

## POSITIVE ACTION IN EU LAW

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### INTRODUCTION

EU law has non-discrimination on grounds of gender as one of its fundamental principles. Article 2(2) of Council Directive 76/207 which is set out below, prohibits discrimination on grounds of sex either directly or indirectly and applies to working conditions and dismissal, selection criteria, for access to all jobs or posts and to training provisions ( Article 3/4/5). While Directive 76/207 is now repealed and replaced by Directive 2006/54 the jurisprudence of the European Court of Justice ( ECJ) described below continues to be applicable in interpreting the provisions of the recast Directive 2006/54. Equally Article 141 of the Treaty of Rome as amended by the Treaty of Amsterdam provides for non-discrimination in matters of pay. Both provisions provide for certain exceptions which allow derogation from the principle of non- discrimination in order in the words of Directive 76/207 to remove existing inequalities which affect women's opportunities in access to employment, promotion, vocational training and working conditions.

There is a considerable body of evidence that providing for equal treatment may not go far enough to eradicate inequalities in opportunities for men and women if women are still in practice disadvantaged by being the main carer and responsible for the major share of family responsibilities which in turn restrict their freedom and flexibility in the labour market. In addition old fashioned thinking as to women's role may continue to disadvantage them in practice.

However, what form of derogation from the principle of equal treatment in favour of women should be permitted and in what circumstances is likely to be controversial. Are targets or quotas permitted? Should there be positive discrimination in appointments if women are under-represented? If so what about a male candidate who may face other forms of disadvantage such as being a single parent or being disabled? These are the issues which are considered by the courts in cases below. It is an important topic and not one open to an easy solution.

### THE RELEVANT EU LAW

**1. EC Directive 76/207 ( The Equal Treatment Directive)** provided in part as follows:

Article 1(1):

'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.'

Article 2:

'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).'

**Article 5(1):**

'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.'

2. **Article 141(1) and (4) EC** which since the entry into force of the Treaty of Amsterdam on 1 May 1999 provides:

'1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

...

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

3. **EC Council Directive 2006/54** on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation which as from 15 August 2009, replaced Directive 76/207 and the Equal Pay Directive 75/117.

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

“(a) ‘direct discrimination’: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(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;”

It provides in Article 3 entitled ‘Positive Action’.

“Member States may maintain or adopt measures within the meaning of Article 141 (4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.”

The context and scope of that provision is explained by preamble (22):

“In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.”

Directive 2006/54 is without prejudice to the following provisions:

1. the protection of women, particularly as regards pregnancy and maternity: art 2(7).
2. to the provisions of EC Council Directive 96/34 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC;
3. EC Council Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
4. to the right of member states to recognise distinct rights to paternity and/or adoption leave: art 2(7) (as so substituted).

These provisions although they may be viewed as a form of positive discrimination are not the subject of this session which concentrates on positive action by way of promoting women in the workplace.

**3. 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 76/207 and sets out the policy reasons for positive action. It 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 underrepresented, 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 ...

## SUMMARY OF CASE LAW

There have been a number of cases before the ECJ which raise questions on the extent of positive action permitted by the Directive 76/207. This is brief summary of the principles emerging from these cases. The important cases are then explored in more detail.

1. The key ruling is that national laws which guarantee women absolute and unconditional priority for appointments or promotion in sectors in which they are under-represented go beyond the limits of the exception provided by art 2(4): Case [C-450/93 Kalanke v Freie Hansestadt Bremen](#) , [1995] ECR I-3051, ECJ.
2. In *Marschall v Land Nordrhein-Westfalen* Case C-409/95 ECR I-6363, the ECJ softened its stance to the extent of ruling that preference to a woman candidate for promotion who was equally qualified as the male candidate in sectors where women are underrepresented could come within art 2(4) if it is in order to counteract the prejudicial effects on female candidates of attitudes and behaviour such as fear that women will interrupt their careers more frequently or that owing to household and family duties they will be less flexible in their working hours. However, this was conditional upon there being an objective assessment of all candidates to take account of criteria relating to individual circumstances and which could allow for the male candidate to be preferred if those criteria applied.
3. *Badeck v Landesamt beim Staatsgerichtshof des Landes Hessen* Case C-158/97 [2000] ECHR I-1875 applied this principle in the context of legislation requiring women's advancement plans which as well as positive measures such as taking into account experience of looking after children etc also applied targets to increase the representation of women in sectors where they were under-represented. Quotas were also established for training positions in occupations where women were under-represented. All these measures were

considered potentially within art 2(4) and permissible positive action provided they did not automatically and unconditionally give priority to men when women and men were equally qualified.

