Joined opinion of Advocate General La Pergola delivered on 22 October 1996

Hellen Gerster v Freistaat Bayern

Reference for a preliminary ruling: Bayerisches Verwaltungsgericht Ansbach - Germany

Case C-1/95

Brigitte Kording v Senator für Finanzen

Reference for a preliminary ruling: Finanzgericht Bremen - Germany

Case C-100/95

Equal treatment for men and women - Public servant - Part-time employment

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Opinion of the Advocate-General

I - Introduction

1 The questions raised by the Bayerisches Verwaltungsgericht (Administrative Court), Ansbach, and the Finanzgericht (Finance Court), Bremen, concern the compatibility of certain provisions of German legislation on public sector employment with the principle of equal treatment for men and women, laid down in Article 119 of the Treaty and governed by Directives 75/117 (1) and 76/207. (2) The Court is asked in particular to rule on the lawfulness of statutory regulations under which the administration takes into account periods of employment completed on a part-time basis - for the purposes, respectively, of promotion, and exemption of an employee from a public examination - differently from those completed on a full-time basis.

II - Facts

A - Case C-1/95

2 The facts giving rise to the questions raised in Case C-1/95 may be summarized as follows. On 1 August 1966 Mrs Hellen Gerster entered the service of the Bavarian State finance administration, where she was made a probationary official on 1 May 1968 and given a permanent appointment on 27 June 1977. Mrs Gerster took unpaid leave between 7 September 1984 and 6 September 1987, after which she worked part-time - one-half of normal working hours - at the local finance administration office.

3 By letter of 2 December 1993, Mrs Gerster applied for a vacancy with the Nuremberg-West Tax Office. In her letter she asked for her part-time employment since September 1987 to be treated as full-time employment for the purpose of calculating length of service when it came to assessing her merits as a candidate.

4 The Oberfinanzdirektion (Principal Revenue Office), Nuremberg, rejected Mrs Gerster's application by decision of 5 January 1994. The administration concluded that the vacant post should be filled by an official taking precedence over Mrs Gerster on the list of officials eligible for promotion.

5 On 25 April 1994 the administration formally dismissed as unfounded Mrs Gerster's complaint against its decision.

6 On 20 May 1994, following confirmation of the measure, Mrs Gerster brought proceedings before the Verwaltungsgericht, arguing inter alia that the decision adopted was contrary to the principles enshrined in Community law concerning the equal treatment of men and women. Mrs Gerster alleged that the administration, acting in accordance with the relevant domestic legislation, had not treated the periods she had worked on a part-time basis as equivalent to full-time employment for the purposes of establishing her position on the promotions list.

7 On the view that Article 119 of the Treaty also applies to public sector employees, the Verwaltungsgericht wishes to ascertain whether Section 13(2), second sentence, of the Bavarian regulations on career structure (`Laufbahnverordnung' (`the LBV')) - which provides that, for the calculation of length of service, an employee who works for more than half the full-time hours, but less than two-thirds, is to be treated as working two-thirds of full-time hours - concerns `pay' as defined in Article 119 of the Treaty. (3) According to the Verwaltungsgericht, length of service is not the only factor taken into consideration by the administration when adopting a promotion decision or, accordingly, when recognizing that the employee concerned is entitled to the related pay increase. Consequently, this case may be distinguished on its facts from Nimz, and it is unlikely therefore that the Court's judgment in that case will be of assistance here. (4)

8 If, however, Mrs Gerster's case is viewed from a different angle, the Verwaltungsgericht believes that the LBV should be assessed in terms of a possible infringement of Community legislation on equal access to promotion. Not only does the calculation of length of service play a role in the evaluation of applications and in determining the order in which officials are placed on the promotions list, it may also, in certain cases, be the crucial factor on which promotion depends.

9 The Verwaltungsgericht has decided that, in order to arrive at a decision in the dispute before it, the following questions must be referred to the Court for a preliminary ruling:

`(1) Is Article 119 of the EC Treaty applicable to public servants?

(2) If Question 1 is to be answered in the affirmative, is there an infringement of Article 119 of the EC Treaty and of Council Directive 75/117/EEC in the form of indirect discrimination against women where Section 13(2), second sentence, of the Laufbahnverordnung (regulations on career structure) provides that, for the purpose of calculating the length of service of public servants, periods of employment involving working hours of at least one-half to two-thirds of normal working hours are counted only as two-thirds of normal working hours?

(3) If Question 1 is to be answered in the affirmative, is there an infringement of Council Directive 76/207/EEC in the form of indirect discrimination against women in regard to access to career progression (promotion), where Section 13(2), second sentence, of the Laufbahnverordnung provides that, for the purpose of calculating the length of service of public servants, periods of employment involving working hours of at least one-half to two-thirds of normal working hours are counted only as two-thirds of normal working hours?'

