JUDGMENT OF THE COURT (Sixth Chamber)

6 April 2000 (1)

(Directives 76/207/EEC and 86/613/EEC - Equal treatment for men and women - Self-employed activity - Downgrading of medical practices)

In Case C-226/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Østre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Birgitte Jørgensen

and

Foreningen af Speciallæger,

Sygesikringens Forhandlingsudvalg

on the interpretation 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) and Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56),

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), G. Hirsch and F. Macken, Judges,

Advocate General: A. Saggio,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mrs Jørgensen, by C. Holberg, of the Copenhagen Bar,

- the Foreningen af Speciallæger and the Sygesikringens Forhandlingsudvalg, by N. Norrbom, of the Copenhagen Bar,

- the Commission of the European Communities, by H.C. Støvlbæk, of its Legal Service, acting as Agent, assisted by P. Heidmann, of the Copenhagen Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Jørgensen, the Foreningen af Speciallæger, the Sygesikringens Forhandlingsudvalg and the Commission, at the hearing on 21 October 1999,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2000,

gives the following

Judgment

1.

By order of 4 June 1998, received at the Court on 24 June 1998, the Østre Landsret (Eastern Regional Court), Denmark, referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions on the interpretation ofCouncil 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) and Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56).

2.

The four questions have been raised in proceedings between Mrs Jørgensen, a rheumatologist, on the one hand, and the Foreningen af Speciallæger (Danish Association of Specialised Medical Practitioners) ('the FAS□') and the Sygesikringens Forhandlingsudvalg (Health Insurance Negotiations Committee) ('the SFU□'), on the other hand, concerning the application of a negotiated scheme for the reorganisation of medical practices.

The legal framework

Community law

3.

According to Article 1, Directive 76/207 has as its purpose to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, under certain conditions, social security.

4.

Article 2(1) of Directive 76/207 provides:

'For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.□

5.

Article 3(1) of Directive 76/207 provides:

'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 jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.□

6.

Under Article 5(1) of Directive 76/207:

'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.□

7.

According to its Article 1, Directive 86/613 has as its purpose to ensure application in the Member States of the principle of equal treatment as between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, in particular as regards those aspects not covered by Directive 76/207. According to Article 2, the directive covers self-employed workers, that is to say, 'all persons pursuing a gainful activity for their own account, under the conditions laid down by national law, including farmers and members of the liberal professions□', as well as their spouses, not being employees or partners, where they habitually participate in those activities under the conditions laid down by national law.

8.

Article 4 of Directive 86/613 provides:

'As regards self-employed persons, Member States shall take the measures necessary to ensure the elimination of all provisions which are contrary to the principle of equal treatment as defined in Directive 76/207/EEC, especially in respect of the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity including financial facilities.□

National law

9. Danish Law No 244 of 19 April 1989 on equal treatment between men and women in regard to employment and maternity leave, as amended (hereinafter 'the Law□), transposed Directives 76/207 and 86/613 into national law.

10. Paragraph 5(1) of the Law provides:

'The obligation to provide equal treatment also applies to any person who introduces provisions and takes decisions concerning access to independent professions. This also applies to the creation, conversion or expansion of an undertaking or to the starting or expansion of any other form of independent activity, including its financing.□

11. The health system in force in Denmark provides that the fees of doctors who have concluded special agreements with the public body which manages the health insurance scheme are to be paid directly by that body. In return, restrictions are imposed on patients limiting their choice of doctor. Patients remain free to choose their doctor but must then bear a substantial portion of the costs, with the result that this possibility is little used. In fact, practically all doctors' fees are paid directly by the health insurance body.

12. Specialised medical practitioners working in a practice can be divided into two categories: first, doctors with 'full-time□ practices, where all of their professional activity is conducted within their practices ('full-time specialised medical practitioners□); second, doctors with a 'part-time□ practice, where they are engaged in another medical activity outside their practice ('part-time specialised medical practitioners□).

13. An agreement was concluded on 1 June 1990 between the FAS, on behalf of specialised medical practitioners, and the SFU, on behalf of the health insurance body (hereinafter 'the Agreement□). Its objectives were, *inter alia*, to limit public expenditure on the care provided by specialised medical practitioners and to improve the financial and geographical planning of the number of such specialists. To that end, the Agreement adopted a 'cut-off scheme□, involving a mandatory reduction in the fees of those practices with the highest turnovers, and a 'reorganisation scheme□, designed to limit the exercise of the activity of part-time specialised medical practitioners.

