OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 30 January 1990 *

Summary

Mr President,
Members of the Court,

1. The questions which the Court of Appeal has referred to the Court arose in a dispute between Mr Douglas Harvey Barber and the Guardian Royal Exchange Assurance Group (hereinafter referred to as 'the Guardian') concerning the compatibility of the conditions in which Mr Barber was dismissed with the Sex Discrimination Act 1975 and Community law.

Background

2. In 1948 Mr Barber became an employee of the Car & General Insurance Corporation Limited (hereinafter referred to as 'C & G'), a company which was subsequently taken over by the Guardian. As from 1970 Mr Barber was Deputy Head of the Guardian's South Yorkshire Claims Bureau at Sheffield. That claims bureau was closed by the Guardian. On 31 December 1980 Mr Barber was dismissed by reason of redundancy together with a number of other employees. He was aged 52 at the time.

* Original language: Dutch.

3. Mr Barber was initially a member of the C & G group's pension fund, and subsequently became a member of the Guardian Royal Exchange Pension Fund ('the pension fund'). That fund forms part of the pension scheme set up by the Guardian for its employees. It is a non-contributory occupational pension scheme, namely an occupational pension scheme financed solely by the employer's contributions. The Guardian's pension scheme is regarded by the competent United Kingdom authority (the Occupational Pensions Board) as a 'contracted-out' scheme within the meaning of Part III of the Social Security Pensions Act 1975. This means that the 'contracted-out scheme' is a substitute for the earnings-related part of the State pension scheme. [1]

4. The normal pensionable age for employees of the Guardian not covered by a separate section of the pension scheme is 65 for men and 60 for women. However, for members of the Guardian's pension fund who, like Barber, were previously members of the C & G's pension fund, the normal pensionable age is 62 for men and 57 for women. The pension scheme further provides that all members of the pension fund may claim an immediate pension not only on reaching the normal pensionable age but also 'on being retired' by the Guardian at any time during the 10 years preceding that date. [2]

5. The staff handbook issued by the Guardian states that special terms are applicable in the event of the termination of an employee's contract of employment before he or she reaches the normal pensionable age. On that point, the staff handbook refers to the Guardian Royal Exchange Assurance Guide to Severance Terms ('the Severance Terms'), which provides that in the case of staff with at least 10 years' service the Severance Terms are deemed to form part of their contract of employment.

Where the contract of employment of the staff concerned is terminated on grounds of early retirement or redundancy and their ages do not exceed 65 (for men) or 60 (for women), they may claim application of the special conditions set out in the Severance Terms. Two of those conditions are relevant in this case, namely pension entitlement (see paragraph 6 below) and terminal payment (see paragraph 7 below).

6. The Severance Terms confer on members of the pension fund who have attained the age of 55 (for men) or 50 (for women) — that is to say 10 years or, in the case of members of the previous C & G

1 — In that regard see paragraph 17 below

2 — See the judgment of the Employment Appeal Tribunal which states that 'under Rule 32, Mr Barber became entitled to an immediate payment on retirement at age 62 or *on being retired* by the participating company at any time during the 10 years preceding normal pension date'

pension fund, 7 years preceding normal pension date — entitlement to an immediate pension to be calculated in accordance with the rules of the pension fund. In the event of a redundancy, those employees are regarded by the Guardian as having been 'retired'. In accordance with the rule set out above (paragraph 4) concerning entitlement to an immediate pension for staff 'on being retired' at any time during the 10 years preceding normal pension date, the pension fund is obliged to grant an immediate pension to the employees concerned. In the case of members of the pension fund who have been employed by the Guardian for 10 years or more but have not attained the age of 55 (for men) or 50 (for women), the Severance Terms merely grant entitlement to a deferred pension in accordance with the rules of that fund. According to that provision, the Guardian does not regard such employees who are made redundant as having been 'retired', and they can (could) not therefore rely on the aforesaid rule concerning retirement during the 10 years preceding normal pension date for the purpose of receiving an immediate pension. Accordingly, such employees who are made redundant actually receive pension benefits only on attaining the normal pensionable age.

7. The Severance Terms further provide that, in the event of a redundancy, employees receive compensation, the amount of which depends on whether or not the person concerned is entitled to claim an immediate pension. If that is the case, the employee receives a terminal payment equal to the statutory redundancy payment increased by a percentage thereof which varies according to the number of years of service. If there is no entitlement to an immediate pension, employees receive, in addition to the statutory redundancy payment, an amount equal to four to five weeks' salary — depending on the number of years of service — for each complete year of accredited service with the firm, not exceeding 104 weeks' salary.

