but on condition that it is to facilitate progression to different duties, entailing new responsibilities and consequently presupposing a certain amount of experience. In the present case, however, the length of service required is merely intended to enable access to a higher wage grade without any alteration in the nature of the duties performed' (point 14).

(39) - Order for reference, paragraph 27.

(40) - Case 170/84 Bilka v Weber von Hartz [1986] ECR 1607, paragraph 36.

(41) - As stated in the order for reference (point 21), the administration has put forward the following reasons to justify its rules: (a) the rules are in keeping with the standard practice of the civil service whereby incremental progression is related to service and only actual paid service is credited; (b) this practice is valuable to the employer in that it gives incentives to improve the quality of work performed; (c) to make an exception of job-sharing service would lead to arbitrary and inequitable situations; (d) to make such an exception because the majority of job-sharers are women would amount to discrimination in favour of women; (e) the present practice ensures that the incremental cost of job-sharing staff is the same as that of full-time staff, thus making the cost of work done by job-sharers the same as the cost of work done by full-time staff.

(42) - Rinner-Kühn and Nimz, both cited above. See also the Opinion of Advocate General Darmon in Nimz, points 10 and 11; judgments in Case C-328/91 Thomas and Others [1993] ECR I-1267; Case C-457/93 Lewark [1996] ECR I-243, paragraph 32, and the Opinion in Gerster, cited above, point 43.

(43) - Case 171/88 Rinner-Kühn, cited at footnote 19, paragraph 14.

(44) - See the Opinion of Mr Darmon in that case, point 14, quoted in footnote 38.