JUDGMENT OF THE COURT (Third Chamber)

3 October 2019 (*)

(Reference for a preliminary ruling – Social policy – Framework Agreement on part-time work – Clause 4 – Principle of non-discrimination – Less favourable treatment of part-time workers compared to full-time workers as regards their conditions of employment – Prohibition – National legislation fixing a maximum duration of fixed-term employment that is longer for part-time workers than for full-time workers – Principle of pro rata temporis – Directive 2006/54/EC – Equal treatment of men and women in matters of employment and occupation – Article 2(1)(b) – Concept of 'indirect discrimination' on grounds of sex – Article 14(1)(c) – Employment and working conditions – Article 19 – Burden of proof)

In Case C-274/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria), made by decision of 19 April 2018, received at the Court on 23 April 2018, in the proceedings

Minoo Schuch-Ghannadan

v

Medizinische Universität Wien,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, F. Biltgen, J. Malenovský, C.G. Fernlund and L.S. Rossi, Judges,

Advocate General: G. Pitruzzella,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 7 March 2019,

after considering the observations submitted on behalf of:

– Ms Schuch-Ghannadan, by A. Obereder, Rechtsanwalt,

– Medizinische Universität Wien, by A. Potz, Rechtsanwältin,

– the Austrian Government, by J. Schmoll and G. Hesse, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, A. Pimenta and S. Duarte Afonso, acting as Agents,

– the European Commission, by M. van Beek, T.S. Bohr and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 June 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Clause 4 of the Framework Agreement on part-time work concluded on 6 June 1997 ('the Framework Agreement on part-time work'), which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), and of Article 2(1)(b) and Article 19(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

2 The request has been made in proceedings between Ms Minoo Schuch-Ghannadan and the Medizinische Universität Wien (Medical University of Vienna, Austria; 'the MUW') concerning an action brought by the former seeking a declaration of continuation of her employment relationship with the latter for an indefinite period.

Legal context

European Union law

Directive 97/80/EC

3 Article 4(1) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6), repealed by Directive 2006/54, provided:

'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

Framework Agreement on part-time work

4 Clause 4 of the Framework Agreement on part-time work, entitled 'Principle of non-discrimination', reads as follows:

'1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.

…'

The Framework Agreement on fixed-term work

5 Clause 5 of the Framework Agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement on fixed-term work'), which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), entitled 'Measures to prevent misuse', provides, in paragraph 1 thereof:

'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.'

Directive 2006/54

6 Under recital 30 of Directive 2006/54:

'The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.'

7 Article 2 of that directive, entitled 'Definitions', provides, in paragraph 1 thereof:

'For the purposes of this Directive, the following definitions shall apply:

…

(b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

…'

8 Article 14 of that directive, entitled 'Prohibition of discrimination', provides, in paragraph 1 thereof:

'There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;

…'

9 Article 19 of that directive, entitled 'Burden of proof', states:

'1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent authority to investigate the facts of the case.

…'

Austrian law

10 Paragraph 6(1) of the Universitätsgesetz 2002 (Law on Universities; 'the UG') reads as follows:

‘The present Federal Law applies to the following universities:

…

4. [MUW];

…’

11 Paragraph 109 of the UG provides:

‘1. Employment contracts may be concluded for an indefinite or a fixed term. Unless otherwise provided for in the present Federal Law, fixed-term employment contracts shall have a maximum duration of six years, failing which they shall be invalid.

2. A series of immediately consecutive fixed-term [contracts] shall be permissible only for employees working within the framework of externally funded projects or research projects, staff assigned exclusively to teaching and replacement staff. The total duration of an employee’s immediately consecutive employment contracts may not exceed six years, or eight years in the case of part-time employment. A one-off extension up to a total of 10 years, and up to a total of 12 years in the case of part-time employment, shall be permissible, provided there is objective justification, in particular for the continuation or completion of research projects and publications.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 It is apparent from the order for reference that Ms Schuch-Ghannadan was employed by the MUW as a research scientist from 9 September 2002 to 30 April 2014, both full-time and part-time, under a series of successive fixed-term contracts.

13 According to the referring court, Austrian law, and in particular Paragraph 109(2) of the UG, provides that successive fixed-term contracts are allowed for employees of the MUW, in particular within the framework of externally funded projects or research projects and for staff assigned exclusively to teaching. The total duration of those immediately consecutive fixed-term employment contracts may not exceed six years, or eight years in the case of part-time employment. Beyond that, a one-off extension up to 10 years for full-time employees, or 12 years for part-time employees, is permissible, provided there is objective justification, in particular for the continuation or completion of ongoing research projects and publications.