14. As far as the latter scheme is concerned, many doctors who in theory worked principally in a hospital and part-time in their practice were criticised for neglecting their hospital work and working chiefly with a view to ensuring the turnover of their practice. A decision was therefore taken to establish a uniform ceiling for turnover of part-time practices, this being fixed, depending on the speciality, at DKK 400 000 or DKK 500 000 per annum (DKK 400 000 in the case of rheumatology).

15. The reorganisation scheme also set out the criteria to enable practices to be reclassified, on the basis of 1989 turnover, as either part-time practices or full-time practices, in order to determine their new status.

16. Thus, under point 6 of this scheme, practices previously regarded as being full-time practices which in 1989 achieved a turnover falling, according to speciality, within a band between DKK 400 000 and DKK 500 000 or between DKK 500 000 and DKK 600 000 would remain full-time practices and would, by virtue of that fact, not be subject to the annual ceiling of DKK 400 000 or DKK 500 000 in respect of fees paid by the social security body. In the event of sale, however, they were to be converted to part-time practices. According to the same point in the reorganisation scheme, if special circumstances, such as illness, caused such practices to fall within the aforementioned band, the turnover for the previous three years was to be taken into consideration.

The dispute in the main proceedings

17. Mrs Jørgensen, who is a member of the FAS, is subject to the Agreement in so far as she receives fees from the health insurance body.

18. Since she had no other medical activity outside her practice and since in 1989 her practice achieved a turnover of DKK 424 016, she came within point 6 of the reorganisation scheme. After the entry into force of the Agreement, her practice has remained a full-time practice and thus she has retained the possibility of increasing her turnover. However, if she were to sell her practice, it would be converted to a part-time practice, with the result that the annual amount of fees paid by the health insurance body which the purchaser could receive would be limited to DKK 400 000.

19. Mrs Jørgensen challenged the application of such a scheme, pointing out that she had always worked in a full-time practice and that a particular reason why her turnover, which she wished to increase to more than DKK 500 000 in future, was not higher was that she had had to devote part of her time to her family commitments when her children were young. She also raised the question of compensation for any loss incurred in the event of the sale of a practice which, at the time of its transfer, would have a turnover in excess of the DKK 400 000 limit laid down by the Agreement.

20. When her complaints were unsuccessful and her appeal to the Speciallægesamarbejdsudvalg i Frederiksborg Amt (Specialised Medical Practitioners' Cooperation Committee for Frederiksborg District) was dismissed, Mrs Jørgensen then brought the matter, on 13 August 1991, before the Østre Landsret, seeking an order requiring the FAS and SFU to recognise that the reorganisation scheme laid down in the Agreement was totally or partially invalid and that Mrs Jørgensen's work in her practice had to be treated as a full-time activity for the purposes of any transfer to a third party. She submitted, in particular, that application of point 6 of the reorganisation scheme constituted indirect discrimination contrary to Paragraph 5 of the Law. In her view, this measure affected a proportionately greater number of female specialised medical practitioners than male specialised medical practitioners, since women attend to the rearing of their children more frequently than their male counterparts and for that reason achieve a lower turnover.

21. The parties to the dispute each commissioned a statistical report from an expert with a view to either establishing or contesting the existence of indirect discrimination on grounds of sex and submitted their respective reports to the Østre Landsret. The report submitted by the applicant concludes that the reorganisation scheme is indirectly discriminatory, while the report produced by the FAS and SFU reaches the opposite conclusion. According to the two experts, the sole reason for this divergence is that they disagree on the original data which formed the basis of their respective replies.

22. The Østre Landsret formed the view that resolution of the dispute required an interpretation of Article 3(1) of Directive 76/207 and of Article 4 of Directive 86/613 and decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. The Court of Justice is asked to clarify how an assessment as to whether there is indirect discrimination on grounds of sex should be undertaken in a case concerning equal treatment under Council Directive 76/207 of 9 February 1976 and Council Directive 86/613 of 11 December 1986.

Since it is supposed that under the settled case-law of the Court of Justice on equal pay a point-for-point comparison should be made, the Court is asked to clarify whether the comparison of occupational conditions to be undertaken in an equal treatment case should be made by way of an overall assessment of all the surrounding factors or by way of a point-for-point comparison as in equal pay cases.

It can be assumed in answering the question that the negotiated reorganisation scheme, assessed as a whole, is gender-neutral in both its effect and purpose.

It can further be assumed that the negotiated reorganisation scheme contains provisions which, viewed in isolation, result in a sex bias, inasmuch as it appears that some provisions predominantly affect female specialised medical practitioners whilst other provisions predominantly affect male specialised medical practitioners.