10 In the course of the proceedings, observations were submitted under Article 20 of the Statute by the applicant, the defendant administration, the Irish Government, the United Kingdom Government and the Commission, all of whom attended the hearing. The Greek Government participated only in the oral procedure.

11 One last point. The LBV underwent substantial amendments in 1995. Those regulations now provide that, as from 17 October 1995, for the purposes of calculating length of service in promotion procedures, part-time and full-time employees are to be assessed in the same way. (5) The amendment takes effect only as from that date. No provision has been made for situations which arose before then.

B - Case C-100/95

12 The circumstances which gave rise to Case C-100/95 may be briefly summarized as follows.

Mrs Kording, who was born in 1953, is a case officer in the Oberfinanzdirektion (Principal Revenue Office), Bremen. She entered public service in 1972 and initially, until 14 November 1980, worked full-time; between that date and 31 October 1993 she worked 20 hours per week; from 1 November 1993 until 18 March 1994, she worked half-time, and since 19 March 1994, she has worked for 26 hours per week.

13 By letter of 21 October 1992, Mrs Kording asked the tax consultants' Admissions Committee of the Senator für Finanzen (Land Finance Minister) to issue a binding opinion as to whether her work with the revenue administration on a part-time basis met the requirements as to length of service - 15 years' service in the field of taxes administered by the Federal or Land tax authorities - laid down by Paragraph 38(1) no. 4(a) of the Steuerberatungsgesetz (Law on Tax Consultancy) for exemption from the examination to qualify as a `tax consultant'. (6)

14 By reply of 11 February 1993, the Admissions Committee notified Mrs Kording, as requested, of its opinion, namely, that the length of service prescribed by law for exemption from the examination was to be understood as referring to full-time work. Consequently, in the case of a part-time employee, the period qualifying for exemption had to be reckoned only according to the ratio between the hours actually worked and normal working hours. (7)

15 On 9 March 1993 Mrs Kording instituted proceedings before the Finanzgericht, claiming that the binding opinion should be annulled and the administration directed to adopt an opinion confirming that the requirements for exemption from the qualifying examination had been satisfied. According to Mrs Kording, the fact of having worked part-time was not relevant for the purposes of calculating the period of service required by law for the exemption in question to apply. The approach adopted by the administration amounted in effect to discrimination against part-time employees, contrary not only to the German Basic Law, but also to the relevant principles of Community law. Women make up the great majority of the part-time workforce and the contested legislation restricts their right to take up the profession of tax consultant. (8)

16 Uncertain whether the German legislation was compatible with Directive 76/207, the Finanzgericht stayed proceedings in order to refer the following question to the Court for a preliminary ruling:

`Is there an infringement, in the form of indirect discrimination against women, of Article 3(1) of 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, or of other Community legislation, where, under domestic legislation (Paragraph 38(1), no. 4(a), second subparagraph, in conjunction with Paragraph 36(3) of the Steuerberatungsgesetz, the 15-year minimum period of employment as a case officer in the executive grade of the revenue administration, which is required for exemption from the tax advisers' examination, is proportionately extended in the case of part-time employment involving working hours of no less than one-half of the normal working hours, and where, of the 119 part-time executive-grade officers in the Bremen revenue administration, 110 are women (92.4%)?'

17 Both the Commission and the defendant administration have submitted written observations and participated at the hearing. The Irish and United Kingdom Governments, on the other hand, took part only in the oral procedure.

III - Analysis

18 Clearly, the issues raised in these references for a preliminary ruling are substantially similar. The central question is whether the national legislation distinguishing between full-time and part-time employees for the purposes of calculating length of service - thereby affecting women to a greater extent than men - contravenes the principle of equal treatment for men and women as defined and further refined by Community law. (9)

However, these questions essentially break new ground in that, by contrast with Nimz - in which part-time employees were penalized by the calculation criteria laid down - the applicable legislation provides, in the case of Mrs Gerster, for part-time employment to be quantified on a more generous basis than directly according to proportion; by contrast, the calculation in Mrs Kording's case is made on a strictly pro rata basis. (10)

A - Case C-1/95

Question 1

19 By its first question, the national court asks whether Article 119 of the Treaty applies to public servants.

20 In my opinion, the answer to that question calls for a brief explanation. Article 119 is binding by nature. It lays down a principle - equal pay for men and women - which `forms part of the foundations of the Community' (11) and therefore applies to workers in the private and public sector alike. That is both logical and consistent with the established case-law of the Court.

21 First, the purpose of Article 119 would be defeated if public servants were excluded from its ambit. Treatment of employees would vary solely according to whether the employer was public or private. That outcome would not be consistent with the general objectives - particularly as they are matters of principle - pursued by that provision of the Treaty.

