



# Night time work in Germany

LB and RG vs. Coca-Cola European Partners Deutschland

Sarah Venken



# Background

- The supplementary allowance
- Regular vs irregular night work
- Preliminary ruling: 7 July 2022
- LB & RG = night workers at Coca-Cola
- Collective agreement with Food, Beverages and Catering Union
- Bound by MTV (*Manteltarifvertrag*): more general conditions



# Facts

1. December 2018 - June 2019: LB - 20%  
December 2018 - January 2019: RG - 25%



Difference in treatment  
⇔ art. 3 German Law:

'(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The State shall promote the actual implementation of equal rights for men and women and shall take action to eliminate existing disadvantages.

(3) No person shall be discriminated against or favoured on grounds of sex, parentage, race, language, homeland and origin, belief, or religious or political opinions. No person shall be discriminated against on grounds of disability.'



2. Labour Court: payment equivalent



3. Higher Labour Court



4. Revision Federal Labour Court



5. Court of Justice: preliminary ruling



# Arguments

## Applicant (LB & RG)

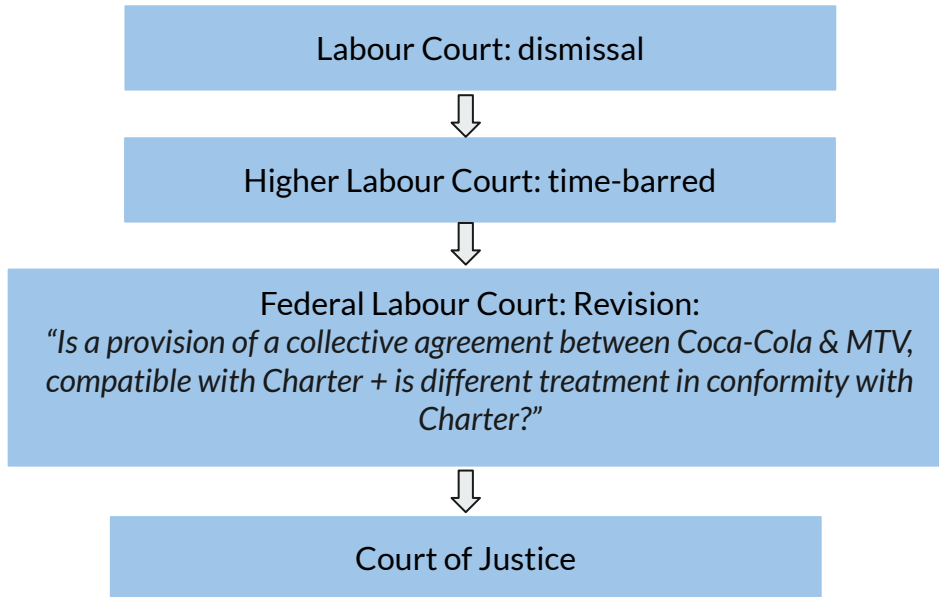
1. Higher supplementary allowance
2. Regular work: higher health risks
3. Disruptions social environment
4. Different treatment

## Defendant (Coca-Cola)

1. Less frequent & additional work
2. Additional benefits
3. Compensation + scare off employer



# Actions





## Joint preliminary ruling requests


1. *“Does a collectively agreed rule implement Directive 2003/88, within the meaning of the first sentence of Article 51(1) Charter, if that collectively agreed rule provides for a higher level of compensation for irregular night work than for regular night work?”*
2. *“If so, Is this collectively agreed rule compatible with Article 20 Charter if it’s intended to compensate not only for the adverse effects on health caused by night work but also for the burden arising from the greater difficulty in planning for irregular night work?”*



# Court of Justice

Admissibility?

