JUDGMENT OF THE COURT

19 March 2002 (1)

(Social policy - Equal treatment of men and women - Derogations - Measures to promote equality of opportunity between men and women - Subsidised nursery places made available by a Ministry to its staff - Places reserved only for children of female officials, save in cases of emergency, to be determined by the employer)

In Case C-476/99,

REFERENCE to the Court under Article 234 EC by the Centrale Raad van Beroep (Netherlands) for a preliminary ruling in the proceedings pending before that court between

H. Lommers

and

Minister van Landbouw, Natuurbeheer en Visserij,

on the interpretation of Article 2(1) and (4) 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken and N. Colneric (Presidents of Chambers), C. Gulmann, A. La Pergola (Rapporteur), J.-P. Puissochet, R. Schintgen and V. Skouris, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- the Netherlands Government, by M.A. Fierstra, acting as Agent,

- the Commission of the European Communities, by H. Michard and C. van der Hauwaert, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by H.G. Sevenster, acting as Agent, and the Commission, represented by H.M.H. Speyart, acting as Agent, at the hearing on 11 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 6 November 2001,

gives the following

Judgment

1. By order of 8 December 1999, received at the Court on 16 December 1999, the Centrale Raad van Beroep (Higher Social Security Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 2(1) and (4) 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, hereinafter ‘the Directive’).

2. The question has been raised in proceedings between Mr Lommers and the Minister heading the Netherlands Ministry which employs him, the Ministry of Agriculture, Nature Management and Fisheries (hereinafter ‘the Minister for Agriculture’) concerning the latter's refusal to give Mr Lommers' child access to the subsidised nursery scheme on the ground that access is in principle reserved only for female officials of that Ministry.

Law applicable

Community provisions

3. Article 1(1) of the Directive provides:

‘The purpose of this Directive 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, and to vocational training and as regards working conditions ... This principle is hereinafter referred to as “the principle of equal treatment”.’

4. Article 2 of the Directive provides:

‘1. 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.

...

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).’

5. Article 5(1) of the Directive reads as follows:

‘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.’

6. Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ 1984 L 331, p. 34), which expressly refers in its preamble to Article 2(4) of the Directive, recommends Member States in particular:

‘(1) To adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices ..., in order:

(a) to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women;

(b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.

...

(3) To take, continue or promote positive action measures in the public and private sectors.

(4) To take steps to ensure that positive action includes as far as possible actions having a bearing on the following aspects:

...

- adapting working conditions ...

...

(8) To make efforts also in the public sector to promote equal opportunities which might serve as an example ...

...'

National provisions

7. Article 1a of the Wet Gelijke Behandeling van Mannen en Vrouwen (Law on Equal Treatment of Men and Women, of 1 March 1980 hereinafter 'the WGB') provides:

'1. In the public service, the competent authority may not make any distinction between men and women ... as regards working conditions ...

...'

8. Article 5 of the WGB, however, provides:

'1. A derogation may be made from Articles 1a, 2, 3 and 4 if the distinction made is intended to place women in a privileged position in order to eliminate or reduce *de facto* inequalities and the distinction is reasonable in relation to the aim in view.

...'

9. On 15 November 1993, the Minister for Agriculture adopted Circular No P 93-7841 (hereinafter 'the Circular') advising Ministry staff that he was making available a certain number of nursery places to female staff. Those places, which in 1995 numbered 128, are allocated between the directorates and services of the Ministry of Agriculture in proportion to the number of female employees working there, at a ratio of about one place for 20 female employees. Some of the places are in the Ministry of Agriculture's own nursery service and some are places obtained by the Ministry in local authority facilities.

10. Officials who have obtained a nursery place for their child must make a parental contribution the amount of which is fixed in accordance with their income and is degressive for children in the same family. That contribution is deducted from the official's salary.

11. The Circular states in particular:

'In principle, nursery places are available only to female employees of the Ministry of Agriculture, Nature Management and Fisheries, save in the case of an emergency, to be determined by the Director.'

The main proceedings and the question referred for a preliminary ruling

12. Mr Lommers is an official at the Netherlands Ministry of Agriculture. His wife is gainfully employed elsewhere.

13.

On 5 December 1995, Mr Lommers asked the Minister for Agriculture to reserve a nursery place for his child yet unborn. His request was rejected on 20 December 1995 on the ground that children of male officials could be given places in the nursery facilities in question only in cases of emergency.

14.

By letter of 28 December 1995, Mr Lommers lodged a complaint against that decision with the Minister for Agriculture. The same day Mr Lommers asked the Commissie gelijke behandeling (Commission for Equal Treatment) to give its opinion on the compatibility of the position taken by the Minister for Agriculture with the WGB.

