ATTORNEY GENERAL – CIVIL AFFAIRS

To the Court of Justice of the European Union Oslo, 30 June 2022

WRITTEN OBSERVATIONS

BY

THE KINGDOM OF NORWAY

represented by Ms Ida Thue, advocate at the Attorney General of Civil Affairs, and Ms Tone Hostvedt Aarthun, senior adviser at the Ministry of Foreign Affairs, acting as agents, submitted pursuant to Article 23(3) and (4) of the Protocol on the Statute of the Court of Justice of the European Union, in

Joined cases C-184/22 and C-185/22 KfH Kuratorium für Dialyse und Nierentransplantation and Others

concerning a request for a preliminary ruling under Article 267 TFEU by the Bundesarbeitsgericht, Germany.

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1 INTRODUCTION

1. The request for a preliminary ruling concerns the interpretation of Article 157 TFEU and Articles 2(1)(b) and the first sentence of Article 4 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), as well as Clause 4(1) of the Framework Agreement on part-time work annexed to Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

2. The request has been made in proceedings between the appellants, two female part-time nurses (working respectively 40 % and 80 % of the normal weekly working hours of a full-time employee), and the respondent (the employer).

2 THE DISPUTE IN THE MAIN PROCEEDINGS

3. The appellants claim that they are unlawfully discriminated against as part-time employees by comparison with full-time employees, and at the same time indirectly discriminated against on grounds of sex.

4. According to the order for reference, the respondent has more than 5000 employees in total, 79.96 % of these are women. Of all the employees, 52.78 % are part-time, and 84.74 % of these are female. Within the group of full-time employees, 68.20 % are women.

5. The appellants' employment contracts are based on a framework collective agreement (hereinafter "the FCA"). Under Paragraph 10(1) of the FCA the normal weekly working time for a full-time employee is, on average, 38.5 hours, excluding breaks, and the normal daily working time for a full-time employee is 7 hours 42 minutes. It follows from Paragraph 10(7) that overtime are hours worked in addition to normal working hours as defined in Paragraph 10(1). All employees have right to an overtime supplement when working overtime, cf. Paragraph 10(7) of the FCA.

6. The appellants claim that they are discriminated against because they are not entitled to an overtime supplement when working hours in excess of the hours stipulated in their individual employment contracts (that is, 40 % and 80 % respectively of the normal weekly working hours of a full-time employee) but less than the overtime thresholds in Paragraph

10 of the FCA. They also argue that they have been discriminated against on grounds of sex, since most of the respondent's part-time employees are women.

3 QUESTION 1

7. By its first question the referring court asks whether Article 157 TFEU and Article 2(1)(b) and the first sentences of Article 4 of Directive 2006/54 must be interpreted as meaning that a provision in a national collective agreement to the effect that the payment of overtime supplement is available only for hours worked in excess of the normal working time of a full-time employee entails a difference in treatment as between full-time employees and part-time employees.

8. This question has already been decided by the Court in *Helmig*.[1] The Court may therefore rule by reasoned order, cf. Article 99 of the Court's Rules of Procedure.

9. In *Helmig*, the Court ruled that Article 119 of the EEC Treaty (now Article 157 TFEU) and Article 1 of Directive 75/117/EEC (now Article 4 of Directive 2006/54) does not preclude collective agreements from restricting payment of overtime supplements to cases where the normal working hours fixed by them for full-time employees are exceeded. The Court considered that there was no difference in treatment between full-time employees and part-time employees, since both groups received the same overall pay for the same number of hours worked:

> *"A part-time employee whose contractual working hours are 18 receives, if he works 19 hours, the same overall pay as a full-time employee who works 19 hours.*
>
> *Part-time employees also receive the same overall pay as full-time employees if they work more than the normal working hours fixed by the collective agreements because on doing so they become entitled to overtime supplements."*[2]

10. The provisions in the collective agreement did not give rise to different treatment as between part-time and full-time employees. Consequently, there was no discrimination incompatible with Article 119 of the EEC Treaty and Article 1 of Directive 75/117/EEC.