- Inadmissible requests → necessity interpretation Directive?
- National court: (1) need for preliminary ruling and (2) relevance questions
- Required to give ruling
- YES



## 1. Interpretation of Directive 2003/88/EC concerning aspects of the organisation of working time


*“Does a collectively agreed rule implement Directive 2003/88, within **the meaning of the first sentence of Article 51(1) Charter** if that collectively agreed rule provides for a higher level of compensation for irregular night work than for regular night work?”*

- **Article 51(1) Charter:**

*“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and **to the Member States only when they are implementing Union law.**”*

- BUT no specific obligation on MS → no EU fundamental rights application → Charter is not applicable
- Collective agreement ≠ scope of Charter





## 1. Interpretation of Directive 2003/88/EC concerning aspects of the organisation of working time

*“Does a collectively agreed rule implement Directive 2003/88, within the meaning of the first sentence of Article 51(1) Charter if that collectively agreed rule provides for a higher level of compensation for irregular night work than for regular night work?”*

- **Directive 2003/88**


Art. 7(1) Annual leave: protecting safety and health, not payment of workers

Art. 153 TFEU (legal basis) + art. 1(1) Directive

Minimum requirements to improve conditions + duration working time

Not:


Payment, strikes, lock-outs because contractual freedom + competence state



## 1. Interpretation of Directive 2003/88/EC concerning aspects of the organisation of working time

- Directive 2003/88  
Art. 8 to 13: relate to night work
- ❑ Art. 8: maximum length
- ❑ Art. 9: (free) health assessment
- ❑ Art. 10: guarantees
- ❑ Art. 11: notification of regular use
- ❑ Art. 12: safety protection
- ❑ Art. 13: pattern and adaption to work

Concerning length - health protection - guarantees - notification authorities  
= doesn't control payment night work/impose obligation



## 1. Interpretation of Directive 2003/88/EC concerning aspects of the organisation of working time

*“Does a collectively agreed rule implement Directive 2003/88, within the meaning of the first sentence of Article 51(1) Charter if that collectively agreed rule provides for a higher level of compensation for irregular night work than for regular night work?”*

- **ILO Night Work Convention:** Art. 3(1) and 8 + recital 6 Directive
  1. No obligations
  2. Proper compensation: time, pay, benefits  
=> not binding
- **Answer to question 1:**

A provision of a collective agreement, which provides for a higher supplementary allowance for irregular night work, is not implementing Directive 2003/88.



## 2. Compatibility with Article 20 Charter?

*“If so, Is this collectively agreed rule compatible with Article 20 Charter if it’s intended to compensate not only for the adverse effects on health caused by night work but also for the burden arising from the greater difficulty in planning for irregular night work?”*

- No answer needed as question 1 was negative



# Night time work in General

Sarah Venken and Camille Vandeghinste



# History

- “Shift work” to use all 24 hours
- Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time
- Amended in 2000
- Directive 2003/88



## Definition “night time work”

- Art. 2 Directive 2003/88
- “Night time”:
  - ☐ > 7 hours, between midnight and 5am
- “Night worker”:
  - ☐ > 3 hours
  - ☐ Part of annual working time, defined by national legislation or collective agreement



## Definition “night time work”

- In Belgium: prohibited between 8pm and 6am
- Exceptions:
  1. By law
    - ❑ Normal (hotels, fire fighters...)
    - ❑ Important for job (bakery, pharmacy)
  2. By royal decree
    - ❑ Decided in specific situations

Definition: actions between 8pm and 5am





## Directive 2003/88: guarantees

- Minimum health and safety requirements for organising working time
- Article 8:

*'Member States shall take the measures necessary to ensure that:*

*(a) normal hours of work for night workers do **not exceed an average of eight hours in any 24-hour period**;*

*(b) night workers whose work involves **special hazards or heavy physical or mental strain (= defined by national legislation)** do not work more than eight hours in any period of 24 hours during which they perform night work.'*



## Directive 2003/88: guarantees

- Article 9:

*'Member States shall take the measures necessary to ensure that:*

*(a) night workers are entitled to a **free health assessment** before their assignment and thereafter at regular intervals;*

*(b) night workers suffering from **health problems** recognised as being connected with the fact that they perform night work are **transferred** whenever possible **to day work** to which they are suited.'*

- Art 11: notifications
- Art 12: safety and health protection
- Art 13: pattern of work



# Risks

- 2009: doctors in training
- Change in work pattern, care of patients
- Interim average week = 48 hours → opt-out?
- Shift work
- More irregular hours → no healthy life-work balance
- Loss of training time
- 60 h-week
- Working time? Duties, training, travelling time, (un)paid overtime, on-call time

## **EWTD regulations include the following key points:**

- Working time not exceeding 48-h per week, averaged over 26-week period.
- Maximum of 13-h work in a 24-h period
- Eleven consecutive hours of rest per 24-h period.
- Minimum of 24-h rest every 7-days, or 48-h rest every 14-days.
- Twenty-minute break per 6-consecutive hours worked.
- Four weeks paid annual leave.