2. If the answer to Question 1 is in the affirmative, the Court is requested to state if (and to what extent) considerations relating to budgetary stringency, savings and medical practice planning may be treated as objective and relevant considerations such as to make it acceptable that proportionately more women than men are affected by the provision in question.

3. In view of the applicant's age (she was born in 1939), can the consideration for goodwill which the applicant could obtain on surrendering her practice at retirement age be likened to an employee's pension savings?

4. If the Court of Justice replies to Question 3 in the affirmative, the Court is asked to explain how the answer to Question 1 is affected by the fact that the disadvantage to which the provision in question gives rise consists in part in lower consideration for goodwill when a practice is relinquished, and thus in reduced pension insurance, having regard to the fact that in paragraph 27 of the judgment in Case C-297/93 *Grau-Hupka* [1994] ECR I-5535, it was held that the Member States are not obliged to grant advantages in the matter of old-age pension insurance to persons who have brought up children or to provide benefit entitlements where employment has been interrupted by child-rearing.

The first question

23. By its first question, the national court is asking whether, in order to determine whether there is indirect discrimination based on sex in a case concerning equal treatment such as that now before it, Directives 76/207 and 86/613 require a separate assessment to be made of each of the key conditions governing the exercise of a professional activity laid down in contested provisions or an overall assessment to be made of all of those elements together.

24. Mrs Jørgensen and the Commission argue that, according to the Court's case-law, the principle of equal treatment must be observed in the case of each condition or provision applying to men and women. They contend that an overall assessment of a whole set of provisions cannot be made where, as in the present case, heterogenous criteria are used.

25. The FAS and SFU, on the other hand, consider that the principle of point-by-point comparison, applicable in equal pay cases, cannot be transposed to cases concerning equal treatment, since the latter cases are totally different in nature. They argue that, since the Agreement and the reorganisation scheme in question constitute a global solution to a problem concerning the management of public funds and are based on objective criteria, nothing precludes an overall assessment of their effects.

26. The Court must observe at the outset that the measures being challenged in the main proceedings concern a professional activity carried on under conditions falling within the scope of Directive 86/613, Article 4 of which expressly refers to the principle of equal treatment as defined in Directive

76/207. The national court is therefore right to inquire about the combined interpretation of those two directives.

27. As the Court explained in paragraphs 34 and 35 of its judgment in Case C-262/88 *Barber* [1990] ECR I-1889, if national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of the principle of equal pay would be diminished as a result. Genuine transparency, permitting an effective review, can therefore be assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women, and not only on the basis of a comprehensive assessment of the consideration paid to workers.

28. The same finding applies, in principle, to all aspects of the principle of equal treatment and not only to those which have a bearing on equal pay.

29. According to the Court's case-law, national provisions or rules relating to pay or social security benefits, access to employment and working conditions discriminate indirectly against women where, although worded in neutral terms, they work to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex (see, in particular, Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2743, paragraph 12, and Case C-189/91 *Kirsammer-Hack* v *Sidal* [1993] ECR I-6185, paragraph 22).

30. Thus, once it is established that a measure adversely affects a much higher percentage of women than men, or vice versa, that measure will be presumed to constitute indirect discrimination on grounds of sex and it will be for the employer or the person who drafted that measure to demonstrate the contrary.

31. An initial overall assessment of all the elements which might be involved in a scheme or set of provisions of which such a measure may form part would not allow effective review of the application of the principle of equal treatment and might not comply with the rules governing the burden of proof in matters relating to indirect discrimination on grounds of sex.

32. It must, however, be pointed out that, as far as application of those rules is concerned, the various elements of the provisions governing a professional activity may only be taken into account individually in so far as they are separable and constitute in themselves specific measures based on their own criteria of application and affecting a significant number of persons belonging to a determined category.

33. As the Court stated in paragraphs 16 and 17 of its judgment in Case C-127/92 *Enderby* [1993] ECR I-5535, a situation may only reveal a prima facie case of indirect discrimination if the statistics describing that situation are valid, that is to say, if they cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and appear, in general, to be significant.

34. In the present case, while the contested provision of the reorganisation scheme is based on application criteria which appear to be distinct from those used in the other provisions and affects a particular category of specialised medical practitioners, inasmuch as it governs only full-time practices which in 1989 achieved a certain level of turnover, it is clear from the uncontested facts reproduced at the hearing before the Court that its application affected only 22 specialised medical practitioners, of whom 14 were women, out of a total of 1 680, of whom 302 were women. It seems doubtful that such data could be treated as significant.

35.

In any event, it is for the national court to determine whether or not, having regard to the interpretative criteria provided by the Court, the specific arrangements and conditions for application of the measure at issue in the main proceedings indicate the existence of indirect discrimination on grounds of sex.

