# JUDGMENT OF THE COURT
27 October 1993 *

In Case C-127/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Court of Appeal of England and Wales for a preliminary ruling in the proceedings pending before that court between

**Dr Pamela Mary Enderby**

and

**1. Frenchay Health Authority**

**2. Secretary of State for Health,**

on the interpretation of Article 119 of the Treaty, enshrining the principle of equal pay for men and women,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida and D. A. O. Edward (Presidents of Chambers), R. Joliet, F. A. Schockweiler, F. Grévisse, M. Zuleeg and J. L. Murray, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

* Language of the case: English.

— Dr Enderby, appellant in the main proceedings, represented by Anthony Lester QC and David Pannick QC;

— the Frenchay Health Authority, first respondent in the main proceedings, represented by Eldred Tabachnik QC and Adrian Lynch, Barrister, instructed by Bevan Ashford, Solicitors;

— the United Kingdom, represented by Patrick Elias QC and Eleanor Sharpston, Barrister, instructed by Sue Cochrane, Treasury Solicitor's Department;

— the German Government, represented by Ernst Röder and Claus-Dieter Quassowski, respectively Ministerialrat and Regierungsdirektor at the Federal Ministry of Economic Affairs, acting as Agents;

— the Commission of the European Communities, represented by Karen Banks, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Dr Enderby, the Frenchay Health Authority, the United Kingdom, the German Government and the Commission at the hearing on 15 June 1993,

after hearing the Opinion of the Advocate General at the sitting on 14 July 1993,

gives the following

## Judgment

1 By order of 30 October 1991, received by the Court of Justice on 17 April 1992, the Court of Appeal of England and Wales, pursuant to Article 177 of the EEC Treaty, referred for a preliminary ruling questions concerning the interpretation of Article 119 of the Treaty, enshrining the principle of equal pay for men and women.

2 Those questions were referred in the context of proceedings brought by Dr Pamela Enderby against the Frenchay Health Authority (hereinafter 'FHA') and the Secretary of State for Health concerning the difference in pay between two jobs within the National Health Service (hereinafter 'NHS').

3 The appellant in the main proceedings, who is employed as a speech therapist by the FHA, considers that she is a victim of sex discrimination due to the fact that at her level of seniority within the NHS (Chief III) members of her profession, which is overwhelmingly a female profession, are appreciably less well paid than members of comparable professions in which, at an equivalent professional level, there are more men than women. In 1986, she brought proceedings against her employer before an industrial tribunal, claiming that her annual pay was only UKL 10 106 while that of a principal clinical psychologist and of a Grade III principal pharmacist, jobs which were of equal value to hers, was UKL 12 527 and UKL 14 106 respectively.

4 Dr Enderby's claim was dismissed by the industrial tribunal and then, on appeal, by the Employment Appeal Tribunal. The industrial tribunal considered that the differences in pay were the result of structures specific to each profession, and in particular the separate collective bargaining arrangements, which were not discriminatory. The appeal tribunal also considered that the differences were not attributable to discrimination. It held further that it had been established that the state of the employment market played some part in the difference in pay between speech therapists and pharmacists and that that was enough to justify the whole of the difference between those two professions.

5 On appeal, the Court of Appeal, considering that the outcome of the proceedings depended on the interpretation of Article 119 of the Treaty, decided to refer questions to the Court of Justice for a preliminary ruling. In the statement of facts in its order, the Court of Appeal defined the job of principal speech therapist as 'job A' and that of principal pharmacist as 'job B', and assumed for the purpose of the present proceedings that those two different jobs were of equal value. It then asked the following questions:

'*Question 1*

Does the principle of equal pay enshrined in Article 119 of the Treaty of Rome require the employer to justify objectively the difference in pay between job A and job B?

*Question 2*

If the answer to question 1 is in the affirmative can the employer rely as sufficient justification for the difference in pay upon the fact that the pay of jobs A and B respectively have been determined by different collective bargaining processes which (considered separately) do not discriminate on grounds of sex and do not operate so as to disadvantage women because of their sex?

*Question 3*

If the employer is able to establish that at times there are serious shortages of suitable candidates for job B and that he pays the higher remuneration to holders of job B so as to attract them to job B but it can also be established that only part of the difference in pay between job B and job A is due to the need to attract suitable candidates to job B

(a) is the whole of the difference of pay objectively justified or

(b) is that part but only that part of the difference which is due to the need to attract suitable candidates to job B objectively justified or

(c) must the employer equalize the pay of jobs A and B on the ground that he has failed to show that the whole of the difference is objectively justified?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

## The first question

7 In its first question, the Court of Appeal wishes to know whether the principle of equal pay for men and women requires the employer to prove, by providing objective justification, that a difference in pay between two jobs assumed to be of equal value, of which one is carried out almost exclusively by women and the other predominantly by men, does not constitute sex discrimination.

*The relevance of the question*

8 The German Government maintains that the Court cannot rule on the question referred without first establishing whether the jobs in question are equivalent. Since, in its view, the jobs of speech therapist and pharmacist are not comparable, there can be no infringement of Article 119 of the Treaty and the pay differentials do not therefore require objective justification.

