JUDGMENT OF THE COURT
25 October 1988 *

In Case 312/86

Commission of the European Communities, represented by Joseph Griesmar, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

French Republic, represented by Gilbert Guillaume, acting as Agent, assisted by Claude Chavance, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy,

defendant,

APPLICATION for a declaration that by failing to adopt within the period prescribed in Article 9 (1) of Council Directive 76/207/EEC of 9 February 1976 all the measures necessary to secure the full and precise implementation of that directive and by adopting Article 19 of Law No 83-635 of 13 July 1983, the French Republic has failed to fulfil its obligations under the Treaty,

THE COURT

composed of: O. Due, President, T. Koopmans, R. Joliet and T. F. O'Higgins, Presidents of Chambers, F. A. Schockweiler, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: Sir Gordon Slynn
Registrar: B. Pastor, Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 22 June 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 September 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 December 1986, the Commission of the European Communities brought proceedings pursuant to Article 169 of the EEC Treaty for a declaration that by failing to adopt within the prescribed period all the measures necessary to secure the full and precise implementation of Council Directive 76/207 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 (Official Journal 1976, L 39, p. 40), the French Republic has failed to fulfil its obligations under the Treaty.

2 Article 5 (2) (b) of Directive 76/207, cited above, (hereinafter referred to as 'the directive') provides that Member States are to take the measures necessary to ensure that 'any provisions contrary to the principle of equal treatment which are included in collective agreements . . . shall be, or may be declared, null and void or may be amended'. Article 9 of the directive provides that Member States are to put into force the laws, regulations and administrative provisions necessary in order to comply with the directive within 30 months of its notification. For France, that period came to an end on 12 August 1978.

3 With a view to ensuring the application of the directive in France, Law No 83-635 of 13 July 1983 amending the Labour Code and the Criminal Code as regards equality at work between women and men (*Journal officiel de la République française*, 14.7.1983, p. 2176) was brought into force. Article 1 of that law

redrafted Article L 123-2 of the Labour Code to provide that any term reserving the benefit of any measure to employees on grounds of sex included in any collective labour agreement shall be void, except where such a clause is intended to implement the provisions relating to pregnancy, nursing or pre-natal and post-natal rest.

4 The first paragraph of Article 19 of that law provides, however, that the abovementioned provision in the Labour Code does not prohibit the application of usages, terms of contracts of employment or collective agreements in force on the date on which the law was promulgated granting special rights to women. The second paragraph of that article provides that employers, groups of employers and groups of employed persons 'shall proceed, by collective negotiation, to bring such terms into conformity' with the provisions of the Labour Code mentioned in the law.

5 The Commission considers that the derogation to the scheme of Law No 83-635 embodied in Article 19 of that law shows that the French authorities have failed to observe their obligations under the directive. The French Government, on the other hand, maintains that the derogation is compatible with the provisions of the directive.

6 Reference is made to the Report for the Hearing for a fuller account of the background to the dispute and the relevant legislation, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 The French Government's defence is based essentially on two arguments. It maintains, first, that the special rights for women safeguarded by Article 19 of French Law No 83-635 derive from a concern to protect women and ensure their effective equality with men, and that they do not therefore give rise to discriminatory working conditions. Secondly, it claims that the machinery prescribed for the revision of clauses relating to special rights for women complies with the directive and that it constitutes the only appropriate method in the context of French labour law. Those arguments must each be considered in turn.

Special rights for women

8 According to the Commission, which has not been contradicted on this point by the French Government, special rights for women included in collective agreements relate in particular to: the extension of maternity leave; the shortening of working hours, for example for women over 59 years of age; the advancement of the retirement age; the obtaining of leave when a child is ill; the granting of additional days of annual leave in respect of each child; the granting of one day's leave at the beginning of the school year; the granting of time off work on Mother's Day; daily breaks for women working on keyboard equipment or employed as typists or switchboard operators; the granting of extra points for pension rights in respect of the second and subsequent children; and the payment of an allowance to mothers who have to meet the cost of nurseries or child-minders.

9 The Commission considers that some of those special rights may be covered by the exceptions to the application of the directive provided for in Article 2 (3) and (4) thereof which involve, respectively, provisions concerning the protection of women, particularly as regards pregnancy and maternity, and measures to promote equal opportunity for men and women. It is of the opinion, however, that the French legislation, by its generality, makes it possible to preserve for an indefinite period measures discriminating as between men and women contrary to the directive.