8. As stated earlier, Mr Barber was dismissed by the Guardian by reason of redundancy at the age of 52. He was not granted an immediate pension. He received from the Guardian a net terminal sum amounting to UKL 18 597, including the statutory redundancy payment of UKL 3 060. Furthermore, he was granted a deferred pension payable as from the normal pensionable age, namely 62. If Mr Barber had been a woman aged 52, he would have been regarded by the Guardian as having been 'retired' and would therefore have received an immediate pension, although the amount of the terminal payment would have been lower.

9. Mr Barber considered that he had fallen victim to discrimination. He instituted proceedings against the Guardian for breach of the Sex Discrimination Act 1975 and Community law before an Industrial Tribunal and, after his claim was dismissed, he appealed to the Employment Appeal Tribunal. That tribunal pointed out that Mr Barber may well be entitled to claim an immediate pension from the trustees of the pension fund on the ground that he was made redundant during the 10 years preceding the normal pensionable date (paragraph 4 above) and that, even though the contract of employment was terminated by reason of his redundancy, his position could still be equated with that of a 'retired' employee. However, the Employment Appeal Tribunal considered that there was

no need for it to decide the issue since the trustees of the pension fund were not parties to the proceedings before it.

The Employment Appeal Tribunal further considered that Mr Barber's claim was unfounded for three reasons: (1) Mr Barber could not base his claim on the prohibition of discrimination laid down in the Sex Discrimination Act 1975 because, even though there was discrimination, that prohibition, according to Section 6(4) of the Act, was inapplicable to 'provision in relation to death or retirement'; (2) in *Burton*[3] the Court of Justice decided that the question whether a person is entitled to a benefit under a pension scheme is one of access to pension benefits which falls to be resolved not by the principle of equal pay but by the principle of equal treatment; (3) finally, Directive 76/207 on equal treatment was not directly applicable in the United Kingdom, nor could it be relied upon for the purpose of interpreting Section 6(4) of the Sex Discrimination Act, inasmuch as it was unclear what the consequences of the *Burton* judgment in conjunction with the directive on equal treatment were with regard to a claim under an occupational pension scheme.

10. Mr Barber appealed against the judgment of the Employment Appeal Tribunal to the Court of Appeal, which asked the Court to give a preliminary ruling on the following questions:

'(1) When a group of employees are made compulsorily redundant by their employer in circumstances similar to those of this case and receive benefits in connection with that redundancy, are all those benefits "pay" within the meaning of Article 119 of the EEC Treaty and the Equal Pay Directive (75/117/EEC), or do they fall within the Equal Treatment Directive (76/207/EEC), or neither?

(2) Is it material to the answer to Question 1 that one of the benefits in question is a pension paid in connection with a private occupational pension scheme operated by the employer ("a private pension")?

(3) Is the principle of equal pay referred to in Article 119 and the Equal Pay Directive infringed in the circumstances of the present case if:

(a) a man and a woman of the same age are made compulsorily redundant in the same circumstances and, in connection with that redundancy, the woman receives an immediate private pension but the man receives only a deferred private pension, or

(b) the total value of the benefits received by the woman is greater than the total value of the benefits received by the man?

(4) Are Article 119 and the Equal Pay Directive of direct effect in the circumstances of this case?

3 — Judgment of 16 February 1982 in Case 19/81 *Burton* [1982] ECR 555.

(5) Is it material to the answer to Question 3 that the woman's right to access to an immediate pension provided for by the Severance Terms could only be satisfied if she qualified for an immediate pension under the provisions of the private occupational scheme in that she was being treated as retired by the Guardian because she was made redundant within seven years of her normal pension date under the pension scheme?'

11. I would refer to the Report for the Hearing for a more detailed account of the facts of the case and the course of the procedure, and for a summary of the observations of the parties. As the relevant legislation is also set out in the Report for the Hearing, I can confine myself here to listing the four Council directives which are referred to by the parties in their observations:

(i) Council Directive 75/117/EEC of 10 February 1975;[4]

(ii) Council Directive 76/207/EEC of 9 February 1976;[5]

(iii) Council Directive 79/7/EEC of 19 December 1978;[6]

(iv) Council Directive 86/378/EEC of 24 July 1986.[7]

Questions 1 and 2

12. In its first question, the Court of Appeal wishes to ascertain whether *all the benefits* which employees made redundant receive under severance terms such as those of the Guardian are to be regarded as 'pay' within the meaning of Article 119 of the EEC Treaty and Directive 75/117, or whether they fall within Directive 76/207 or any other Community legislation. The second question merely draws attention to the fact that the first question is concerned, amongst other things, with *pension* benefits granted under an occupational pension scheme. For that reason, I shall not consider that question separately.