4. Case [C-407/98 \*Abrahamsson v Fogelqvist\*](#) [2000] ECR I-5539,, ECJ considered legislation which gave preference to a candidate who was a member of under-represented sex with qualifications not equal to but inferior to those of candidate of the opposite sex. It ruled that such legislation contravened EC [Council Directive 76/207](#) (OJ L39, 14.2.76, p 40) art 2 (as substituted)).
5. In E-1/02 *EFTA Surveillance Authority v Kingdom of Norway* [2003] 1 CMLR 725, the EFTA Court applying the Directive's provisions, considered national legislation which automatically allocated positions to the under-represented class and therefore contravened the principle ruling against automatic preference. of EC [Council Directive 76/207](#).
6. However, in Case [C-476/99 \*Lommers v Minister Van Landbouw, Natuurbeheer en Visserij\*](#) [2002] ECR I-2891, [2004] 2 CMLR 1141, the ECJ decided that provision of nursery facilities for female employees while only making provision for male employees in an emergency was not discriminatory if it was construed as allowing male staff who took care of children themselves to have access on the same terms as female staff. While the reasoning might be considered a little strained, the important principle applied was that in determining the scope of any derogation from an individual right such as equal treatment of men and women, due regard must be had to the principle of proportionality. Derogations must be remain within the limit of what is appropriate and necessary in order to achieve the aim of improving the ability of women to pursue a career on equal footing with men, and the principle of equal treatment reconciled as far as possible with achieving that aim.
7. Applying the same principle in *Briheche v Ministre de L'Interieur*, [2004] ECR I – 8807 (Case C-319/03), the court found it was not proportionate to exempt widows who had not remarried from an age limit of 45 to sit a competitive examination for recruitment of administrative assistants while not exempting widowers in the same circumstances.

## THE LEADING CASES

### **Kalanke v Freie Hansestadt Bremen** (Case [C-450/93](#))

[Council Directive \(EEC\) 76/207](#), art 2(1)(4).

A German man who was employed by the City of Bremen Parks Department, complained that he was one of two candidates on the final shortlist for a managerial position in that department and despite a recommendation that he should be promoted to the position he was rejected in favour of the other shortlisted candidate, a woman with similar qualifications. The decision was

based on a regional law on equal treatment for men and women in the public service, which provided that, in the case of an appointment or promotion to a position of higher pay, remuneration and salary bracket, women with the same qualifications as men applying for the same post were to be given priority if they were underrepresented. Underrepresentation was held to exist if women were less than half the numbers of staff in a specified category. This was challenged on the basis that it conflicted with various provisions of the federal constitution, the regional constitution and the German civil code. The federal labour court found it did not conflict with domestic law but referred it to the ECJ asking if it conflicted with EC Directive 76/207. The national court asked whether art 2(1)<sup>a</sup> and (4) of the directive, which implemented the principle of equal treatment and permitted derogation from that principle for measures to promote equal opportunity for men and women, precluded national rules which, in cases where candidates of different sexes shortlisted for promotion were equally qualified, automatically gave priority to women in sectors where they were underrepresented.

The ECJ ruled:

1. while the derogation in [art 2\(4\)](#) of Directive 76/207 permitted national measures relating to access to employment, including promotion, which, although discriminatory in appearance, were intended to eliminate or reduce actual instances of inequality and consequently gave 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, it also involved a derogation from an individual right laid down in the directive and, as such, art 2(4) itself had to be interpreted strictly.
2. Accordingly, national rules which guaranteed women absolute and unconditional priority for appointment or promotion went beyond the promotion of equal opportunities and overstepped the limits of the exception in art 2(4).
3. It followed that, in cases where candidates of different sexes shortlisted for promotion to the same post were equally qualified, national rules which automatically gave priority to women in sectors where they were underrepresented constituted unlawful sexual discrimination and were accordingly precluded by [art 2\(1\)](#) and [\(4\)](#) of Directive 76/207.

### **Marshcall v Land Nordrhein-Westfalen, C-409/95 ECR I-6363**

*EEC Equal Treatment Directive 76/207: Articles 2(1), 2(4)*

Hellmutt Marschall, a teacher at a comprehensive school in Germany, applied for promotion to a higher grade teaching post. The civil service law of the Land of North Rhine-Westphalia provided that where “there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour.”