22 Secondly, we need look no further than the Court's own case-law for express confirmation that this view is correct and that the public sector is subject to all legislation giving effect to the principle set out in Article 119. The Court has stated that:

`... both Directive 76/207 and Directive 75/117 apply to employment in the public service. Like Article 119 of the EEC Treaty, those directives are of general application, a factor which is inherent in the very nature of the principle which they lay down. New cases of discrimination may not be created by exempting certain groups from the provisions intended to guarantee equal treatment of men and women in working life as a whole.' (12)

23 Thus the case-law offers clear guidance, indicating that the answer to the first question should be - in agreement, moreover, with the Verwaltungsgericht's own views and with the observations submitted by all the parties participating in the proceedings - that Article 119 also covers employment relations governed by public law.

Questions 2 and 3

24 By its second question, the Verwaltungsgericht seeks to establish whether Section 13(2), second sentence, of the LBV infringes Article 119 of the Treaty and Directive 75/117, in that it gives rise to indirect discrimination against women as regards pay. The national court also asks, in its third question, whether - since the above provision of national law specifically concerns access to employment broadly construed, including eligibility for promotion - it should instead be appraised by reference to Directive 76/207.

25 Before we address the substantive issues raised here, it is useful to recapitulate the promotion procedure adopted by the Land administration in implementation of directives issued by the Bavarian Finance Ministry.

26 Under the LBV, promotion is based on merit and length of service.

On the strength of a performance rating from his immediate superior, an employee is assigned a `minimum qualifying period' which runs from the date of his last promotion and at the end of which he will be eligible for promotion to a higher grade. Thus, in the case before the Court, an employee assessed as `very good' could be promoted to the next grade after serving at least three and a half years in his current post; however, if the rating were `broadly satisfactory', the qualifying period would instead be of five years' duration.

On completion of the qualifying period, the employee is effectively eligible for promotion (as from that date, in theory), but, of course, only if a post at that career level becomes available. Thus, once the qualifying period is over, the `waiting period' begins, during which the official waits to see whether his expectations of promotion will materialize.

27 It is the administration's practice to draw up a formal list of those eligible for promotion. The officials concerned are listed in the same order as the dates on which, respectively, they became eligible for promotion in theory. When a post falls vacant, the position is offered to the employee at the top of the list, who may or may not accept it. If he accepts, his name is removed from the list and his own post taken by the candidate immediately below him. If, however, he decides not to accept, the candidate in second place is offered the vacant post, and so on, until that post is finally accepted.

28 The problem before the Court has come about because, for the purposes of determining the date on which certain part-time employees qualify for promotion in theory under the LBV, the length of time for which they have been employed is not treated as equivalent to a period of full-time employment. In the case of those who have worked between half and two-thirds of normal working hours, their length of service is reckoned as equivalent to two-thirds of normal hours over the same period. Their `minimum qualifying period' will be longer than that of many other employees who have been given the same performance rating, but have been working full-time. The lower an employee's name on the promotions list, the slower his promotion, with obvious implications so far as his pay is concerned.

29 Should such a system be appraised, for present purposes, in the light of the directive on pay or the directive on access to employment?

30 I propose the second alternative. The LBV only affects pay indirectly. When an employee is placed on the promotions list, his progression to a higher grade cannot be classed as a right, but as a mere expectation. Actual promotion, however, depends on various factors, including, first, the availability of a post in a higher grade and, secondly, the maintenance of the employee's position on the promotions list even when this is reshuffled by

applying the criteria for `mobility based on performance', laid down by the LBV itself. (13) I therefore agree with the defendant administration - and with the observations made by the Irish Government and the Commission - that here, by contrast with the rules examined in Nimz, there is no `practically automatic' link between length of service and level of pay, which in that case led the Court to assess the BAT (Bundesangestelltentarif: Collective Wage Agreement for Federal Employees) in the light of Article 119. The main purpose of Section 13(2), second sentence, of the LBV is to lay down the conditions, in terms of length of service, for an official's access to a higher position. That does not affect - save indirectly, as mentioned above - the level of pay to which the official concerned is entitled upon completion of the promotions procedure, particularly since, as the Commission has rightly observed, in its judgment in Defrenne III the Court clearly endorsed a narrow construction of the principle of equal treatment as regards pay, stating that `it is impossible to extend the scope [of Article 119] to elements of the employment relationship other than those expressly referred to'. (14)

31 I now turn to the purpose of the provision at issue, which seeks to regulate the weight to be attributed to length of service in the procedure for access to higher grades. Directive 76/207 is thus the proper yardstick against which to check whether the LBV discriminated against women. Directive 76/207 gives clear directions in that regard. According to Article 1(1), its purpose is `to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion' (emphasis added). Article 2(1) states that this principle `shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly'. Article 3(1) states that `application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to ... all levels of the occupational hierarchy' (emphasis added).