## Equal treatment - health?

- Many disorders: sleep, epilepsy, heart diseases < circadian cycle + lack of melatonin
- **Men:** diabetes
- **Women:** breast/lung cancer, early menopause, pregnancies, need for fertility treatment
- Injuries 28% higher
- More difficult to sleep in daytime → fatigue and wakefulness



# Equal treatment - gender?

## LEGISLATION

- 1957: Treaty of Rome - art 119: “*each Member State must ensure that the principle of equal pay for equal work is observed*” (does not concern working conditions or access)
- 1961: resolution to implement equal pay
- 1960-70: issue of gender discrimination and equal pay
- ° active social action program: principle equal treatment men and women



## Equal treatment - gender?

- ° Directives:
  - 1) 1975 - equal pay for men and women performing work of equal value  
= first act and signal of EC
  - 2) 1976 - equal treatment in the work place  
*“Mean(s) that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status”*  
→ also working conditions, gender-based distinction, prohibition indirect discrimination  
3 exceptions: ability - protection - promotion equal opportunity



# Equal treatment - gender?

## BAN OF NIGHT TIME WORK

- Night Work (Women) Convention 1919: prohibition
- Adverse effects for male AND female workers: disruption
- Gender  $\neq$  factor for tolerance
- Pregnancy and additional load → more protection
- General frame work and periodic review
- Protocol 1990 to Convention No.89: possibility, pregnancy + institutional protection
- Right to move to day time work: health - care of child/relatives



## Night work - summary

- Night work < day work
- General framework + female protection
- Health problems
- Regular vs irregular

Sex	2013 (thousands)	2018 (thousands)	Growth 2013-2018 (thousands)	% change 2013-2018	% of all employee working nights 2018
<b>Men</b>	1,841	1,891	+50	2.7%	14.6
<b>Women</b>	1,146	1,247	+101	8.8%	9.2
<b>Total</b>	2,987	3,138	+151	5.1%	11.5





# Part-time work in Germany

Menger und Scheffel v. Innungskrankenkasse  
Rheinhessen-Pfalz

Camille Vandeghinste



# Background

- 14 december 1995, C-444/93,
- Minor and short-term employment
- Equal treatment for women and men in social security matters
- Article 4 (1) of Council Directive 1978 (79/7/ EEC) on the progressive implementation of the principle of equal treatment for men and women in matters of social security



# Context

- Parties
  - Mrs Megner and Mrs Scheffel
  - Innungskrankenkasse Rheinhessen-Pfalz (now: Vorderpfalz), supported by Firma G.F. Hehl&Co
- Contract of employment
  - Max. working time: 2h/ day, 5x week
  - remuneration: not exceed 1/7 relevant monthly reference
- Issue
  - Exclusion from compulsory old-age insurance and sickness insurance and from the obligation to pay unemployment insurance contributions



# Facts

## Main proceedings:

1. Subject to compulsory insurance under statutory sickness and old-age insurance
2. pay contributions to the statutory unemployment insurance scheme



1992: Request refused: 'minor and short-term employment'



**Minor-employment'**: Paragraph 8(1)(1) of Volume IV of the Sozialgesetzbuch  
o is regularly engaged in for **fewer than 15 hours a week** and the monthly **remuneration** does not regularly exceed:

b)... **one-seventh** of the average monthly salary (Paragraph 18) ...'

**Short-term employment'**: Paragraph 102(1) of the AFG

o '... employment which is by its nature regularly **limited to 18 hours a week** or is so limited in advance by a contract of employment ...'



# Facts

Sozialgericht Speyer: indirect discrimination against women (Article 4 (1) of the Directive 1978)



Question to the Court for a Preliminary Ruling

*Paragraph 7 of Volume V of the SGB*

*Minor employment is **exempt** from compulsory sickness insurance*

*Paragraph 5(2)(1) of Volume VI of the SGB*

*Minor employment is **not subject** to compulsory old-age insurance.*

*Paragraph 169a(1) and (2) of the AFG*

*Workers in short-term or minor employment are **exempt** from the obligation to pay contributions in unemployment insurance schemes*



Scope of the directive?