Mr Marschall was informed by the district authority of Arnsberg that, in accordance with these provisions, since fewer women than men were employed in the relevant pay and career bracket, an equally-qualified woman was to be appointed to the

position. He brought legal proceedings and the Administrative Court of Gelsenkirchen referred the following question to the European Court of Justice:

“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 a rule of national law which provides that, in sectors of the public service in which fewer women than men are employed in the relevant higher grade post in a career bracket, women must be given priority where male and female candidates for promotion are equally qualified (in terms of suitability, competence and professional performance) unless reasons specific to an individual male candidate tilt the balance in his favour:

The ECJ held that:

1. Legislation which provides for preferential treatment for female candidates for promotion who are equally qualified as male candidates in sectors where women are underrepresented may fall within the scope of [Article 2\(4\)](#) of the Equal Treatment Directive, if it contains a saving clause which guarantees that women are not to be given priority if reasons specific to an individual equally-qualified male candidate tilt the balance in his favour. Such a rule, since it does not guarantee absolute and unconditional priority for women, does not go beyond the limits of [Article 2\(4\)](#) unlike the rules at issue in the Kalanke case.
  - 2.
3. The rule should take into account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate.

#### **APPLICATION BY BADECK AND OTHERS [ (Case 158/97) 2000] ECR I-3051**

*EC Equal Treatment [Directive 76/207](#): [Articles 2\(1\)](#), [2\(4\)](#) EC Treaty (as amended): [Article 141\(4\)](#)*

The German regional authority (Land) of Hesse enacted an equal rights law (HGIG) in 1993 to ensure equal access for men and women in public sector posts. The legislation applied the general principle that “women and men may not be discriminated against because of their sex or family status. It required departments to adopt an “advancement plan” to eliminate underrepresentation of women. If fewer women than men were employed in a particular pay grade in a career group the advancement plan had to provide that more than half of the posts in such a pay grade must be given to women.

The legislation provided that: “In order to ensure equal rights for women and men in connection with appointment and promotion and to ensure fulfilment of the women's advancement plans, suitability, capability and professional performance (qualifications) are to be assessed in accordance with the requirements of the post to be filled or the office to be conferred ... If the targets of the women's advancement plan for each two years are not fulfilled, until they are fulfilled every further appointment or promotion of a man in a sector in which women are underrepresented shall require the approval of the body which has approved the women's advancement plan ...”

Women were not to be automatically selected over men where the candidates have equal qualifications. Firstly no preference would be given unless it was necessary in order to achieve the targets of the particular advancement plan. If that was the case preference would only be given if applying the rules set out below there were no reasons to the contrary.

There were five rules which justified overriding the rule of advancement of women. These included giving priority to promoting disabled persons, the long-term unemployed, or those wishing to return to full-time working after a period of part-time work.

Members of the Parliament of the Land of Hesse brought an application for judicial review of this legislation, seeking a declaration that it was incompatible with the Hesse constitution and that it was contrary to the principle of equal treatment and thus contrary to the Equal Treatment Directive as interpreted by the European Court in the *Kalanke* [1995] IRLR 660 case.

The ECJ held that:

1. a measure which is intended to give priority in promotion to women in sectors of the public service where they are underrepresented is compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.
2. In the present case, the statutory rule giving priority to women was not absolute and unconditional, and therefore it did not discriminate on grounds of sex contrary to the Equal Treatment Directive.
3. The Equal Treatment Directive does not preclude a rule for the public service which allocates at least half the training places to women in occupations in which women are underrepresented and for which the State does not have a monopoly of training.
4. Although the quota was intended to establish a balanced allocation of training places in the public service, it did not necessarily entail total inflexibility, since it was possible for more than half of the places to be taken by men if there were not enough applications from women. Since the quota applied only to training places for which places were also available in the private sector, no male candidate was definitively excluded from training. Taking an overall view of training in the public and private sectors, the provision merely improved the chances of female candidates in the public sector. The measures in question therefore were authorised by Article 2(4) of the Directive, as being intended to improve the ability of women to compete on the labour market and to pursue a career on an equal footing with men.
5. The Equal Treatment Directive does not preclude a rule for the public service which guarantees, in sectors in which women are underrepresented, that where male and female candidates have equal qualifications, either all women who are qualified will be given an interview, or that no more male candidates than female candidates will be interviewed.