Of interest here is the method of quantifying, for promotion purposes, a part-time official's length of service. Specifically, the material provisions are those governing access to employment (to be precise, the selection criteria used at all the various levels of the occupational hierarchy). That is why, in my opinion, the compatibility of the LBV with Community law should be measured against the yardstick indicated above.

32 Using the established case-law of the Court for guidance, let us therefore examine whether the LBV is consistent with the principles of Community law on equal treatment.

Cases of discrimination are identified by means of a dual test. The first step is to ascertain whether there is unequal treatment and, if so, whether the discrimination is direct or indirect; the second is to check whether or not such discrimination may be objectively justified on the basis of factors unrelated to sex. (15)

Moreover, although the Court has not restricted the range of interests which the national court must take into consideration when called upon to assess whether unequal treatment is justified, it has nevertheless set limits to what may constitute objective justification: the measures chosen must correspond to a real need on the part of the body concerned and be appropriate and necessary to the objective pursued. (16)

33 As remarked above, Section 13(2), second sentence, of the LBV affects part-time employees and causes them to be treated differently - in peius - by comparison with those who work full-time: the acquisition of seniority by part-time employees will be slower. The implications as regards eligibility for promotion have already been noted.

34 Viewing the LBV from that angle, I do not believe that this constitutes direct discrimination. The LBV is sex-blind, laying down rules which apply to part-time employees as such, irrespective of whether they happen to be men or women.

35 Equally clearly, however, the facts of the case set out by the Verwaltungsgericht demonstrate how indirect discrimination against female employees can arise.

36 We have seen that part-time employees are objectively at a disadvantage; furthermore, statistical analysis of that category makes it quite clear that the majority of part-time officials are women. According to Mrs Gerster, in the department where she works, women account for 87% of those employed part-time. The Verwaltungsgericht, too, proceeds on the assumption that that percentage figure accurately reflects the general situation throughout the Bavarian civil service. (17)

37 In those circumstances, any rule adversely affecting the legal position of part-time employees without objective justification would, for that very reason, give rise to discrimination on grounds of sex. If it unjustifiably delayed the career advancement of the women in question, it could be classified as indirect discrimination, contrary to the principles laid down in Directive 76/207 regarding access to promotion.

38 That, therefore, is the crucial test. For my part, I am unable to agree with the Irish and United Kingdom Governments, who maintain in their observations that the test laid down by the Court in Helmig and Others has to be applied here as well, with the result that there can be no question of unequal treatment having arisen. (18) In that judgment, the Court did not perceive any inequality in the rules applied to part-time employees solely on account of an objective and unequivocal factor relating to pay: for the same number of hours worked overtime with respect to the number of hours fixed in the collective agreement, both part-time and full-time employees received the same pay. In those circumstances, part-time employees were refused an overtime supplement provided for under a collective agreement, which they claimed in respect of hours worked in addition to those fixed in their individual contracts. The Court did not regard the rules at issue in that case as constituting unequal treatment of the various categories of employee, since pay for both part-time and full-time employees was linked to the same objective criteria. (19) That was consistent with Article 1 of Directive 75/117, which provides that `the principle of equal pay for men and women ... 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'.

39 However, the case now before the Court is quite different. Admittedly, as the United Kingdom Government emphasizes, the LBV attributes a higher value to the time worked by the part-time employee than that yielded by a pro rata calculation. Even so, that does not prevent the LBV from affecting part-time employees in the adverse manner described above and, if such persons are promoted more slowly, it means that the objective of equal treatment as regards access to employment - expressly pursued by Directive 76/207 - has been thwarted.

40 In this connection, I should like to clarify the distinction between Helmig and Others and the present case, also with reference to the criteria employed by the Court in that decision in order to exclude the existence of unequal treatment in that the essential elements were missing. In the present case, the longer qualifying period fixed for part-time employees is not justified, as it was in Helmig and Others, on the basis of an objectively verifiable criterion, but rooted solely in an assumption underlying the rules governing promotion. It is assumed that officials who work part-time need to complete longer periods of service than those who work full-time, if they are to acquire the professional skills and aptitude necessary for duties at a higher level.

That is not the only difference: in my view there is a second, even more significant difference between the two cases. As I see it, the notion of access to employment is quite different from that of pay for work performed, in the context of which it may well be appropriate to distinguish between full-time and part-time employment. Access to employment falls within the objectives of Directive 76/207, which is clearly based on the principle of equal opportunity; in cases involving the respective treatment of men and women, compliance with that principle is ensured only when the conditions applied to women employees are substantively equal to conditions for men. Accordingly, the vital stage at which equality counts is the starting point from which a career develops, compensating for the disadvantage which women alone continue to face, by removing the practical obstacles to equal opportunity in the field of employment. (20)