# Preliminary ruling request

*'Must Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) be interpreted .... constitute discrimination on grounds of sex if considerably more women than men are affected thereby, and is it the case that such discrimination is not justified by objective criteria unrelated to any discrimination on grounds of sex?'*

- Compulsory **insurance** under the statutory sickness and old-age scheme:
  - employment fewer than 15h/ week and regularly attracting remuneration 1/7 of the monthly reference amount
- Obligation to **contribute** to the statutory unemployment insurance scheme
  - employment regularly limited by its nature, to fewer than 18 hours/ week or limited in advance to the obligation to contribute



## ***Scope ratione personae* of the Directive**

### **Article 2 of the Directive: 'a worker'**

*the directive 'shall apply to the working population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalided workers and self-employed persons'.*

- The question
- Very broad definition



## (II) Reactions

The German government and Firma G.F. Hehl&Co

- Persons in minor employment are not part of the working population (Art. 2)
- Earnings insufficient to satisfy their needs

Previous Court's case-law: considered 'workers' (Artt. 48 and 119 of the Directive)

- Income lower than the minimum living wage according to national law (Levin)
- The work does not exceed 18h/week (Ruzius-Wilbrink), or 12h/ week (Kempf) or 10 hours of work/week (Rinner-Kuhn)





## (III) Reactions


German government argues:

- Worker in the meaning of 'social security law', not in the meaning of Art. 48
  - Competence of Member States (no reference to *Levin*)
- Principle of equal treatment: *Levin*, *Kempf* and *Rinner-Kuhn*- cases



# Judgement on scope *ratione personae*

- Reference to *Levin*, *Kempf* and *Rinner-Kuhn*- cases, despite
  - social security law
  - Not concerning the interpretation of Art. 2 of the Directive
  - Principle of equal treatment
- People in minor employment fall under the Article 2 of the Directive
- The women fall under the scope *ratione personae* of the Court



# Interpretation of Article 4 (1) of the Council Directive 79/7/EEC

## Article 4 (1) of Council Directive 79/7/ EEC

1. The **principle of equal treatment** means that there shall be **no discrimination** whatsoever **on ground of sex** either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

- *The scope of the schemes and the conditions of access thereto,*
- *The obligation to contribute and the calculation of contributions,*
- *The calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.*

The principle of equal treatment meaning there shall be no direct or indirect discrimination on the ground of sex.



# The Question of the national Court

**Question:** Are the national provisions, within the interpretation of Art. 4(1) of the Directive, a discrimination on grounds of sex when noticeably more women are affected by this than men:

- Exception of compulsory insurance of statutory sickness and old-age schemes: employment fewer than 15h/ week and a regular remuneration up to 1/7 a moth
- Exclusion form the obligation to contribute to statutory unemployment insurance scheme: employment by its nature fewer than 18h/week or so limited by advance in the contract of employment

Court:

- National measure in disadvantage to far more women than men → discrimination (Art. 4 (1) of the Directive)
- **Unless** measure based on objective factors, necessary and reflects a legitimate social policy aim.



## (II) Arguments of the German Government

German Government: exclusion in correspondence with structural German social security scheme

1. Obligatory for the functioning on an exclusively contributory basis
2. The social demand for minor employment
3. Lack of ability to replace the loss of jobs



# Preliminary ruling

*“When article 4 (1) of the directive is interpreted withing **national provisions** ‘under which employment regularly consisting of fewer than 15 hours/ week and regularly attracting remuneration of up to 1/7 of the monthly reference amount is excluded from compulsory insurance under the statutory sickness and old-age insurance schemes, and national provisions under which employment which tends by its nature to be regularly limited to fewer than 18 hours/ week or is so limited in advance by a contract of employment is excluded from the obligation to contribute to the statutory unemployment insurance scheme’; do **not fall under discrimination on grounds of sex**, even if those provisions affect noticeably more women than men, since the national law was reasonably entitled to consider the law in question was **necessary to achieve** a social policy **aim** unrelated to any discrimination on grounds of sex. “*