*EC Equal Treatment Directive 76/207: Articles 1(1), 2(1), 2(4) EC Treaty (as amended): Articles 141(1), 141(4)*

The 1993 Swedish Regulations on universities established a specific form of positive discrimination for cases where a higher educational institution decided that this was permissible in the filling of posts with a view to promoting equality between men and women. In such cases, a candidate belonging to an under-represented sex and possessing sufficient qualifications for the post could be chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen, provided that the difference in their respective qualifications was not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments.

However, progress in achieving an increase in the number of female professors was slow and, in 1995, the Swedish Government amended the relevant Regulation. The new Regulation provided that a candidate belonging to an under-represented sex who possessed sufficient qualifications "must be granted preference over a candidate of the opposite sex who would otherwise have been chosen ('positive discrimination') where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed. Positive discrimination must, however, not be applied where the difference between the candidates' qualification is so great that such application would give rise to a breach of the requirement of objectivity in the making of appointments."

The University of Goteborg advertised a vacancy for the chair of Professor of Hydrospheric Sciences. The candidates included Ms Abrahamsson, a Ms Destouni, Ms Fogelqvist and Mr Anderson. The appointments committee found that Mr Anderson had the best scientific qualifications, but proposed that Ms Destouni should be appointed after also taking account the 1995 Regulation. Ms Fogelqvist was placed third.

Ms Destouni withdrew her application and the matter was referred back to the selection board. It considered that there was a considerable difference between Mr Anderson and Ms Fogelqvist. Nevertheless, the Rector of the university decided to appoint Ms Fogelqvist, in accordance with the university's plan for equality and on grounds that the difference between their respective merits was not so considerable that positive discrimination in favour of the woman constituted a breach of the requirement of objectivity in the making of appointments.

Mr Anderson appealed to the Universities' Appeals Board. He contended that the appointment was contrary to decision of the European Court of Justice in the *Kalanke* [1995] IRLR 660 case. The Universities' Appeals Board referred the issues to the European Court of Justice for a preliminary ruling:

The ECJ held that

1. Article 2(1) and (4) of the Equal Treatment Directive precludes national legislation which provides for positive discrimination in recruitment in favour of candidates of the under-represented sex by automatically granting preference to candidates belonging to the under-represented sex, so long as they are sufficiently qualified, subject only to the proviso that the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirement of objectivity in making appointments.

2. The aim of that provision is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons concerned.
3. Under the legislation in the present case, the scope and effect of that condition could not be precisely determined, with the result that the selection of a candidate from among those who are sufficiently qualified was ultimately based on the mere fact of belonging to the underrepresented sex. In contrast to the national legislation on positive discrimination examined by the Court in its *Kalanke*, *Marschall* and *Badeck* judgments, the Swedish legislation enabled preference to be given to a candidate of the under-represented sex who, although sufficiently qualified, did not possess qualifications equal to those of other candidates of the opposite sex.
4. Moreover, the candidates were not subjected to an objective assessment taking account of their specific personal situation. Therefore, the legislation was not such as to be permitted by Article 2(4).
5. Nor was it justified by Article 141(4) of the Treaty. Although Article 141(4) allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred that it allows a selection method, such as in the present case, which was disproportionate to the aim pursued.
6. Community law does not in any way make application of the principle of equal treatment for men and women concerning access to employment conditional upon the level of the posts to be filled. Therefore, whether national rules providing for positive discrimination in the making of appointments in higher education are lawful does not differ according to the level of the post.

**LOMMERS (applicant) v. MINISTER VAN LANDBOUW, NATUURBEHEER EN VISSERIJ** Case [C-476/99](#) [2002] ECR I-2891

*EC Equal Treatment Directive 76/207: Articles 2(1), 2(4), 5(1) EC Treaty (as amended): Article 141(4)*

Mr Lommers was a civil servant employed by the Netherlands Ministry of Agriculture, Nature Management and Fisheries. His wife was employed by a different employer.

In November 1993, the Minister for Agriculture adopted a policy of making available a limited number of subsidised nursery places to staff. The policy circular stated: "In principle, nursery places are available only to female employees ... save in the case of an emergency, to be determined by the Director." There was about one place allocated for every 20 female employees. The policy was adopted in response to underrepresentation of women in the Ministry. At the end of 1994, of a total workforce of 11,251 in the Ministry, 2,792 were women and women were underrepresented at senior levels.