14 Ms Schuch-Ghannadan brought an action before the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria) seeking a declaration of the continuation of her employment relationship with the MUW beyond 30 April 2014, since, according to her, the maximum period permitted for fixed-term employment relationships – eight years in her case – had already expired at that date. She further argued that Paragraph 109(2) of the UG constitutes discrimination against part-time workers. Finally, she claimed that that provision puts women at a particular disadvantage, given that fewer women work full-time. Thus, in the absence of any objective justification, that difference in treatment constitutes indirect discrimination on grounds of sex, which is contrary to EU law.

15 In its defence, the MUW argued that an extension of the maximum duration of successive fixed-term contracts to a maximum period of 12 years was justified in this case, since the last fixed-term contract had been concluded to enable the applicant in the main proceedings to pursue a project and to complete tasks within the framework of that project.

16 By judgment of 2 June 2016, the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) dismissed the action, relying on the fact that the MUW had been entitled to extend the employment relationship with the applicant to a maximum period of 12 years.

17 Ms Schuch-Ghannadan brought an appeal before the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria). That court set aside the judgment of the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) on the ground that the latter court had not sufficiently examined the conformity

of Paragraph 109(2) of the UG with EU law, even though the applicant had raised that issue. The appellate court therefore referred the case back to the referring court and instructed it to provide the MUW with the opportunity to make observations and, if necessary, adduce evidence as to whether that provision was capable of putting women at a particular disadvantage as compared with men, and, if so, determine whether such unequal treatment was justified.

18 Before the referring court, the MUW argues that the Oberlandesgericht Wien (Higher Regional Court, Vienna) carried out an incorrect assessment of the burden of making out and proving discrimination, in finding that the burden of proving that there was no discrimination lay on the MUW. According to the MUW, the applicant merely claimed, in an unsubstantiated manner, that there was indirect discrimination on grounds of sex, without setting out, in a concrete and reasoned manner, how the application of Paragraph 109(2) of the UG would constitute discrimination against female workers by comparison with male workers. The MUW also maintains that indefinite-term employment is extremely rare in universities and that Paragraph 109(2) of the UG allows its employees to work for it for longer. Finally, the MUW argues that, for the purpose of assessing whether that provision adversely affects women in particular, the common situation at all Austrian universities should be the reference period used. However, not having access to the entirety of those data, the MUW submits that, as far as it is concerned, the proportion of fixed-term workers covered by Paragraph 109(2) of the UG is 79% for women and 75% for men.

19 For her part, Ms Schuch-Ghannadan argues that a measure which is such as to affect a higher percentage of women than men is presumed to constitute indirect discrimination, such that it is for the opposing party to adduce evidence to the contrary. Since the MUW has been unable either to provide the figures for the other universities covered by the same legislation or to prove the existence of a justification, the existence of indirect discrimination is established.

20 In that regard, the referring court notes that Paragraph 109(2) of the UG constitutes a derogation from the usual labour law rules, the sequence of two or more consecutive fixed-term contracts being considered, in principle, unlawful unless there is objective justification.

21 Nevertheless, according to the referring court, that provision is not contrary to Clause 5 of the Framework Agreement on fixed-term work, given that, in fixing the maximum total duration of successive fixed-term employment contracts or relationships, the national legislature has adopted a measure of the nature referred to in Clause 5(1)(b).

22 The referring court also raises the question of the compatibility of Paragraph 109(2) of the UG with Clause 4 of the Framework Agreement on part-time work, in that that paragraph fixes a maximum duration for fixed-term employment relationships for part-time workers that is longer than that for full-time workers. The referring court is of the view that that provision could be seen as the application of the *pro rata temporis* principle, which is to be found in Clause 4(2), on the ground that, during the employment relationship, part-time workers acquire less knowledge and experience than full-time workers. If that is the case, it need only be examined whether recourse to that principle is appropriate in the case at hand, without having to ascertain whether there are objective grounds justifying the measure in question.

23 As regards Directive 2006/54, in order to assess whether the national measure at issue in the main proceedings involves indirect discrimination on grounds of sex, the referring court considers it necessary to take the employees of all Austrian universities within the scope of the UG as a reference group and to compare the percentage of men and women employed part-time who are covered by that measure. In that regard, under Article 19(1) of that directive, it is for the party who considers him or herself wronged by indirect discrimination to substantiate its existence.