36. The answer to the first question must therefore be that, in order to determine whether indirect discrimination on grounds of sex exists in a case concerning equal treatment such as the present case, Directives 76/207 and 86/613 must be interpreted as requiring a separate assessment to be made of each of the key conditions governing the exercise of a professional activity laid down in the contested provisions, in so far as those key elements constitute in themselves specific measures based on their own criteria of application and affecting a significant number of persons belonging to a determined category.

The second question

37. By its second question, the national court asks whether considerations relating to budgetary stringency, savings or medical practice planning may be regarded as objective considerations such as to justify a measure which adversely affects a larger number of women than men.

38. Mrs Jørgensen argues that, according to the Court's case-law, budgetary considerations cannot justify sex discrimination. The FAS and SFU, while taking the view that it isfor the national court to determine whether a measure involving indirect discrimination is justified on objective grounds, contend that cost management is necessary where medical services are paid for out of public funds. For its part, the Commission takes the view that general measures of social policy such as those invoked in the main proceedings may justify a difference in treatment, but the same does not apply to budgetary considerations alone if they constitute an end in themselves.

39. It must be observed in this regard that, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes (Case C-343/92 *De Weerd and Others* [1994] ECR I-571, paragraph 35). Moreover, to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States (*De Weerd and Others*, cited above, paragraph 36).

40. However, as the Commission has pointed out, reasons relating to the need to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care are legitimate and may justify measures of social policy.

41. As Community law stands at present, social policy is a matter for the Member States, which enjoy a reasonable margin of discretion as regards the nature of social protection measures and the detailed arrangements for their implementation (Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraph 22, and Case C-226/91 *Molenbroek* [1992] ECR I-5943, paragraph 15). If they meet a legitimate aim of social policy, are suitable and requisite for attaining that end and are therefore justified by reasons unrelated to discrimination on grounds of sex, such measures cannot be regarded as being contrary to the principle of equal treatment (*Commission* v *Belgium*, cited above, paragraphs 19 and 26, and *Molenbroek*, cited above, paragraphs 13 and 19).

42. The answer to the second question must therefore be that budgetary considerations cannot in themselves justify discrimination on grounds of sex. However, measures intended to ensure sound

management of public expenditure on specialised medical care and to guarantee people's access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end.

The third question

43. By its third question, the national court is asking whether the price which a doctor can obtain from the sale of his or her practice, when he or she ceases working on reachingretirement age, can be treated as equivalent to a retirement pension for an employed person.

44. Mrs Jørgensen and the Commission take the view that a medical practice's sale price cannot be treated as a retirement pension. The FAS and SFU, on the other hand, consider that the proceeds of such a sale are more like a pension payment than pay for work, in so far as the doctor receives those proceeds upon cessation of his or her professional activity.

45. On this point, it is sufficient to hold that goodwill is an incorporeal element of a medical practice, so that the price for its transfer cannot in any circumstances be treated as equivalent to benefits paid by way of a retirement pension. The transfer of a practice is not necessarily linked to the age of the transferor and may occur at any time, whereas a pension is obtained only at a certain age and subject to a certain period of activity and payment of a specific amount of contributions. Furthermore, it is the person taking over the practice who pays the purchase price and not those who normally provide the doctor's remuneration, whether these be his patients, the State or the health insurance body.

46. The answer to the third question must therefore be that the price which a doctor may receive for goodwill when the doctor ceases activity on reaching retirement age cannot be treated as equivalent to the retirement pension of an employed worker.

The fourth question

47. In view of the answer to the third question, it is unnecessary to reply to the fourth question.

Costs

48. The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Østre Landsret by order of 4 June 1998, hereby rules:

1. In order to determine whether indirect discrimination on grounds of sex exists in a case concerning equal treatment such as the present case, 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 and Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood must be interpreted as requiring a separate assessment to be made of each of the key conditions governing the exercise of a professional activity laid down in the contested provisions, in so far as those key elements constitute in themselves specific measures based on

their own criteria of application and affecting a significant number of persons belonging to a determined category.

2. Budgetary considerations cannot in themselves justify discrimination on grounds of sex. However, measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end.

3. The price which a doctor may receive for goodwill when the doctor ceases activity on reaching retirement age cannot be treated as equivalent to the retirement pension of an employed worker.

Moitinho de Almeida Gulmann
Puissochet

Hirsch Macken

Delivered in open court in Luxembourg on 6 April 2000.

R. Grass

J.C. Moitinho de Almeida

Registrar

President of the Sixth Chamber

1: Language of the case: Danish.