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[1] Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78-93, *Helmig and Others*.
[2] Ibid. paras. 28-29.

11. Based on the information provided in the order for reference, there seem to be no relevant differences between the national provisions at issue in the present case, and the national provisions at issue in *Helmig*.

12. The Government is aware that the Commission has argued that the reasoning in *Helmig* is no longer valid in its written observations in case C-660/20 (Lufthansa City Line).[3] The Commission bases its argument on the judgments in *Elsner-Lakeberg*[4] and *Voß*[5], and claims that the words "by contrast" in para. 32 of *Voß* seems to indicate a change in relation to its earlier case-law (*Helmig*).

13. That argument cannot be accepted, for several reasons.

14. First, the national provisions at issue in *Elsner-Lakeberg* and *Voß* are not comparable to the national provisions in *Helmig* and the present case.

15. In *Elsner-Lakeberg*, a teacher had to work three hours over his or her regular monthly schedule to be paid for any additional hours. In *Helmig* and in the present case, the threshold for overtime compensation was the same for part-time and full-time workers (that is to say, the number of normal hours fixed for full-time employees). That was not so in *Elsner-Lakeberg*. In *Elsner-Lakeberg*, the threshold for pay for additional hours varied according to the individual employment contract. A teacher with a contract based on 60 hours per month, would not receive pay for 61 and 62 hours of work, while a full-time teacher (98 hours per month) would receive pay for those hours.[6]

16. In *Voß*, national legislation defined overtime as hours worked over the normal working hours stipulated in the individual employment contract. Those additional hours were remunerated at a lower rate than the hourly rate applicable to normal working hours.[7] So, just as in *Elsner-Lakeberg*, the threshold for overtime compensation was not the same for part-time and full-time employees but varied according to the specified normal working time in the individual employment contract.[8] For Ms Voß, who had a part-time employment contract based on a normal of 23 teaching hours per week, this meant that she would

[3] Written observations paras. 31-32.
[4] Case C-285/02 *Elsner-Lakeberg*.
[5] Case C-300/06 *Voß*.
[6] Case C-285/02 *Elsner-Lakeberg* para. 17, see also the description of *Elsner-Lakeberg* in *Voß* para. 33.
[7] Case C-300/06 *Voß* para. 21.
[8] See para. 36.

receive less pay if she worked 3.5 hours over her normal working hours, compared to full-time teachers with contracts for 26.5 teaching hours per week.

17. By contrast, in *Helmig* and in the present case, the threshold for overtime compensation does not vary according to the normal working hours stipulated in the employment contract but is identical for part-time and full-time workers. This explains why there is no difference in treatment between part-time and full-time workers in *Helmig* and in the present case, as compared to *Elsner-Lakeberg* and *Voß*.

18. Secondly, the Court applies the same test in *Helmig* and in *Voß* when assessing whether part-time and full-time employees are treated differently. This is done by comparing the overall pay per hour for the same number of hours worked by part-time employees and full-time employees. Overall pay per hour must be understood as the total amount of payments received. This might be, for example, the normal rate per hour, the normal rate plus an overtime supplement, or a reduced hourly rate (such as in *Voß*).

19. This test is applied in *Helmig* paras. 27-29. The Court notes that a part-time employee whose contractual working hours are 18 receives, if he works 19 hours, the same overall pay as a full-time employee who works 19 hours. Part-time employees who work more than the normal working hours fixed by collective agreements also receive the same overall pay as full-time employees, since they both are entitled to overtime supplements for the same number of hours.

20. The same test is applied in *Voß* para. 35. The Court states that a part-time teacher whose normal weekly hours are 23 teaching hours per week and who works 3.5 hours over those hours receives less pay than a full-time teacher receives for 26.5 teaching hours.

21. Since the test applied by the Court in *Helmig* and in *Voß* is the same test, it is evident that the the words “by contrast” in *Voß* para. 32 do not signify that the Court had changed its opinion on the correct method for assessing whether there is a difference in treatment between part-time and full-time employees.