24 Nevertheless, according to a number of judgments of the Oberster Gerichtshof (Supreme Court, Austria), the fact that the rate of part-time employment is generally much higher among women constitutes a presumption of unequal treatment which is for the employer to rebut by proving that the proportion of women affected by a given measure is not significantly higher than that of men in the same situation.

25 For that reason, the referring court asks the Court to interpret Article 19 of Directive 2006/54.

26 In those circumstances, the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the principle of *pro rata temporis* under point 2 of clause 4 of the [Framework Agreement on part-time work], in conjunction with the principle of non-discrimination under point 1 of clause 4, to be applied to legislation under which the total duration of immediately consecutive employment contracts of an employee of an Austrian university working within the framework of externally funded projects or research projects is 6 years for full-time employees, but 8 years for part-time employees, and moreover, if there is objective justification, in particular for the continuation or completion of research projects or publications, a further one-off extension up to a total of 10 years for full-time employees and of 12 years for part-time employees is permissible?

(2) Does legislation such as that described in Question 1 constitute indirect discrimination based on sex within the meaning of Article 2(1)(b) of Directive [2006/54] in the case where, within the group of workers subject to that legislation, a significantly higher percentage of women is affected as compared with the percentage of men so affected?

(3) Is Article 19(1) of Directive [2006/54] to be interpreted as meaning that a woman who, in the area of application of legislation such as that set out in Question 1, claims to have suffered indirect discrimination based on sex on the ground that significantly more women than men are employed on a part-time basis, must assert this fact, in particular that women are statistically much more significantly affected, by submitting specific statistics or specific facts and must substantiate this by means of appropriate evidence?'

Consideration of the questions referred

Preliminary observation

27 As a preliminary point, with respect to the scope of the questions referred for a preliminary ruling, it must be observed that, by those questions, the referring court seeks an interpretation only of Clause 4 of the Framework Agreement on part-time work and of Article 2(1)(b) and Article 19(1) of Directive 2006/54.

28 In that regard, it must be noted that the European Commission has argued, both in its written observations and at the hearing before the Court, that Paragraph 109(2) of the UG does not constitute an adequate transposition of Clause 5(1) of the Framework Agreement on fixed-term work.

29 However, as has been noted in paragraph 21 of the present judgment, it is very clear from the request for a preliminary ruling that, in the view of the referring court, Paragraph 109(2) of the UG is an adequate and lawful transposition of that clause. Consequently, the referring court does not consider itself in need of clarification regarding the possible impact of Clause 5(1) of the Framework Agreement on fixed-term work on the answer to be given to the questions asked.

30 According to settled case-law, it is for the referring court alone to determine and formulate the questions to be referred for a preliminary ruling concerning the interpretation of EU law which are necessary in order to resolve the dispute in the main proceedings (judgment of 13 December 2018, *Touring Tours und Travel and Sociedad de transportes*, C-412/17 and C-474/17, EU:C:2018:1005, paragraph 39 and the case-law cited).

31 It is also clear from the case-law of the Court of Justice that, if the referring court stated in its order for reference that it did not consider it necessary to ask a question, the Court of Justice may not answer that question or take it into account in the reference for a preliminary ruling (see, to that effect, judgment of 13 December 2018, *Touring Tours und Travel and Sociedad de transportes*, C-412/17 and C-474/17, EU:C:2018:1005, paragraph 41 and the case-law cited).

32 In those circumstances, the Court of Justice may not, in the present case, extend the scope of the questions asked by examining them in the light, not only of Clause 4 of the Framework Agreement on part-time work and Article 2(1)(b) and Article 19(1) of Directive 2006/54, but also of Clause 5(1) of the Framework Agreement on fixed-term work.

The first question

33 By its first question, the referring court asks, in essence, whether Clause 4 of the Framework Agreement on part-time work must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which lays down, for the fixed-term workers it covers, a maximum duration of employment relationships longer for part-time workers than for comparable full-time workers and, in addition, whether the principle of *pro rata temporis* referred to therein applies to such legislation.

34 It should be borne in mind that, in accordance with point 1 of that clause, as regards conditions of employment, part-time workers may not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds. Moreover, under point 2 of that clause, where appropriate, the principle of *pro rata temporis* is to apply.