The first question is not concerned with the issue whether clear-cut discrimination between male and female employees is contrary to Community law; that point only arises in the third question. The first question concerns exclusively the classification in the light of Community law of the two benefits provided for by the Severance Terms, namely: (1) the grant of a terminal payment, including the statutory minimum redundancy payment, to all employees made redundant; (2) the grant of an (immediate) pension to redundant employees who have attained the age of 55 (for men) or 50 (for women).

4 — Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975, L 45, p. 19).

5 — 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 (OJ 1976, L 39, p. 40).

6 — 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).

7 — Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986, L 225, p. 40).

I now turn to the question of the extent to which those two kinds of benefits fall within the scope of Article 119 of the EEC Treaty. I shall not consider Directive 75/117 separately since the question raised concerns the delimitation of the scope of Article 119 and not the specific application of the principle of equal pay, which is dealt with by Directive 75/117.[8]

The terminal payment

13. Under Article 119 of the EEC Treaty, a consideration other than the actual wage or salary is to be regarded as 'pay' where it is received by the employee, whether directly or indirectly, in cash or in kind, in respect of his employment from his employer. As Mr Advocate General VerLoren van Themaat emphasized in his Opinion in *Burton*,[9] the phrase 'in respect of his employment' presupposes an unseverable causal connection between pay and employment.

14. The parties do not deny that such part of the terminal payment granted by the Guardian as exceeds the statutory minimum redundancy payment is to be regarded as 'pay' within the meaning of Article 119. I agree with that view for the following reasons.

The causal connection between the terminal payment and the employment is clearly illustrated by the fact that the amount of the payment depends on the number of years of service completed by an employee made redundant. That connection is not displaced by the fact that the payment is made after the employment has been terminated. Since the judgment in *Garland*,[10] which was concerned with travel facilities granted to male employees upon retirement, it has been established law that advantages granted after the employment has come to an end fall within the scope of Article 119. Furthermore, I consider that the judgment in *Worringham*[11] provides — implicit, if not explicit — confirmation of the view that terminal payments constitute 'pay' within the meaning of Article 119. In paragraph 15 of that judgment the Court stated that:

'Sums . . . which are included *in the calculation* of the gross salary payable to the employee and which directly determine the calculation of other advantages linked to the salary, *such as redundancy payments* . . . , form part of the worker's pay within the meaning of the second paragraph of Article 119 of the Treaty even if they are immediately deducted by the employer and paid to a pension fund on behalf of the employee' (emphasis added).

My understanding of that passage is that where sums are directly paid over to redundant employees by an employer by way of redundancy payments the Court regards those sums *a fortiori* as 'pay'.[12]

15. Does that also hold true in the case of that part of the terminal payment which corresponds to the statutory minimum

8 — See the judgment of 31 March 1981 in Case 96/80 *Jenkins* [1981] ECR 911, paragraphs 19 to 22

9 — [1982] ECR 579, at p. 589.

10 — Judgment of 9 February 1982 in Case 12/81 *Garland* [1982] ECR 359.

11 — Judgment of 11 March 1981 in Case 69/80 *Worringham* [1981] ECR 767.

12 — The English courts would appear to take the same approach. Thus, in a judgment given in January 1988 in *Hammersmith and Queen Charlotte's Special Health Authority* v *Cato*, published in the CMLR, the Employment Appeal Tribunal expressly stated that a terminal payment constitutes 'pay' within the meaning of Article 119 of the EEC Treaty

redundancy payment? In its observations at the hearing, the United Kingdom submitted that Article 119 of the EEC Treaty is not applicable in those circumstances. In its view, that part of the terminal payment constitutes an advantage in the nature of a social security benefit. According to the Court's judgment in *Defrenne I*,[13] that legally prescribed part of the terminal payment cannot be regarded as pay from the employer.

I disagree with that view. Pay that is prescribed by law does not for that reason fall outside the scope of Article 119. In its judgment in *Defrenne II*,[14] the Court clearly stated (in its answer to the first question) that Article 119 may be relied upon before the national courts 'in particular as regards those types of discrimination arising directly from legislative provisions'. Moreover, the fact that the employer's duty to pay compensation is dictated by social security considerations is not, in my view, sufficient to prevent a minimum payment from falling outside the scope of Article 119. The same situation arises with regard to statutory provisions on the minimum wage. It would seem to be self-evident that the salary paid by an employer falls in its entirety within Article 119, even though it is wholly or partially subject to statutory provisions on the minimum wage.