22. Rather, it is apparent that in *Voß*, the Court found it helpful to provide one example of a case where the Court had found no difference in treatment in relation to pay (*Helmig*), and one example of a case where the Court had concluded that there was a difference in treatment (*Elsner-Lakeberg*). The words “by contrast” in *Voß* thus merely provide a

transition between *Helmig* in para. 31 ("… the Court held that there is no difference in treatment") and *Elsner-Lakeberg* in para. 32 ("… the Court held that there is a difference in treatment").

23. The Government is aware that, prior to the Court's judgment in *Voß*, there had been some discussion as to the correct method for assessing difference in treatment between part-time employees and full-time employees.[9] Nevertheless, the fact remains that the operational test applied by the Court in *Helmig* and *Voß* is identical. The reasoning of the Court in *Helmig* is therefore still valid, and the Court must conclude that the national provisions at issue in the present case treat part-time and full-time employees in the same way.

24. It should be added that paying overtime compensation to part-time employees who exceed the working hours stipulated in their individual work contract would amount not only to a difference in treatment in relation to full-time employees, but also to arbitrary discrimination within the group of part-time employees. It is indeed difficult to see why a person with a 40 % work contract (such as one of the appellants in the case before the referring court) should receive overtime payments when working more than 40 %, while a person with an 80 % contract (such as the other appellant) would have to work more that 80 % before receiving overtime payments.

25. A common threshold for overtime compensation thus ensures that all employees are treated equally, both part-time employees as compared to full-time employees, and part-time employees working different percentages of normal weekly working hours.

26. Based on the above, the Government submits that national provisions such as Paragraph 10 of the FCA treats part-time workers and full-time workers in the same way in relation to pay. It is therefore not necessary for the Court to answer questions 2 and 3.

4 QUESTION 2

27. The second question is based on the premise that the Court concludes that the national provisions in the present case amount to a difference in treatment between part-time and full-time employees.

[9] See the Opinion in Case C-300/06 *Voß* paras. 39-46 and 54-58.

28. The referring court essentially asks what the right method is for determining whether the difference in treatment affects considerably more woman than men.

29. Article 2(1) (b) of Directive 2006/54 defines the concept of "indirect discrimination" as the situation in which an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

30. It is settled case-law that the existence of a particular disadvantage may be established, for example, if it is proved that legislation such as that at issue in the main proceedings is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex.[10]

31. The Court has also stated that the best approach to the comparison of statistics is to consider, on the one hand, the proportion of men in the work-force affected by the difference in treatment and on the other, the proportion of women in the workforce who are so affected.[11] If the statistics indicate that, of the workforce, the percentage of part-time workers who are women is considerably higher than the percentage of part-time workers who are men, there is *prima facie* evidence of sex discrimination.[12]

32. In the present case, the order for reference states that 79.96 % of the respondent's workforce are women, and that within the group of part-time employees, 84.74 % are female. This means that the proportion of women within the group of part-time workers is larger than the proportion of women in the workforce as such.

33. It is for the national court to assess whether this difference is large enough to conclude that the national provisions at issue in the present case are to the disadvantage of a significantly greater proportion of women than men.

34. The referring court also asks whether the judgment in Case C-16/19 *Spzital Kliniczny im. dra J. Babínskiego Samodzielny Publiczny Zaktad Opieki Zdrowotnej w Krakowie* is of relevance for the assessment of whether there is a difference in treatment.

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[10] See case C-274/18 *Schuch-Ghannadan* para. 45, with further references to case-law.
[11] See Case C-300/06 *Voß* para. 41, with further references to case-law.
[12] See Case C-300/06 *Voß* para. 42.

35. That case concerned the question whether there could be discrimination on the grounds of disability for the purposes of Article 2 of Council Directive 2000/78/EC in a situation where the alleged discrimination occurred within a group of persons, all of whom had disabilities.

36. The questions raised by the referring court in the present case do not concern alleged discrimination on the grounds of sex within a group of persons, all of whom are female. Hence, it is difficult to see how Case C-16/19 could be relevant for the assessment of whether there is discrimination on the grounds of sex in the present case, where there are both women and men working full-time and part-time. The question of possible discrimination on the grounds of sex in a situation where the workforce consists only of women, is hypothetical and consequently immaterial to the present case.