35 In the present case, the question arises, first of all, of whether the legislation at issue in the main proceedings involves, as regards the duration of fixed-term employment relationships, less favourable treatment of part-time workers than of full-time workers, which both the MUW and the Austrian Government dispute. According to them, the fact that part-time fixed-term workers can work for a university for a longer period than full-time fixed-term workers constitutes an advantage for the former, particularly in view of the difficulty for staff covered by that legislation to obtain a contract of indefinite duration with a university.

36 Nevertheless, as the Commission and the applicant argue, such a circumstance appears liable to reduce or postpone, in greater measure for part-time workers than for full-time workers, the possibility of obtaining a contract of indefinite duration, which, where appropriate and subject to verification by the referring court, constitutes less favourable treatment of that first category of workers.

37 Subsequently, the question arises as to whether the difference in treatment provided for in Paragraph 109(2) of the UG can be justified on objective grounds.

38 The MUW and the Austrian Government argue that that is the case, since the level of knowledge and experience that part-time workers can acquire during their employment relationships is inevitably lower than that acquired by comparable full-time workers. Thus, if those two categories of workers were subject to the same maximum duration of fixed-term employment relationships, part-time workers would be put at a particular disadvantage, since they would have less time to carry out research and produce scientific publications, when those are essential aspects of becoming established in the university sector.

39 In that respect, it is settled case-law that it is impossible to identify objective criteria unrelated to any discrimination on grounds of sex on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalisation concerning certain categories of worker. Although length of service goes hand in hand with experience, the objectivity of such a criterion depends on the totality of circumstances in each individual case, in particular, on the relationship between the nature of the duties carried out and the experience which performance of those duties brings after a certain number of hours of work have been completed (see, to that effect, judgment of 10 March 2005, *Nikoloudi*, C-196/02, EU:C:2005:141, paragraph 55 and the case-law cited).

40 It is for the referring court to assess, in the specific context of the employment relationships covered by Paragraph 109(2) of the UG and, in particular, of the tasks performed by the applicant in that context, whether that special link between the nature of the duties carried out and the experience which performance of those duties brings after a certain number of hours of work have been completed exists and, depending on the case, whether the time necessary to complete research and ensure the publication

of results is liable to justify the national legislation at issue in the main proceedings. If that is the case, it is for that court to verify whether that legislation is proportionate to the objective pursued.

41 Finally, as regards the question of whether the principle of *pro rata temporis* applies to legislation such as that at issue in the main proceedings, it would seem that such legislation cannot be regarded as an application of that principle, given that the maximum duration of consecutive employment relationships is extended by two years for all part-time employees and is therefore not proportionate to the hours actually worked.

42 In the light of the foregoing, the answer to the first question is that Clause 4(1) of the Framework Agreement on part-time work must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which lays down, for the fixed-term workers it covers, a maximum duration of employment relationships longer for part-time workers than for comparable full-time workers, unless such a difference in treatment is justified on objective grounds and is proportionate to those grounds, which it is for the referring court to determine. Clause 4(2) of the Framework Agreement on part-time work must be interpreted as meaning that the principle of *pro rata temporis* referred to therein does not apply to such legislation.

The second and third questions

43 By its second and third questions, which should be dealt with together, the referring court asks, in essence, whether Article 2(1)(b) of Directive 2006/54 must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, which lays down, for the fixed-term workers it covers, a maximum duration of employment relationships longer for part-time workers than for comparable full-time workers constitutes indirect discrimination on grounds of sex for the purposes of that provision and, in addition, whether Article 19(1) of that directive must be interpreted as requiring the party who considers him or herself wronged by such discrimination to submit specific statistics or facts relating to the alleged discrimination in order to establish a presumption of discrimination.

44 As regards the first part of those questions, it must be recalled that Article 2(1)(b) of Directive 2006/54 defines the concept of 'indirect discrimination' within the meaning of that directive as the situation in which an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

45 The existence of a particular disadvantage may be established, for example, if it is proved that legislation such as that at issue in the main proceedings is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex (see, to that effect, judgment of 8 May 2019, *Villar Láiz*, C-161/18, EU:C:2019:382, paragraph 38 and the case-law cited).

46 The Court has already held that, as is also apparent from recital 30 of Directive 2006/54, the appreciation of the facts from which it may be presumed that there has been indirect discrimination is the task of the national judicial authority, in accordance with national law or national practices which may provide, in particular, that indirect discrimination may be established by any means, including on the basis of statistical evidence (see, to that effect, judgment of 8 May 2019, *Villar Láiz*, C-161/18, EU:C:2019:382, paragraph 46 and the case-law cited).