15.

In a letter of 22 February 1996 sent to the Commission for Equal Treatment, the Minister for Agriculture stated in particular that the distinction drawn on grounds of sex in the Circular reflected the Ministry's determination to tackle the under-representation of women in the Ministry. On 31 December 1994, out of a total workforce of 11 251, only 2 792 were women and women were under-represented at senior levels.

16.

In an opinion issued on 25 June 1996, the Commission for Equal Treatment held that the Minister for Agriculture had not infringed Articles 1a(1) and (5) of the WGB. It found that it was well known that women more often than men do not embark on or abandon a career for reasons linked to child-care and that it was a reasonable assumption that the established inadequacy of child-care facilities was therefore likely to play a decisive role in decisions by women to give up employment and concluded that the Circular was justified by the aim of reducing the number of female staff quitting their jobs and that it did not therefore go beyond what was necessary for this purpose. The fact that a male official bringing up children on his own might, as a matter of ‘emergency’, have access to nursery places ought, however, to have been clearly stated in the Circular. The Commission also thought that the Circular's compatibility with the WGB could not be taken for granted and that regular reviews would be a way of checking that the measure in question remained appropriate.

17.

Mr Lommers' child was born on 5 July 1996.

18.

Acting on the basis of the opinion given by the Commission for Equal Treatment, pending which he had suspended his decision, the Minister for Agriculture, by Decision of 11 September 1996, rejected Mr Lommers' complaint.

19.

By judgment of 8 October 1996, Mr Lommers' appeal against that decision was declared unfounded by the Arrondissementsrechtbank (District Court), the Hague. Ruling on the basis of national law alone, that court endorsed the opinion given by the Commission for Equal Treatment.

20.

On 13 November 1996, Mr Lommers appealed against that judgment to the Centrale Raad van Beroep. He claimed that the Minister for Agriculture had not demonstrated that the number of women staying in their jobs after taking maternity leave had increased as a result of the subsidised nursery places scheme. He also maintained that, in most Netherlands Government Ministries no distinction is made between men and women as regards access to subsidised nursery schemes arranged within them, which would indicate that insufficiency of resources cannot be invoked as a ground for excluding male officials at the Ministry of Agriculture from the nursery scheme in question. Mr Lommers also considered that the exclusion of male officials is contrary to Article 2 of the Directive.

21.

The Minister for Agriculture maintained that the scheme in question is justifiable under Article 2(4) of the Directive. The priority given to women was the result of the Ministry's determination to tackle inequalities existing between male and female officials, as regards both the number of women working

at the Ministry and their representation across the grades. The creation of subsidised nursery places is precisely the kind of measure needed to help to eliminate this *de facto* inequality.

22. The Centrale Raad van Beroep observes first of all that there appear to be different views on the question whether Article 2(4) of the Directive is applicable to measures aimed at employees' children, particularly where it appears that guaranteeing employees of both sexes access to such measures would not prevent achievement of the objective of promoting equality of opportunity. According to some academic writers, measures such as those provided for in the Circular are likely to perpetuate and legitimise the traditional division of roles between men and women. Referring to the judgments in Cases C-450/93 *Kalanke* [1995] ECR I-3051 and C-409/95 *Marschall* [1997] ECR I-6363, the Centrale Raad van Beroep questions whether the derogation provided for by the Circular only for male employees who find themselves in an emergency situation is not excessively restrictive. Finally, it raises the possible relevance of the fact that Mr Lommers' exclusion from the scheme might disadvantage his wife if she is also ineligible for nursery facilities with her own employer.

23. Taking the view that those questions could not be decided on the basis of the case-law of the Court, the Centrale Raad van Beroep decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

‘Does Article 2(1) and (4) 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 preclude rules of an employer under which subsidised nursery places are made available only to female employees save where, in the case of a male employee, an emergency situation, to be determined by the employer, arises?’

The question referred for a preliminary ruling

24. Articles 1a and 5 of the WGB transposed Articles 1(1) and 2(1) and (4) of the Directive in relation to the Netherlands public sector. According to settled case-law, when applying national law, in particular the provisions of a national law specifically enacted in order to implement a directive, national courts are required to interpret their national law in the light of the wording and purpose of the directive (see, as regards the Directive, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 53).

25. The Court has also held that the principle of equal treatment laid down by the Directive is of general application and that the Directive applies to employment in the public service (see, in particular, Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 18, and Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 18).