9 That proposition cannot be accepted.

10 The Court has consistently held that Article 177 of the Treaty provides the framework for close cooperation between national courts and the Court of Justice, based on a division of responsibilities between them. Within that framework, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court (see, in particular, the judgment in Case C-67/91 *Asociación Española de Banca Privada* [1992] ECR I-4785, at paragraph 25). Accordingly, where the national court's request concerns the interpretation of a provision of Community law, the Court is bound to reply to it, unless it is being asked to rule on a purely hypothetical general problem without having available the information as to fact or law necessary to enable it to give a useful reply to the questions referred to it (Case C-83/91 *Meilicke* [1992] ECR I-4871).

11 In this case, the Court of Appeal, like the tribunals which heard the case below, decided in accordance with the British legislation and with the agreement of the parties to examine the question of the objective justification of the difference in pay before that of the equivalence of the jobs in issue, which may require more complex investigation. It is for that reason that the preliminary questions were based on the assumption that those jobs were of equal value.

12 Where, as here, the Court receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings, it must reply to that request and is not required to consider the validity of a hypothesis which it is for the referring court to verify subsequently if that should prove to be necessary.

*The question referred*

13 It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of

such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.

14 However, it is clear from the case-law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 of the Treaty, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex (Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, at paragraph 31, Case C-33/89 *Kowalska* [1990] ECR I-2591, at paragraph 16, and C-184/89 *Nimz* [1991] ECR I-297, at paragraph 15). Similarly, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (Case 109/88 *Danfoss* [1989] ECR 3199, at paragraph 16).

15 In this case, as both the FHA and the United Kingdom observe, the circumstances are not exactly the same as in the cases just mentioned. First, it is not a question of *de facto* discrimination arising from a particular sort of arrangement such as may apply, for example, in the case of part-time workers. Secondly, there can be no complaint that the employer has applied a system of pay wholly lacking in transparency since the rates of pay of NHS speech therapists and pharmacists are decided by regular collective bargaining processes in which there is no evidence of discrimination as regards either of those two professions.

16 However, if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the

two jobs in question are of equal value and the statistics describing that situation are valid.

17 It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.

18 Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (see, by analogy, the judgment in *Danfoss*, cited above, at paragraph 13).

19 In these circumstances, the answer to the first question is that, where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.

## The second question

20 In its second question, the Court of Appeal wishes to know whether the employer can rely as sufficient justification for the difference in pay upon the fact that the rates of pay of the jobs in question were decided by collective bargaining processes which, although carried out by the same parties, are distinct and which, considered separately, have no discriminatory effect.

21 As is clear from Article 4 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), collective agreements, like laws, regulations or administrative provisions, must observe the principle enshrined in Article 119 of the Treaty.

22 The fact that the rates of pay at issue are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not preclude a finding of prima facie discrimination where the results of those processes show that two groups with the same employer and the same trade union are treated differently. If the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as sufficient justification for the difference in pay, he could, as the German Government pointed out, easily circumvent the principle of equal pay by using separate bargaining processes.

23 Accordingly, the answer to the second question is that the fact that the respective rates of pay of two jobs of equal value, one carried out almost exclusively by women and the other predominantly by men, were arrived at by collective bargaining processes which, although carried out by the same parties, are distinct, and, taken separately, have in themselves no discriminatory effect, is not sufficient objective justification for the difference in pay between those two jobs.

## The third question

24 In its third question, the Court of Appeal wishes to know to what extent — wholly, in part or not at all — the fact that part of the difference in pay is attributable to a shortage of candidates for one job and to the need to attract them by higher salaries can objectively justify that pay differential.

25 The Court has consistently held that it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds (Case 170/84 *Bilka-Kaufhaus*, cited above, at paragraph 36 and Case C-184/89 *Nimz*, cited above, at paragraph 14). Those grounds may include, if they can be attributed to the needs and objectives of the undertaking, different criteria such as the worker's flexibility or adaptability to hours and places of work, his training or his length of service (Case 109/88 *Danfoss*, cited above, at paragraphs 22 to 24).

26 The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground within the meaning of the case-law cited above. How it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court.

27 If, as the question referred seems to suggest, the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality.

28 If that is not the case, it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all of the difference.

29 The answer to the third question therefore is that it is for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question.

## Costs

30 The costs incurred by the United Kingdom, the German Government and the Commission of the European Communities, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Court of Appeal of England and Wales, by order of 30 October 1991, hereby rules:

1. **Where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.**

2. **The fact that the respective rates of pay of two jobs of equal value, one carried out almost exclusively by women and the other predominantly by men, were arrived at by collective bargaining processes which, although carried out by the same parties, are distinct, and, taken separately, have in**

themselves no discriminatory effect, is not sufficient objective justification for the difference in pay between those two jobs.

3. It is for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question.

Due Mancini Moitinho de Almeida Edward

Joliet Schockweiler Grévisse Zuleeg Murray

Delivered in open court in Luxembourg on 27 October 1993.

J.-G. Giraud O. Due

Registrar President