In December 1995, Mr Lommers asked the Minister to reserve a nursery place for his as yet unborn child, but his request was rejected on the ground that children of male officials could be given places only in cases of emergency.

Mr Lommers complained that this contravened the Dutch law implementing the EC Equal Treatment Directive. The Commission for Equal Treatment issued an opinion that the policy was justified because it was well-known that more women than men did not embark on or abandoned a career for reasons linked to childcare. The Commission added that the policy circular should have clearly stated, however, that a male official bringing up children on his own might, as a matter of “emergency”, have access to nursery places.

Mr Lommers took the case to the District Court, but it endorsed the opinion given by the Commission for Equal Treatment. He then appealed to the Higher Social Security Court, which referred the following question to the European Court of Justice 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 European Court of Justice held that:

1. A scheme under which an employer makes nursery places available to employees is to be regarded as a “working condition” within the meaning of the EC Equal Treatment Directive rather than as “pay” within the meaning of Article 141 of the EC Treaty, notwithstanding that the cost of the nursery places was partly borne by the employer.
2. The fixing of certain working conditions which may have pecuniary consequences is not sufficient to bring such conditions within the scope of Article 141, which is a provision based on the close connection existing between the nature of the work done and the amount of pay.
3. Provision of a limited number of subsidised nursery places to female staff only is permissible in principle under Article 2(4) of the Equal Treatment Directive, where the scheme has been set up by the employer to tackle extensive under-representation of women, in a context characterised by a proven insufficiency of proper, affordable childcare facilities, so long as male employees who take care of their children by themselves are allowed to have access to the scheme on the same conditions as female employees.
4. Article 2(4), which provides that the 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”, is specifically 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. In principle, a measure such as that in the present case, which reserved for women enjoyment of certain working conditions designed to facilitate their pursuit of, and progression in, their career, fell into that category of measures.

5. Those conditions are guided by the fact that, 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.
6. The fact that the policy did not guarantee access to nursery places to employees of both sexes on an equal footing was not contrary to the principle of proportionality. Account had to be taken of the fact that the number of nursery places was limited and there were waiting lists for female employees to obtain a place. Moreover, the scheme did not deprive male employees of all access to nursery places for their children, since such places were accessible on the market.
7. While a measure which would exclude male officials who take care of their children by themselves from access to a subsidised nursery scheme would go beyond the derogation permitted by Article 2(4), that would not be the case if male employees who take care of children by themselves are allowed access to the nursery places scheme on the same conditions as female employees.

**EFTA SURVEILLANCE AUTHORITY v. KINGDOM OF NORWAY (Case E-1/02) [2003]**

**European Free Trade Association Court, (EFTA Court)**

*EC Equal Treatment Directive 76/207: Articles 2(1), 2(2), 2(4), 3(1)*

Article 30(3) of the Norwegian Universities Act 1995 allows academic positions to be earmarked for women. The legislation provides that: "If one sex is clearly under-represented in the category of post in the subject area in question, applications from members of that sex shall be specifically invited. Importance shall be attached to considerations of equality when the appointment is made. The Board can decide that a post shall be advertised as only open to members of the under-represented sex."

Based on that provision, in 1998 the Norwegian Government allocated 40 post-doctoral research grants, funded through the national budget, to universities and university colleges. Of these 40 posts, 20 were assigned to the University of Oslo, and the university earmarked all the posts for women. Under the university's Plan for Equal Treatment 2000–2004, another 10 post-doctoral positions and 12 permanent academic positions were to be earmarked for women. According to the plan, the university will allocate the permanent positions to the faculties by way of an evaluation of, amongst other things, academic fields where women in permanent academic positions are considerably under-represented, giving priority to fields with less than 10% female academics, and academic fields where women in permanent academic positions are under-represented as compared to the number of female students.

The EFTA Surveillance Authority, the EFTA equivalent of the European Commission, brought infringement proceedings against Norway on grounds that

Norway had failed to fulfil its obligations under the agreement establishing the European Economic Area because the Universities Act, by reserving posts for women, contravened EC Equal Treatment [Directive 76/207](#) in that it discriminated against men on grounds of sex. The case law of the European Court of Justice is relevant when interpreting the provisions of the Directive.

The Norwegian Government contended that, in view of the under-representation of women in academic positions, its legislation fell within the scope of Article 2(4) of the Equal Treatment Directive. The Norwegian Government accepted that the rule provided an automatic and unconditional preference for women, but argued that formal equality in treatment was not sufficient to achieve substantive equality. The aim of the legislation, it contended, was to achieve long-term equality between men and women as groups.