26. First, as far as the measure at issue in the main proceedings is concerned, as the referring court has observed, the making available to employees, by their employer, of nursery places at their place of work, or outside it, is indeed to be regarded as a ‘working condition’ within the meaning of the Directive.

27. Contrary to the argument advanced by the Commission at the hearing, that categorisation cannot be rejected in favour of a categorisation as ‘pay’ simply because the cost of the nursery places is partly borne by the employer, as in the present case.

28. In that connection, it should be noted that the Court has previously held that the fact that the fixing of certain working conditions may have pecuniary consequences is not sufficient to bring such conditions within the scope of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), which is a provision based on the close connection existing between the nature of the work done and the amount of pay (Case 149/77 *Defrenne III* [1978] ECR 1365, paragraph 21, and Case C-236/98 *Jämo* [2000] ECR I-2189, paragraph 59).

29. Furthermore, as the Advocate General rightly observes at point 48 of his Opinion, a measure such as that at issue in the main proceedings is essentially a practical one. Making nursery places available saves the employee from the uncertainties and difficulties involved in endeavouring to find for his or her child a nursery which is both suitable and affordable. The primary object and effect of such a measure, therefore, especially where the supply of nursery places is insufficient, is to facilitate the exercise of the occupational activity of the employees concerned.

30. Secondly, a scheme under which nursery places made available by an employer to his staff are reserved only for female employees does in fact create a difference of treatment on grounds of sex, within the meaning of Articles 2(1) and 5(1) of the Directive. The situations of a male employee and a female employee, respectively father and mother of young children, are comparable as regards the possible need for them to use nursery facilities because they are in employment (see, to that effect, Case 312/86 *Commission* v *France* [1988] ECR 6315, paragraph 14, and, by analogy, as regards the situation of female employees and male employees assuming the upbringing of their children, judgment of 29 November 2001 in Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 56).

31. Consequently, the question to be examined in the third place is whether a measure such as that at issue in the main proceedings is nevertheless permissible under Article 2(4) of the Directive.

32. As far as that question is concerned, it is settled case-law that Article 2(4) is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. It authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men (*Kalanke*, paragraphs 18 and 19, *Marschall*, paragraphs 26 and 27, and Case C-158/97 *Badeck and Others* [2000] ECR I-1875, paragraph 19).

33. More particularly, the Court has held that Article 2(1) and (4) of the Directive does not preclude adoption of a national rule relating to the public service which, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women. The Court pointed out that such a rule forms part of a restricted concept of equality of opportunity. It is not places in employment which are reserved for women but places in training with a view to obtaining qualifications with the prospect of subsequent access to trained occupations in the public service. It is therefore limited to improving the chances of female candidates in the public sector. The Court therefore held that such a measure belongs to that group of measures that are designed to eliminate the causes of women's reduced opportunities of access to employment and careers and intended to improve the ability of women to compete on the labour market and pursue a career on an equal footing with men (*Badeck and Others*, paragraphs 52 to 55).

34. Thus, as the Netherlands Government rightly submits in its observations, similar considerations would suggest that a measure such as that at issue in the main proceedings - which in any case meets the guidelines in points 1, 3, 4 and 8 of Recommendation 84/635 - does not infringe Article 2(1) and (4) of the Directive.

35. Contrary to what the Commission contends in this regard, the judgment in *Commission* v *France*, cited above, does not in any way prejudge the way in which the present case is to be decided. The Court simply stated, in paragraph 15 of that judgment, that nothing in the case papers submitted to it by the defendant Member State made it possible to conclude that the fact, imputable to that State, of maintaining in force without distinction the set of collective agreements providing special rights for women might correspond to the particular situation envisaged in Article 2(4) of the Directive.

36.

As regards the measure at issue in the main proceedings, first, in the light of the order for reference, the national court's file and the oral argument before the Court, at the time when the Circular was adopted and at the material time in the main proceedings, the employment situation within the Ministry of Agriculture was characterised by a significant under-representation of women, both in terms of the number of women working there and their occupation of higher grades.

37. Second, as the Commission for Equal Treatment observed in its Opinion of 25 June 1996, mentioned above, a proven insufficiency of suitable and affordable nursery facilities is likely to induce more particularly female employees to give up their jobs (see in this regard the ninth and tenth recitals of the preamble to Council Recommendation 92/241/EEC of 31 March 1992 on child care, OJ 1992 L 123, p. 16).

38. That being so, a measure such as that at issue in the main proceedings, which forms part of the restricted concept of equality of opportunity in so far as it is not places of employment which are reserved for women but enjoyment of certain working conditions designed to facilitate their pursuit of, and progression in, their career, falls in principle into the category of measures designed to eliminate the causes of women's reduced opportunities for access to employment and careers and are intended to improve their ability to compete on the labour market and to pursue a career on an equal footing with men. It is for the national court, in this regard, to determine whether the factual circumstances mentioned in paragraphs 36 and 37 above are indeed established.