41 If career progression is made dependent on a pro rata calculation of the hours worked, women will continue to have unequal access to employment and promotion because of the disadvantages of working part-time. The pro rata approach exacerbates the disadvantages suffered by women on the job market. It is impossible to remedy this situation of `impaired equality' - also in the light of the Court's decision in Kalanke - by adopting measures to ensure the equal treatment of men and women in employment which target the `points of arrival'. (21) Thus the rule that pay must reflect the proportion of hours worked turns out to be inimical to sexual equality when viewed in the context of access to employment, which is the issue now before the Court. In other words, where employees perform the same duties, their pay can vary according to the hours worked without infringing, even indirectly, the principle of equal treatment. In this case, however, the question raised is how to ensure that men and women can gain access to employment in conditions of substantive equality. That question takes precedence over the issue of how, and how much, men and women are paid, after they have secured employment. What is more, it is quite independent of the question whether it is justifiable to calculate pay on a pro rata basis, distinguishing between full-time and part-time work.

42 I have already pointed out how the pro rata approach can give rise to discrimination indirectly affecting the promotion of women, since they outnumber men in the field of part-time work. It remains to be seen whether it is reasonable and justified.

43 That is entirely a matter for the national courts. It is for them to establish whether and in what measure the reasons adduced by the employer - in this case, the Bavarian administration - may be regarded as objectively justified. (22) However, this does not prevent the Court from appraising the justification put forward with respect to the LBV. The Court has not held back from making such an investigation in the past. Without going into the facts, it has given its own assessment of the criteria relied upon in order to justify discriminatory conduct, measuring that conduct against the level of objectivity required in the circumstances. (23) In this case, that would not mean, as the United Kingdom Government maintained at the hearing, that the Court is `yielding to the temptation' of evaluating the objectivity of the criterion adopted by the domestic legislature. (24) The Community judicature cannot take the place of the national court in investigations falling within the latter's jurisdiction, but it must provide that court with all the information which may assist it in settling, in full compliance with Community law, the dispute giving rise to the request for a preliminary ruling.

44 The pro rata system rests, as I have said, on the assumption that professional competence develops in step with the number of hours worked. The LBV was amended, as noted above, in 1995 so as to place part-time employees on an equal footing with those who work full-time. In promotion decisions taken under the provisions at issue here, importance is attached not only to the constitutionally sanctioned criterion of performance but also to length of service. Admittedly, the length of the `minimum qualifying period', which must be completed before promotion, depends on the employee's performance rating. However, the LBV also provides that the number of hours worked must be taken into account. That time-related quantification is considered together with quality of performance as a necessary element in the evaluation to be made; it is a crucial factor in the competent authority's decision whether to promote an employee and thus affects the development of that person's career.

45 What justification is there for a system of that nature? The defendant administration claims that it is a logical response to the administration's need to establish a gauge in terms of length of service against which an employee's professional experience can be measured prior to any decision as to his suitability for promotion. In view of the fact that the employment in question is in the civil service, that system provides the administration with the means necessary for the management of staff careers. That requirement - which is common, for that matter, to all administrative bodies - entails as a corollary that, since part-time employees handle fewer cases, they must prove themselves over a longer time-span. This is essentially the argument already adduced by the defendant administration and the German Government in Nimz: the greater the number of hours worked, the higher the employee's level of professional ability. (25) That also explains the swifter acquisition of the right to a higher salary and, in the present case, improved prospects of promotion.

46 I cannot accept these arguments. The principle on which the LBV is based proves on closer scrutiny to be quite irrelevant to any objective assessment of an official's suitability for promotion. This calls for an explanation. To distinguish between full-time and part-time employment - for the purposes under discussion, and in accordance with the rules followed by the Bavarian administration in this case - is futile when the aim is to ascertain, or at least to check adequately, the true abilities of part-time officials in relation to the duties currently performed and to those which promotion would entail.

47 However, that approach, which polarizes part-time and full-time employment, cannot be appraised in isolation. It must be viewed in the context of the national rules which the national courts are required to apply.

In the case before the Court, the approach taken has been embodied in certain provisions for which it is impossible to find any reasonable and objective justification. Part-time employees working over two-thirds of the normal working hours are equated with full-time employees. Those who work for a marginally smaller fraction - for three-fifths, let us say - of the normal working hours continue to be classified as part-time employees. In my opinion, the system lacks internal coherence. It admits of only one option where two are possible. Either it is accepted or it is ruled out that, in the context of promotion as well, there is an essential and permanent link between an employee's acquisition of professional experience and the amount of time worked. If the existence of that link is accepted, the time worked must be weighted on a strictly pro rata basis in relation to normal hours, without any rounding-up or down, or other adjustments, which are invariably inspired by value judgments based on assumptions of questionable validity. If it is ruled out, part-time and full-time employment should, on the contrary, be regarded as equivalent, and the eligibility of the employee for promotion should therefore of necessity be measured by various kinds of selection mechanisms (aptitude tests, for example, or periodic checks) designed to establish objectively his current or potential level of performance.