The EFTA Court held that:

1. allowing a number of academic posts to be reserved exclusively for women because they are under-represented in the particular post goes beyond the scope of Article 2(4) of the EC Equal Treatment Directive in so far as it gives absolute and unconditional priority to female candidates.
2. The Equal Treatment Directive is based on the recognition of the right to equal treatment as a fundamental right of the individual. National rules and practices derogating from that right can only be permissible when they show sufficient flexibility to allow a balance between the need for the promotion of the under-represented gender and the opportunity for candidates of the opposite gender to have their situation objectively assessed. There must, as a matter of principle, be a possibility that the best-qualified candidate obtains the post.
3. There must be criteria for assessing the qualifications of candidates. Such an assessment could consider factors which tend to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality. Weight could be given female life experience which in numerous academic disciplines may be relevant to the determination of the suitability and capability for, and performance in, higher academic positions.
4. However, the legislation in question made no provision for flexibility and the outcome was determined automatically in favour of a female candidate. The Norwegian rule went further than the Swedish legislation considered in the *Abrahamsson* case, where a selection procedure involving an assessment of all candidates was foreseen at least in principle. Since the Swedish rule was held by the European Court of Justice to be in violation of the principle of equal treatment of women and men, it was clear that the Norwegian was not permitted.

**BRIECHE V MINISTRE DEL'INTERIEUR** (Case C-319/03) 30 September 2004

Article 141(4) EC – Directive 76/207/EEC

Serge Briheche, a 48-year-old widower who had not remarried with one dependent child, applied to sit various competitive examinations organised by the French public administration, including a competitive examination organised by the Ministry for the Interior in 2002 for the recruitment of administrative assistants within central government.

His application to sit the latter competitive examination was rejected by decision of 28 January 2002 on the ground that he did not fulfil the age limit of 45 years laid down in the first paragraph of Article 5 of Decree No 90-713 for entry to that examination.

That appeal was dismissed by decision of the Minister for the Interior who stated that except for certain categories of women, only unmarried men with at least one dependent child who are obliged to work may benefit from the abolition of the age limit for obtaining access to public-sector employment.

On 28 March 2002, Serge Briheche applied to the Tribunal claiming that the relevant law, in so far as it reserves to 'widows who have not remarried' the benefit of the exemption from the age limit for obtaining access to public-sector employment, is not in accordance with the objectives of the Directive. Although the Directive is to be without prejudice to measures removing existing inequalities which affect women's opportunities of obtaining employment, it obliges the Member States to review provisions for which the objective of protection on which they were originally based is no longer justified.

The Tribunal administratif asked the Court for a preliminary ruling as to the compatibility of the law with Article 3(1) and Article 2(4) the Directive:

The ECJ ruled that:

1. A national provision which provides, as regards entry to competitive examinations organised for the recruitment of civil servants, that the age limit is not applicable to widows who have not remarried who are obliged to work, results in discrimination on grounds of sex, contrary to Article 3(1) of the Directive, against widowers who have not remarried who are in the same situation as those widows.
2. In those circumstances it must be considered whether such a provision may nevertheless be allowed under Article 2(4) of the Directive, which states that it '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).'
3. 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 (Case C-409/95 *Marschall* [1997] ECR I-6363, paragraph 26).
4. A measure which is intended to give priority in promotion to women in sectors of the public service must be regarded as compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the

candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates (see, to that effect, Case C-158/97 *Badeck and Others* [2000] ECR I-1875, paragraph 23).

5. Those conditions are guided by the fact that, 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 as set out in *Lommers*.
6. It follows that a provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women, while it is to men in the same situation as those women, cannot be allowed under Article 2(4) of the Directive.
7. Neither can such a provision be allowed under Article 141(4) EC which does not allow measures which prove to be disproportionate to the aim pursued.

## **CONCLUSION**

The case of Briheche is a useful summary of the principles adopted by the court to determine what positive action measures will be permitted as a derogation from the principle of equal treatment and falling within art 2(4) of Directive 207/76 or now art 3 of Directive 206/54.

However, it remains the case that these principles may not be straightforward to apply in practice. What constitutes equally qualified candidates, what criteria should be applied to over-ride a preference to be accorded to the under-represented sex, and how any such criteria should be applied in practice may all be difficult issues to resolve.

**Tess Gill**

**26/10/10**