10 The French Government observes first that, under French constitutional law, the law must ensure that women have rights equal to those of men in every field. The existence of special rights favouring women is nevertheless considered compatible with the principle of equality when those special rights derive from a concern for protection. The French Government considers that the directive should be interpreted in the same manner, and that such an approach is supported by the provisions of Article 2 (3) and (4) of the directive.

11 The French Government further considers that neither the directive nor the principle of equal treatment for men and women is intended to modify the organization of the family or the responsibilities actually assumed by the marriage partners. It claims that the special rights for women provided for in collective agreements are designed to take account of the situation existing in the majority of

French households. Member States, moreover, have a degree of discretion in that regard when implementing the directive.

12 It must be borne in mind that the principle of equal treatment which is to be implemented, under Article 5 (2) (b) of the directive, with regard to collective labour agreements means, in the words of Article 2 (1) of the directive, that 'there shall be no discrimination whatsoever on grounds of sex'. Article 2 (3) and (4) provides that the directive is to be without prejudice either to provisions concerning the protection of women, particularly as regards pregnancy and maternity, or 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 the directive.

13 The exception provided for in Article 2 (3) refers in particular to the situations of pregnancy and maternity. In its judgment of 12 July 1984 in Case 184/83 (*Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047), the Court held that the protection of women in relation to maternity is designed to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.

14 It must be concluded, both from the generality of the terms used in the French legislation, which allows any clause providing 'special rights for women' to remain in force, and from the examples of such special rights which have been cited in the pleadings, that the contested provisions cannot find justification in Article 2 (3). As some of those examples show, some of the special rights preserved relate to the protection of women in their capacity as older workers or parents — categories to which both men and women may equally belong.

15 The exception provided for in Article 2 (4) is specifically and exclusively designed to allow 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. Nothing in the papers of the case, however, makes it

possible to conclude that a generalized preservation of special rights for women in collective agreements may correspond to the situation envisaged in that provision.

16 The French Government has therefore not succeeded in demonstrating that the unequal treatment which forms the subject-matter of this application, and which it acknowledges, falls within the limits laid down by the directive.

Collective negotiation

17 The Commission alleges that the second paragraph of Article 19 of French Law No 83-635, cited above, authorizes the maintenance of discriminatory conditions for an indeterminate period and leaves their removal to the discretion of the two sides of industry. The law does not provide for any machinery capable of remedying any inadequacy of the results achieved by collective negotiation.

18 The French Government maintains, first of all, that it would be difficult in the circumstances of French society to provide for the immediate removal by legislative act of rights acquired during past negotiations between the two sides of industry. Collective negotiation is the most appropriate means of ensuring that the clauses concerned are made to conform with the principle of equal treatment, being more likely than a legislative measure to influence the behaviour in practice of those involved and thus bring any discrimination to an end.

19 Secondly, the French Government points out that under French labour law national collective agreements for particular occupations are subject to an approval procedure which enables the agreement to be extended to the whole of the field of activity concerned. That procedure can be used to ensure that discriminatory measures do not survive.

20 At the Court's request, the French Government has provided information on the extent to which, in practice, collective agreements have been renegotiated in the light of the second paragraph of Article 19 of Law No 83-635. That information shows that 16 collective agreements, 11 of them national, were renegotiated on that basis between 1983 and 1987. Such figures are extremely modest when

compared with the number of collective agreements entered into each year in France (in 1983 there were 1 050 agreements covering different occupations and 2 400 applying to individual undertakings). The requirement that collective agreements must be approved and the possibility that they may be extended by the public authorities have therefore not led to a rapid process of renegotiation.

21 The French Government's argument that collective negotiation is the only appropriate method of abolishing the special rights in question must be considered in the light of that conclusion.

22 In that regard, it is enough to observe that, even if that argument were to be accepted, it could not be used to justify national legislation which, several years after the expiry of the period prescribed for the implementation of the directive, makes the two sides of industry responsible for removing certain instances of inequality without laying down any time-limit for compliance with that obligation.

23 It follows from those considerations that the French Government's argument that the task of removing special rights for women should be left to the two sides of industry working through collective negotiation cannot be accepted.

24 It must therefore be held that by failing to adopt within the prescribed period all the measures necessary to secure the full implementation of Directive 76/207 the French Republic has failed to fulfil its obligations under the Treaty.

Costs

25 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by failing to adopt within the prescribed period all the measures necessary to secure the full implementation of Directive 76/207 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, the French Republic has failed to fulfil its obligations under the Treaty.

(2) Orders the French Republic to pay the costs.

Due Koopmans Joliet

O'Higgins Schockweiler Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 25 October 1988.

J.-G. Giraud
Registrar

O. Due
President