48 The German system recently made clear which of the above options it endorses. By the 1995 amendment to the LBV, part-time employment was equated with full-time employment so far as concerns the assessment of employees in the promotion procedure. That amendment obviously reflects an attempt to achieve equal treatment for men and women in professional life. During the proceedings before the Verwaltungsgericht, the defendant administration confirmed that the 1995 amendment `is intended to assist in making working life more compatible with family life'. (26) For my part, I would add that the protection of women in family life and in the workplace is a principle broadly accepted in the legal systems of the Member States of the Community as a natural corollary of the fact that men and women are equal. I would go as far as to say that this is a feature of our shared constitutional heritage, recognized in the Treaty as one of the guarantees afforded to citizens, not only by individual States, but also as part of the European venture.

The new LBV makes it possible for able employees to obtain promotion irrespective of their working hours, thereby removing the obstacle which limited - indirectly, but in practice inevitably - the full and due recognition of the working woman's right to equal opportunity. That was the form of protection needed, in my opinion, if the LBV was to comply with Community law on equal access for men and women to employment and promotion. However, so far as concerns women who work but who have not given up their responsibilities in the home, that form of protection can itself be described as merely indirect. The assessment of merit independently of the hours worked is the legal basis for evaluating staff and applies to men and women alike. In practice, however, the fact that full-time work is no longer rated more highly than part-time employment means equalizing the value attributed to work performed by women, who, as the statistics show, would otherwise be at a disadvantage lacking all objective justification.

49 It ought to be clear from the foregoing observations that the defendant administration's argument does not amount to a reasonable justification of the LBV. As I have explained, the idea that full-time employees acquire the professional skills and experience required for promotion before those who work part-time is an assumption, the validity of which the national court must establish on a case-by-case basis. (27) Indeed there is no reason why, if both are impartially assessed, a part-time employee may not be more gifted and capable of better performance than a colleague who works full-time. The truth is that the assumption that professional competence increases with every hour worked was embodied in a rule - specifically in the rule discriminating between full-time and part-time employment - which the new LBV has repealed. It was by no means fortuitous that the Court warned in Nimz that the `objectivity' of the criterion according to which `experience goes hand in hand with length of service, and ... enables the worker in principle to improve performance of the tasks allotted to him' depends on the `circumstances of a particular case' and, in particular, `on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours'. (28)

50 With the Court's warning in mind, there is another aspect to this case which should be considered. Over the last ten years of working on a part-time basis, Mrs Gerster carried out the duties attaching to the grade to which she was hoping to be promoted. (29) What is more, her ability to perform those duties was favourably assessed by the administration. That demonstrates, indirectly but significantly, how the rule causing Mrs Gerster to undergo a longer qualifying period in order to prove her suitability for duties at a higher grade can give rise to discrimination against a part-time employee. Hence the re-emergence of unjustified discrimination, which is bound ultimately to affect working women.

B - Case C-100/95

51 The case before the Finanzgericht bears, in more than one respect, a strong resemblance to that just examined. In both cases part-time employees are treated differently from those who work full-time. The circumstances in which Mrs Kording was affected by the criteria for career development laid down by the relevant domestic rules are also analogous. The above considerations may therefore be applied to this case, too, as I shall now explain.

52 The domestic rules, as interpreted by the Admissions Committee and as subsequently amended, provide that for the purposes of exemption from the qualifying examination for tax advisers, part-time employees must complete a period of service which is proportionally longer than that prescribed for full-time employees. Therein lies the unequal treatment between the two categories.

53 In point of fact, as the Finanzgericht points out, the rules thus construed affect women employees in this case to an even greater extent than in Case C-1/95. Women account for as many as 92.4% of all executive-grade employees working on a part-time basis in the Bremen revenue administration.

As in the previous case, therefore, the question here is whether or not such unequal treatment, which indirectly places women at a disadvantage, may be justified on objective grounds.

54 According to the tax consultants' Admissions Committee, the rules in issue are justified because part-time employees presumably take longer than those who work full-time to acquire the experience required for exemption from the examination in question. That criterion is not materially different from the one analysed above in Case C-1/95. It is not an objective criterion, nor is it logical or consistent with the fundamental principle of equal access to employment. In this case, access has been facilitated by allowing exemptions from the qualifying examination. However, that facility should have been - but was not - regulated in such a way that no unjustified restrictions adversely affected, by comparison with other employees, a category in which women greatly outnumber men.

55 Thus, in many ways, the circumstances which gave rise to these proceedings are symptomatic of the difficulties created for women when a strictly pro rata approach is adopted in evaluating length of service. Let us focus on Mrs Kording's case. Whereas those of her colleagues who work full-time are entitled to the exemption after 15 years' employment, Mrs Kording would have to wait until she had reached an age (over 50) when, not only is it difficult to enter a new profession, but it is more customary to wind up a career than to embark on one.