39. Nevertheless, according to settled case-law, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued (*Johnston*, paragraph 38; *Sirdar*, paragraph 26, and *Kreil*, paragraph 23).

40. Under the division of jurisdiction provided for by Article 234 EC, it is in principle the task of the national court to ensure that the principle of proportionality is duly observed. However, according to the Court's case-law, the Court may provide the national court with an interpretation of Community law on all such points as may enable that court to assess the compatibility of a national measure with Community law for the purposes of the judgment to be given in the case before it. In the present case, as appears from paragraph 22 of the present judgment, the national court has also raised a number of specific queries which should be answered.

41. A measure such as that at issue in the main proceedings, whose purported aim is to abolish a *de facto* inequality, might nevertheless also help to perpetuate a traditional division of roles between men and women.

42. That fact may, admittedly, appear to lend support to the academic legal opinion to which the national court refers and which argues that, if the aim of promoting equality of opportunity between men and women pursued by the introduction of a measure benefiting working mothers can still be achieved if its scope is extended to include working fathers, the exclusion of men from its scope would not be in conformity with the principle of proportionality.

43. However, in the case now under consideration, account must be taken of the fact that, given the insufficiency of supply mentioned above, the number of nursery places available under the measure at issue is itself limited and that there are waiting lists for female officials working at the Ministry of Agriculture, so that they themselves have no guarantee of being able to obtain a place.

44.

Moreover, a measure such as that at issue does not have the effect of depriving the male employees concerned, any more than other female staff who have not been able to obtain a nursery place under the nursery places scheme subsidised by the Ministry of Agriculture, of all access to nursery places for their children, since such places still remain accessible mainly on the relevant services market (see, by analogy, as regards training places, *Badeck and Others*, paragraph 53).

45. Next, it must also be remembered that the measure at issue does not totally exclude male officials from its scope but allows the employer to grant requests from male officials in cases of emergency, to be determined by the employer.

46. As far as the scope of that exception is concerned, it is to be noted that both the Minister for Agriculture, in the main proceedings and before the Commission for Equal Treatment, and the Netherlands Government, in the proceedings before this Court, have indicated that male officials who bring up their children by themselves should, on that basis, have access to the nursery scheme at issue.

47. In this respect, a measure which would exclude male officials who take care of their children by themselves from access to a nursery scheme subsidised by their employer would go beyond the permissible derogation provided for in Article 2(4), by interfering excessively with the individual right to equal treatment which that provision guarantees. Moreover, in relation to those officials, the argument that women are more likely to interrupt their career in order to take care of their young children no longer has the same relevance.

48. In the circumstances described in paragraphs 43 to 47 above, it cannot be maintained that the fact that the Circular does not guarantee access to nursery places to officials of both sexes on an equal footing is contrary to the principle of proportionality.

49. As for the fact that Mr Lommers's wife might have difficulty in pursuing her career because of the necessity to take care of the couple's young children, this appears to be of no relevance for the assessment of the validity of the measure at issue in relation to Article 2(1) and (4) of the Directive. In the case of working conditions determined by one particular employer, the principle of equal treatment can, by definition, only be applied as between the employees working for that employer. That provision cannot therefore be construed as requiring an employer who adopts a measure to tackle under-representation of women amongst his own staff to take account of considerations related to the maintenance in employment of women not belonging to that staff.

50. In view of all the foregoing considerations, the answer to be given to the question referred for a preliminary ruling must be that Article 2(1) and (4) of the Directive does not preclude a scheme set up by a Ministry to tackle extensive under-representation of women within it under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone whilst male officials may have access to them only in cases of emergency, to be determined by the employer. That is so, however, only in so far, in particular, as the said exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials.

Costs

51. The costs incurred by the Netherlands Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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,

in answer to the question referred to it by the Centrale Raad van Beroep by order of 8 December 1999, hereby rules:

Article 2(1) and (4) 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 does not preclude a scheme set up by a Minister to tackle extensive under-representation of women within his Ministry under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone whilst male officials may have access to them only in cases of emergency, to be determined by the employer. That is so, however, only in so far, in particular, as the said exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials.

Rodríguez Iglesias	Jann	Macken
Colneric	Gulmann	La Pergola
Puissochet	Schintgen	Skouris

Delivered in open court in Luxembourg on 19 March 2002.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

1: Language of the case: Dutch.