47 As regards statistical evidence, the Court has already held, first, that the national court must take into account all those workers subject to the national legislation in which the difference in treatment has its origin and, second, that the best approach to the comparison is to consider the respective proportions of men in the workforce affected by the rule at issue and of those not affected thereby, and to compare those proportions as regards women in the workforce (see, to that effect, judgments of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, EU:C:1999:60, paragraph 59, and of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, paragraph 40).

48 In that regard, it is for the national court to assess to what extent the statistics adduced before it concerning the situation of the workforce are valid and whether those can be taken into account, that is to say, whether, for example, they illustrate purely fortuitous or short-term phenomena, and whether, in

general, they appear to be significant (see, to that effect, judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, EU:C:1999:60, paragraph 62 and the case-law cited).

49 Should the referring court, on the basis of the statistics adduced and, where applicable, other relevant facts, conclude that the national legislation at issue in the main proceedings puts women at a particular disadvantage as compared with men, such legislation would be contrary to Article 2(1)(b) of Directive 2006/54, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

50 In the present case, as has already been noted in paragraph 38 of the present judgment, the MUW and the Austrian Government argue that the inequality in treatment of part-time workers as compared with full-time workers provided for in Paragraph 109(2) of the UG is justified by the fact that the former acquire a lower level of experience and knowledge than the latter and that, in so doing, they need a longer period to complete certain research and publish the results. Thus, fixing the same maximum duration of fixed-term employment relationships for both categories of workers would reduce the possibilities for part-time workers to establish themselves in the university sector in question at the end of that period. As has been noted in paragraph 40 of the present judgment, it is for the referring court to assess whether the legislation at issue in the main proceedings is objectively justified in the light of all the facts and circumstances of the case in the main proceedings.

51 As regards the second part of the questions, it should be recalled that, under Article 19(1) of Directive 2006/54, Member States are to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment. Thus, and as recital 30 of that directive states, the burden of proof lies with the respondent when there is a prima facie case of discrimination.

52 As has been noted in paragraph 47 of the present judgment, in order to establish the existence of discrimination on grounds of sex, it is important to take into account all those workers subject to the national legislation in which the difference in treatment has its origin and to compare, within that overall figure, the respective proportions of workers who are affected by the rule at issue and those who are not affected, among both male and female workers.

53 In the present case, the applicant submits that, as a general rule, measures which adversely affect part-time workers as compared with full-time workers are liable to put women at a particular disadvantage. To support that argument, she has submitted to the referring court statistics relating to the general Austrian labour market, from which it is apparent that a considerably greater number of women than men are employed on a part-time basis. However, she noted that she did not have data on the workers employed at Austrian universities covered by the UG.

54 In those circumstances, it is important to clarify how and by what means a person who considers him or herself wronged by indirect discrimination on grounds of sex can establish a prima facie case of discrimination in the event that statistical data or other means of evidence relating to all workers subject to the national legislation in which the difference in treatment has its origin are not available or are difficult to access for that person.

55 In that respect, the Court has held, as regards Article 4(1) of Directive 97/80 – the wording of which is identical to that of Article 19(1) of Directive 2006/54 – that, although the former provision does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish ‘facts from which it may be presumed that there has been direct or indirect discrimination’ in accordance with that provision, the fact remains that the inaccessibility of information or relevant statistical data, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness (see, to that effect, judgment of 21 July 2011, *Kelly*, C-104/10, EU:C:2011:506, paragraphs 34 and 35).

56 In view, in particular, of the need to ensure that Article 19(1) of Directive 2006/54 has a practical effect, that provision must be interpreted, as the Advocate General noted in point 63 of his Opinion, as allowing a worker who considers herself wronged by indirect discrimination on grounds of sex to substantiate a prima facie case of discrimination by relying on general statistical data concerning the job market in the Member State concerned, where the person concerned cannot be expected to produce more precise data regarding the relevant group of workers, such data being difficult to access or unavailable.

57 It follows that the answer to the second and third questions is that Article 2(1)(b) of Directive 2006/54 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which lays down, for the fixed-term workers it covers, a maximum duration of employment relationships longer for part-time workers than for comparable full-time workers, if it is established that that legislation adversely affects a significantly higher percentage of female workers than male workers and if that legislation is not objectively justified by a legitimate aim or if the means of achieving that aim are not appropriate and necessary. Article 19(1) of that directive must be interpreted as not requiring the party who considers him or herself wronged by such discrimination to submit, in order to establish a prima facie case of discrimination, specific statistics or facts pertaining to the workers concerned by the national legislation at issue if that party does not have access to those statistics or facts or can access them only with difficulty.