56 To sum up: the unequal treatment stems from the use of a criterion for assessment which is unjustified because it is not objective. An objective approach would instead have involved verifying (again, by means of appropriate internal methods of selection and testing) whether part-time employees would also be capable of working as tax advisers. The only apparent justification for the rule employed is the assumption that a person who works full-time develops skills and abilities which are proportionally superior to those of the part-time employee. The drawback is that an assumption of that nature may prove true in some cases but not in others, whereas here it has been accepted as a rule to be applied every time the question arises of exempting an employee from the examination in question. (30) The practical effect of the rule is to discriminate against women as regards access to employment. It is nearly always women who are unable to take advantage of the exemption because they have been working part-time, even though, as in the case now before the Court, the woman in question may fully deserve to be exempted on account of her true abilities and experience.

On the basis of the above conclusions, I propose that the Court should reply as follows to the questions submitted by the national court:

Case C-1/95

(1) Article 119 of the Treaty applies to employees in the public sector.

(2) Section 13(2), second sentence, of the Bavarian regulations on career structure, which provides that periods of employment during which working hours are less than two-thirds of normal working hours are only partially to be taken into account for the purposes of calculating length of service, does not fall within the scope 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 (OJ 1975 L 45, p. 19).

(3) Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) must be interpreted as precluding national legislation which does not take into account, or does not fully take into account, length of service for promotion purposes in the case of part-time officials whose working hours are less than two-thirds of normal working hours, if considerably fewer men than women work part-time, save where that legislation is shown to be based on objective criteria unrelated to discrimination on grounds of sex, having regard in particular to the relationship between the nature of the duties performed and the professional experience gained.

Case C-100/95

Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) should be interpreted as precluding, in cases where considerably fewer men than women make up the part-time workforce, national legislation which provides, for the purposes of exemption from the qualifying examination for tax advisers, that the 15-year period laid down for full-time employees should be extended on a pro rata basis for those who work part-time, save where it is shown that such legislation is based on objective grounds justifying the connection specified therein between the type of duties performed and the experience gained from those duties for the purposes of the professional preparation considered necessary and sufficient for exemption.

(1) - 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).

(2) - Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

(3) - The LBV provides that: `Periods of employment during which the hours worked are less than half normal working hours are not to be taken into account for the purposes of calculating length of service. Periods of employment during which the hours worked are at least half of normal working hours are treated as equivalent to two-thirds for the purposes of calculating length of service. Periods of employment during which the hours worked exceed two-thirds of normal working hours are deemed equivalent to periods of full-time employment for the purposes of calculating length of service' (emphasis added).

(4) - See Case C-184/89 [1991] ECR I-297. The Court held in that case that Article 119 of the Treaty precludes a collective agreement entered into within the national public service from providing for the period of service of employees working at least three-quarters of normal working time to be fully taken into account for access to a higher salary grade, where only one-half of such period of service is taken into account in the case of employees whose working hours are between one-half and three-quarters of those normal working hours. The contested rules of the Bundesangestelltentarifvertrag (the `BAT', a collective wage agreement for public sector employees) set those conditions for automatic (rectius, practically automatic) access to a higher salary grade for employees who had completed six years' service.

(5) - The provision in question is Section 13(2) of the Laufbahnverordnung, as last amended (GVBl. 1996, 99 et seq.). It also provides that, in order to determine how shorter periods of work are to be quantified for the purposes of calculating length of service, it is necessary to take into consideration the situation as a whole in each individual case.

(6) - Under the national rules, exemption from the qualifying examination for tax consultants must be granted to `former executive-grade officers and employees of the revenue administration who have been employed for not less than 15 years in the area of taxes administered by the Federal or Land tax authorities, as a "Sacharbeiter" (case officer) or in a post which is at least equivalent'.

(7) - The administration's interpretation was to be confirmed in an amendment made in 1994 - hence after the events material to this case - to the German legislation in issue. Paragraph 36(4) of the Law on Tax Consultancy provides, as last amended, that, for the purposes of calculating length of service, part-time work on the basis of less than half normal working hours is not to be taken into account whereas part-time work on the basis of half normal working hours or more is to be quantified on a pro rata basis in relation to the time actually worked.

(8) - Mrs Kording submitted in support of her arguments that the reason for the legislative amendment by which in 1972 the period was extended from 5 to 15 years was to prevent an `exodus' of public servants to the private sector. Thus, the legislation makes no provision for any evaluation of the suitability of part-time employees to obtain exemption from the public examination.

(9) - On that point, the case calls for the Court to assess the compatibility with Article 119 of national rules (not merely conduct of private employers or collective agreements), as in Case 171/88 Rinner-Kühn [1989] ECR 2743.