1. Social security law: margin of discretion for the Member States (Case C-229/89 Commission v Belgium [1991] ECR I-2205,)
2. Social and employment policy aim is objectively unrelated to discrimination on the grounds of sex, eventhough considerabley more women then men are affected by this provision

→ **No** (in)direct **discrimination** on grounds of sex within the meaning of Article 4(1) of Council Directive 79/7/EEC



## Conclusion

- **10 hours of work/week** with a remuneration **less than 1/7 of the monthly average** is sufficient to be considered a worker within the Council Directive 79/7/ EEC on social security matters.
- There was **no discrimination** on the grounds of sex even where the relevant provisions affect considerably more women than men are affected by this provision within the meaning of Article 4 (1) of the directive. Regarding the **exclusion of 'minor and short-term workers'** to the compulsory social insurance schemes.



# Part-time work in General

Camille Vandeghinste and Sarah Venken





# Definition, Importance & challenges

**Part-time work**= work that is performed during a weekly number of hours (or average number of hours in a given period) which is lower than the one performed during full-time work in a comparable situation.

## The increased **importance**

- Flexibility
- Accessibility to the formal labor market
- Work-life balance

## Challenges

- Non-discrimination between part-time and full-time workers
- Access to employment
- Working Conditions



# Part-time Working Convention, 1994 (No.175)

Convention on protecting and giving equivalent conditions

**Art. 1** *Part-time worker: an employed person whose normal **hours of work are less than those of comparable full-time workers**;*

## Art. 4-7 Non-discrimination

- Art. 5: The principle of *pro rata temporis*
- Art. 6: Social security scheme
- Art. 7: Equivalent conditions

# Council Directive 97/81/EC Concerning the Framework Agreement on Part-time work

General principles and minimal requirements for part-time work.

*Part-time worker an employee whose normal **hours of work**, calculated on a weekly basis or on average over a period of employment of up to one year, **are less than the normal hours of work of a comparable full-time worker.***

Clause 1: The **purpose** of this Framework Agreement is:

*(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;*

Clause 4: Principle of **non-discrimination**

- 1. In respect of employment conditions,....*
- 2. Where appropriate, the principle of pro rata temporis shall apply.*



# Objective justification for different treatment


## Principle of non-discrimination

- Various grounds
  - Sex: Women vs. Men
  - Working time: Part-time workers vs Full-time workers
- No less favorable treatment unless justified on objective grounds



# Women part-time workers

- Survey 'Second European Survey on Working Conditions' 2002
- 15 Member states
- Big increase in part-time work
- Preliminary performed by women
- Highly industrialized countries