Limitation of the temporal effects of the present judgment

58 The MUW, supported by the Austrian Government, has asked the Court, in its written and oral submissions, to limit the temporal effects of the present judgment, should the Court find that a national provision such as Paragraph 109(2) of the UG constitutes discrimination against part-time workers, prohibited by Clause 4(1) of the Framework Agreement on part-time work.

59 The MUW argues, in essence, that limitation of the temporal effects of the present judgment is indispensable for reasons of legal certainty. It asserts that numerous fixed-term contracts have been concluded in good faith with part-time employees on the basis of Paragraph 109(2) of the UG. Moreover, there is a risk of serious economic consequences should the Court find that Clause 4(1) of the Framework Agreement on part-time work precludes national legislation such as that at issue in the main proceedings, given that numerous fixed-term contracts would then have to be converted into contracts of indefinite duration.

60 It should be recalled in that connection that, according to settled case-law, the interpretation which the Court gives to a rule of EU law, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 51 and the case-law cited).

61 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed: those concerned must have acted in good faith and there must be a risk of serious difficulties (judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 52 and the case-law cited).

62 More specifically, the Court has taken that step only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of

European Union provisions, to which the conduct of other Member States or the Commission may even have contributed (judgment of 10 July 2019, *WESTbahn Management*, C-210/18, EU:C:2019:586, paragraph 46 and the case-law cited).

63 As regards the risk of serious difficulties, it must be observed that, in the present case, the interpretation of European Union law given by the Court in this judgment relates to discrimination against part-time workers for the purposes of Clause 4(1) of the Framework Agreement on part-time work and to the criteria which the national court may or must apply when examining the legislation at issue in the main proceedings, particularly with regard to that clause. It is for the national court to rule, in the first place, on whether the legislation at issue in the main proceedings involves less favourable treatment of part-time workers than of comparable full-time workers solely on the ground that the former work part-time. In the second place, it is for that court, where appropriate, to ascertain whether the potential discrimination may be justified on objective grounds (see, by analogy, judgment of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 60 and the case-law cited).

64 In those circumstances, the financial consequences, in particular for the universities, cannot be determined on the sole basis of the interpretation of European Union law given by the Court in the present case (see, by analogy, judgment of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 61 and the case-law cited).

65 Consequently, the existence of a risk of serious difficulties within the meaning of the case-law cited in paragraph 61 above, capable of justifying a limitation of the temporal effects of the present judgment, cannot be regarded as established (see, to that effect, judgment of 21 March 2013, *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 62).

66 Moreover, the MUW has not provided the Court with any precise information as to the number of legal relationships concerned or the nature and extent of the economic repercussions of the present judgment, such that, in any event, the existence of a risk of serious difficulties justifying the limitation of the temporal effects of the present judgment cannot be regarded as established.

67 Furthermore, as regards the second criterion devised in the case-law cited in paragraph 61 of the present judgment, namely the good faith of those concerned, the MUW does not adduce sufficient evidence to establish the existence of objective, significant uncertainty as to the scope of EU law provisions. The mere assertion that numerous fixed-term contracts have been concluded in good faith on the basis of Paragraph 109(2) of the UG cannot suffice in that regard.

68 Accordingly, there is no need to limit the temporal effects of the present judgment.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Clause 4(1) of the Framework Agreement on part-time work concluded on 6 June 1997, which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which lays down, for the fixed-term workers it covers, a maximum duration of employment relationships longer for part-time workers than for comparable full-time workers, unless such a difference in treatment is justified on objective grounds and is proportionate to those grounds, which it is for the referring court to determine. Clause 4(2) of the Framework Agreement on part-time work must be interpreted as meaning that the principle of *pro rata temporis* referred to therein does not apply to such legislation.**

2. **Article 2(1)(b) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which lays down, for the fixed-term workers it covers, a maximum duration of employment relationships longer for part-time workers than for comparable full-time workers, if it is established that that legislation adversely affects a significantly higher percentage of female workers than male workers and if that legislation is not objectively justified by a legitimate aim or if the means of achieving that aim are not appropriate and necessary. Article 19(1) of that directive must be interpreted as not requiring the party who considers him or herself wronged by such discrimination to submit, in order to establish a prima facie case of discrimination, specific statistics or facts pertaining to the workers concerned by the national legislation at issue if that party does not have access to those statistics or facts or can access them only with difficulty.**

[Signatures]

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* Language of the case: German.