(10) - In the circumstances examined in Nimz, the part-time employee was penalized by the quantification criteria used by the administration. For the purposes of access to a higher salary grade, the length of service of employees who worked between half and three-quarters of normal working hours counted as half only. By contrast, in the present case the questions attach no importance to the fact that part-time work for less than half normal working hours is not taken into consideration for the purposes of determining length of service (the relevance of which is mostly confined to special circumstances, such as where a public servant is involved in political activities).

(11) - Case 43/75 Defrenne [1976] ECR 455.

(12) - Case 248/83 Commission v Germany [1985] ECR 1459, paragraph 16. Regarding the binding nature of Article 119, and its applicability not only to public authorities but also to all agreements, see Case C-33/89 Kowalska [1990] ECR I-2591, paragraph 12; as regards the irrelevance of whether the workplace is public or private, see Defrenne, cited above (footnote 11), paragraph 1 of the operative part; see also Nimz, cited above (footnote 4), paragraph 11.

(13) - As the defendant administration explains, it is always possible for the employee to move up (and by the same token, to move down) the promotions list following a new performance rating (every three years). A different rating means a new calculation, which may affect the employee's position on the list.

(14) - See Case 149/77 Defrenne III [1978] ECR 1365, paragraph 20, but see also paragraphs 21 to 23.

(15) - Case 170/84 Bilka [1986] ECR 1607, paragraph 29; Case 96/80 Jenkins [1981] ECR 911, paragraph 13.

(16) - Bilka, cited above (footnote 15), paragraph 36.

(17) - See p. 4 of the defendant administration's observations and p. 15 of the order for reference.

(18) - Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 [1994] ECR I-5727.

(19) - See Helmig and Others, cited above (footnote 18), paragraphs 27, 28 and 29.

(20) - See the Opinion of Advocate General Tesauro in Case C-450/93 Kalanke [1995] ECR I-3051.

(21) - See the judgment in Kalanke, cited above. The quotations are taken from the Opinion delivered in that case by Advocate General Tesauro (points 19 and 13, respectively).

(22) - See Jenkins, cited above (footnote 15), paragraph 13, and Bilka, cited above (footnote 15), paragraph 36.

(23) - See the judgments in Rinner-Kühn, cited above (footnote 9), and Nimz, cited above (footnote 4); also points 10 and 11 of the Opinion of Advocate General Darmon in Nimz. See also Case C-328/91 Thomas and Others [1993] ECR I-1247 and, most recently, Case C-457/93 Lewark [1996] ECR I-243, paragraph 32.

(24) - See the minutes of the hearing of 13 June 1996 in Luxembourg.

(25) - See the judgment in Nimz, cited above (footnote 4), paragraph 13.

(26) - See the order for reference, p. 10, in fine.

(27) - On this point, I would remind the Court of the remarks made by Advocate General Darmon in his Opinion in Nimz concerning the validity of the assumption that, as regards access to higher duties, the greater the length of service the greater the degree of professional ability (namely the situation here): `Even in such a case ... it would be necessary to take into consideration the nature of the post in question - experience is not as decisive a criterion for the post of maintenance worker as it is for that of the head of an administrative department - and that in such matters it is not possible to accept a general and abstract rule' (point 15). In that way, the Advocate General clarified the relationship between the circumstances in Nimz and the Court's findings in Danfoss (Case 109/88 [1989] ECR 3199, paragraph 24). It is for the national court to verify, in the light of the facts in each individual case, whether the link between length of service and better performance, though valid in theory, exists in practice.

(28) - See the judgment in Nimz, cited above (footnote 4), paragraph 14. Similarly, in Rinner-Kühn (cited above in footnote 9) the Court found another criterion to be inadequate because it was not based on objective standards. In that case, the German Government contended that the conferral ex lege of entitlement to pay from the employer in cases of sickness solely on workers whose contracts exceeded a given number of hours per week or per month was justified by the fact that workers outside that category `were not as integrated in, or as dependent on, the undertaking employing them as other workers'. The Court stated in response that `those considerations, in so far as they are only generalizations about certain categories of workers, do not enable criteria which are both objective and unrelated to any discrimination on grounds of sex to be identified' (paragraphs 13 and 14).

(29) - See the applicant's observations (not contested by the defendant administration), according to which, as from her last promotion on 1 January 1984, Mrs Gerster carried out duties linked to a post in Level A 9 + Z - that is to say, in the same category as the post for which she applied. See also the defendant's observations, p. 2.

(30) - I have in mind, by way of a simple example, the case of a full-time employee who in the course of his work investigates cases relating solely to one of the matters for which the revenue administration is responsible and, vice versa, the case of a part-time employee whose work is divided on a rota basis between the various departments. Obviously, the employee in the latter case will have experience which is wider (although, admittedly, shallower) than the former.