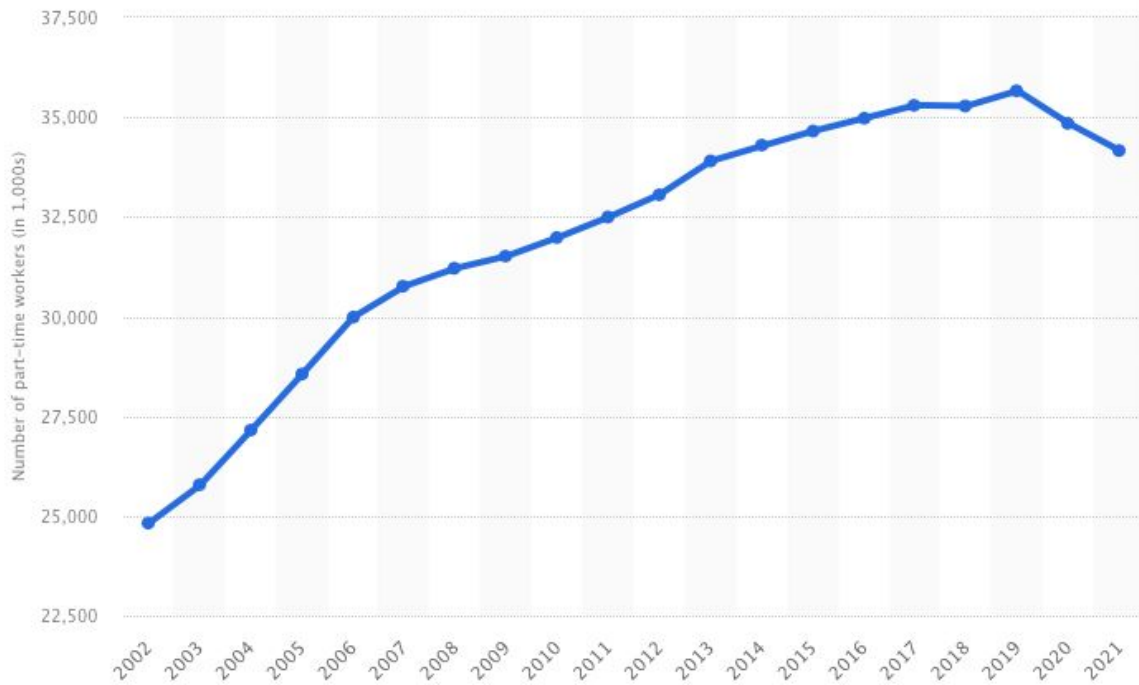


## 2002-2021

1992: 14,2%

2002: 18,1%

2021: 17,1%



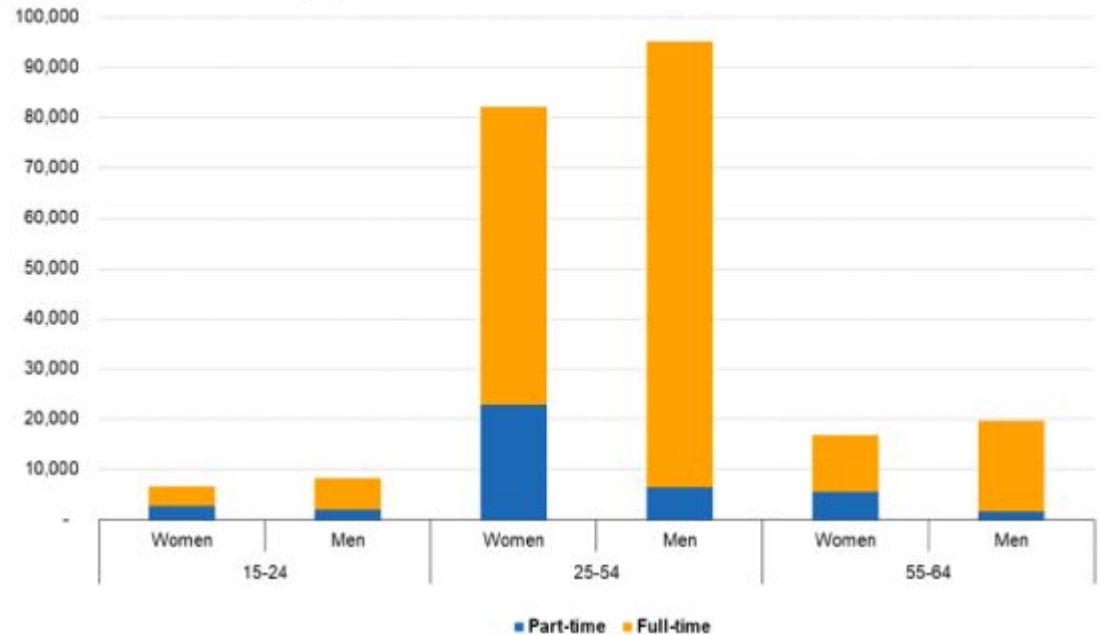
# 2021

Women: 28%

Men: 8%

**Employment by part-time and full-time, age group and by sex, average Q1-Q2-Q3 2021**

(in thousands, not seasonally adjusted data)





## 4 regimes of Women part-time employment

### The gender-roles regime

- secondary earners
- children, household chores

### The responsive firms model:

- respond to the demand for working fewer hours

### The optimal staffing model:

- response to time-related demand of services (consumer)

### The secondary-labor model

- Employers create low-wage jobs
- Job insecurity, poor wages, poor working conditions





# Legislation: Non-discrimination on grounds of sex

Council Directive 75/117/EEC of 10 February 1975 'Equal treatment in **payment**'

Article 1

1. *'elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration'.*

Council Directive 76/207/EEC of 9 February 1976 'Equal treatment concerning **access to employment and working conditions**'

Council Directive of 19 December 1978 'Equal treatment in **matters of social security**' (79/7/EEC)

Article 4

2. *'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status.'*



**Thank you**