As stated earlier, the crux of the matter is the existence of an unseverable causal connection between the employment and the benefit. Such a connection comes into being as soon as the employer makes a payment out of his own funds to workers which he himself employs or has employed on account of their work and therefore 'in respect of [their] employment', albeit in accordance with statutory provisions based on considerations of social security.

16. To summarize, I consider that a terminal payment, including the statutory minimum redundancy payment, which is paid by an employer on the basis of an occupational scheme to employees made compulsorily redundant by him, constitutes 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty.

The pension benefits

17. Before considering whether pension benefits such as those at issue in the main proceedings fall within Article 119 of the EEC Treaty, I intend to deal with the characteristics of the Guardian's pension scheme in more detail.

As stated earlier, the scheme in question is an occupational pension scheme which is regarded by the competent authority as a 'contracted-out' scheme. In two previous cases, namely *Worringham* and *Newstead*,[15] the Court had occasion to consider a 'contracted-out' pension scheme of that kind. In paragraph 3 of its judgment in *Newstead*, the Court described such a scheme as follows:

'Under the applicable United Kingdom legislation it is a substitute for the earnings-related part of the State pension scheme.

13 — Judgment of 25 May 1971 in Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445.

14 — Judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

15 — Judgment of 3 December 1987 in Case 192/85 *Newstead* [1987] ECR 4753.

Persons covered by a scheme of this kind, referred to as a "contracted-out" scheme, make reduced contributions to the national scheme, corresponding to the basic flat-rate pension payable under the national scheme to all workers regardless of their earnings. On the other hand, they are required to contribute to the occupational scheme, in accordance with the conditions which it lays down.'

The Guardian's pension scheme corresponds to that description, except in one respect: it is a non-contributory scheme, that is to say one to which employees are not required to contribute.

The Guardian's pension scheme is also characterized by the existence of a pension *fund*. In his Opinion in *Worringham*, Mr Advocate General Warner described in detail the manner in which such a pension fund operates.[16] The fund is managed by trustees. In addition to one or more persons representing the employer, one or more nominees of the staff association and/or the union are usually appointed as trustees. The trustees are required to carry out their duties as fiduciaries quite independently of the employer and the employees. The pension fund is fed by contributions from the employer which are calculated by an actuary on the basis of the current and anticipated demands on the fund. Those contributions are not ascribed to any particular member. Benefits are paid out of the pension fund by the trustees in accordance with its rules.

16 — [1981] ECR 796 to 798.

In considering the question whether pensions paid under a scheme of that kind in connection with redundancy fall within Article 119 of the EEC Treaty, I must draw attention to the Court's judgments in *Defrenne I*, *Bilka*[17] and *Newstead*.

18. In *Defrenne I* the Court considered whether a retirement pension introduced under a statutory social security scheme constituted a consideration within the meaning of Article 119. The Court answered that question in the negative in paragraphs 7 to 9 of its judgment:

'7 Although consideration in the nature of social security benefits is not therefore in principle alien to the concept of pay, there cannot be brought within this concept, as defined in Article 119, social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers.

8 These schemes assure for the workers the benefit of a legal scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy.

17 — Judgment of 13 May 1986 in Case 170/84 *Bilka* [1986] ECR 1607

9 Accordingly, the part due from the employers in the financing of such schemes does not constitute a direct or indirect payment to the worker.'

In taking that approach the Court indicated that pension contributions paid by an employer on the basis of and to a *statutory* social security scheme do *not* fall within Article 119 since they are determined less by the employment relationship between the employer and the employee than by considerations of social policy.

19. Following that judgment, the question arose whether it was possible to infer *a contrario* that direct or indirect payments made by the employer under an occupational pension scheme of *contractual* origin *do* come within that article.

In its judgment in *Bilka* the Court confirmed that such an inference could be drawn. That case was concerned with a supplementary occupational pension which was established under German legislation by a collective agreement and financed exclusively by the employer. Full-time but not part-time employees — who were preponderantly women — were entitled to that pension. After establishing that the contested pension scheme was based on an agreement between the employer and the staff committee, and formed an integral part of the contracts of employment entered into with the employees, the Court came to the conclusion that the benefits paid to employees under that scheme fell within Article 119 (see paragraphs 20 to 22 of the judgment).