5 QUESTION 3

37. The third question is based on the premise that the Court concludes that the national provisions in the present case entail a difference in treatment that affects considerably more women than men.

38. The referring court essentially asks whether the objectives of deterring the employer from mandating overtime, rewarding the employees for working overtime, and preventing full-time employees from being treated less favourably than part-time employees constitute legitimate aims within the meaning of Article 2(1) (b) of Directive 2006/54.

39. The Government observes that the first and second objectives referred to by the national court (deterring employers from mandating overtime and rewarding employees for working overtime) are closely linked. The reason why employers are deterred from mandating overtime is that they must pay the workers overtime supplements. The employees are in their turn compensated for a special effort, an effort which cannot be demanded from them in normal situations (working hours above the threshold set for normal working hours for a full-time employee).

40. The Government submits that the objectives of deterring the employer from mandating overtime and rewarding the employees for working overtime are legitimate aims within the meaning of Article 2(1) (b) of Directive 2006/54. The ultimate objective of such provisions is

to limit the use of overtime in order to protect the employees' health and safety and ensure a good balance between work and leisure.

41. The common threshold for overtime is set at the level which the parties to the collective agreement (the FCA) considered necessary in order to reach these objectives.

42. The Government would add that the national provisions at issue in the present case must be regarded as both appropriate and necessary to achieve the legitimate aims of deterring the employer from mandating overtime and rewarding the employer for working overtime, but these questions are ultimately for the national court to decide.

43. As regards the referring court's question of whether the objective of preventing full-time employees from being treated less favourably than part-time employees might constitute a legitimate aim within the meaning of Article 2(1) (b) of Directive 2006/54, the Government cannot in principle exclude that this could be regarded as a legitimate aim. However, if the national provisions treat full-time and part-time workers in the same way, as in the present case, the correct approach would be to conclude that there is no difference in treatment in the first place, and consequently, no need for a justification.

6 QUESTIONS 4 AND 5

44. By its fourth and fifth question, the referring court essentially asks whether national provisions such as Paragraph 10 of the FCA must be assessed in the same way in relation to the rules on discrimination on the grounds of sex (Article 157 TFEU and Article 2(1)b and the first sentences of Article 4 of Directive 2006/54/EC) and in relation to the rules on discrimination of part-time workers (Clause 4(1) of the Framework Agreement on part-time work annexed to Directive 97/81/EC).

45. The Government considers that this question must be answered in the affirmative.

46. It would indeed be illogical if the rules on discrimination on grounds of sex and the rules on discrimination of part-time workers were interpreted and applied differently in relation to national provisions affecting the same part-time workers.

47. The Court's case law on discrimination on the grounds of sex is consequently relevant for the assessment of whether there is a difference of treatment of part-time employees under Clause 4(1) of the Framework Agreement on part-time work.

48. Based on the above, the Government refers to its submissions under question 1 and respectfully submits that national provisions such as Paragraph 10 of the FCA do not entail any difference in treatment as between part-time and full-time employees. Since the overtime threshold is the same for both groups, part-time employees receive the same pay as full-time employees for the same number of hours worked.

49. In the event that the Court finds that national provisions such as Paragraph 10 of the FCA do entail a difference in treatment as between part-time and full-time employees, the Government refers to its submissions under question 3 and respectfully submits that a difference in treatment can be justified based on the legitimate aims of deterring the employer from mandating overtime and rewarding the employer for working overtime.

7 PROPOSED ANSWERS TO THE QUESTIONS REFERRED

50. The Government respectfully submits that the questions should be answered as follows:

1. Article 157 TFEU and Article 2(1)b and the first sentences of Article 4 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) do not preclude collective agreements from restricting payment of overtime supplements to cases where the normal working hours fixed by them for full-time employees are exceeded.

2. Clause 4(1) of the Framework agreement on part-time work annexed to Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC does not preclude collective agreements from restricting payment of overtime supplements to cases where the normal working hours fixed by them for full-time employees are exceeded.

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Oslo, 30 June 2022

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