The decision in *Bilka* must, in my view, be understood as meaning that pensions paid under an occupational scheme established by contract and financed exclusively by the employer must be regarded as pay — even though they resemble social security benefits — inasmuch as they are established (usually) after consultation within the undertaking concerned in favour of a special category of employees, namely those who work in a particular undertaking, and are therefore connected with the employment relationship between a given employer and his employees.

20. In *Defrenne I* and *Bilka* the Court clearly defined the scope of Article 119 in relation to purely statutory pension schemes and purely contractual pension schemes respectively. But what about 'contracted-out' schemes?

In his Opinion in *Worringham*,[18] Mr Advocate General Warner pointed out that a 'contracted-out' scheme is a special pension scheme which is designed not as a supplement to the State social security scheme but as a substitute for it or for part of it. For those reasons, he took the view that such a scheme fell outside the scope of Article 119. In that case, however, the Court took a different approach from the Advocate General to the question of interpretation, so that it did not have to give a

18 — [1981] ECR 796, at pp. 805 and 806.

ruling on the consequences which must be drawn from that connection between an occupational pension scheme and the State pension scheme.

In *Newstead* that question arose once again. Like Mr Barber, Mr Newstead was affiliated to an occupational pension scheme which was regarded as a 'contracted-out' scheme. In accordance with the qualifying conditions laid down by the Social Security Pensions Act 1975, that scheme provided for the award of a widow's pension (but not a widower's pension) on the death of a married male employee. The widow's pension was paid out of a fund financed by contributions from male employees. Those contributions were deducted from the gross salary by the employer. Since female employees were not required to pay contributions to the fund, they received a higher net salary than male employees.

It seems to me that, in particular, paragraphs 14 and 15 of the judgment are relevant to this case:

'14 It must therefore be concluded that the factor which gives rise to the disparity at issue is neither a benefit paid to workers nor a contribution paid by the employer to a pension scheme on behalf of the employee, which might be regarded as "consideration . . . which the worker receives, directly or indirectly" as referred to in Article 119.

15 The disparity at issue is in fact the result of the deduction of a contribution to an occupational pension scheme. That scheme contains some provisions which are more favourable than the statutory scheme of general application and is a substitute for the latter. Such a contribution must therefore, like a contribution to a statutory social security scheme, be considered to fall within the scope of Article 118 of the Treaty, not of Article 119.'

21. The United Kingdom regards the judgment in *Newstead* as confirming its contention that 'contracted-out' schemes such as the Guardian's fall outside the scope of Article 119 of the EEC Treaty on the ground that they are in substitution for the statutory scheme. In my view, that conclusion is too general.

When *Newstead* is read, it must be borne in mind that the gross salary paid by the employer was the same for men and women. Hence there was no discrimination as regards (gross) pay. The difference established was in the net salary and was exclusively the result of a pension scheme for widows, imposed by United Kingdom *law* with a view to its qualifying as a 'contracted-out' scheme, whereby the employer was required to withhold a contribution towards that pension from the salary paid to his male employees. The Court's decision related to that special scheme imposed by law for widows and followed the decision in *Defrenne I* in which the Court had likewise held a pension scheme established by law to be outside the scope of Article 119.

It seems to me that to remove, as the United Kingdom suggests, the scheme under

consideration from the scope of Article 119 on account of its resemblance to the one in *Defrenne I* constitutes an excessively far-reaching extension of the decision in *Newstead*. Instead, the situation now before the Court resembles the one in *Bilka*. To begin with, in this case entitlement to an immediate pension in connection with *compulsory redundancy* does *not* arise from legislation which makes such entitlement mandatory by analogy with equivalent provision made under the State social security scheme for redundant employees generally. It arises from the Guardian's Severance Terms which, as in *Bilka*, are of a purely contractual nature. Moreover, the scheme at issue here is not financed, as in *Newstead*, by deductions from earnings, but, as in *Bilka*, by contributions which the employer pays to his employees out of his own funds through a pension scheme as additional consideration. Accordingly the Guardian's pension scheme for redundant employees — just like the terminal payment with which it is closely connected and partially interchangeable in this case — comes within the scope of Article 119.

22. I pointed out above (in paragraph 17) that the Guardian's pension scheme exhibits two characteristics: on the one hand, it is financed solely by the employer's contributions and, on the other, the contributions are paid to and the pensions are paid by the trustees of a pension fund.

In my view, neither of those two characteristics affects the aforesaid standpoint. The first characteristic supports that standpoint inasmuch as it brings the scheme under consideration (still) closer to the one in *Bilka* (which was also concerned with a pension financed exclusively by the employer). On the other hand, the second characteristic in no way precludes Article 119 from being applicable. That Treaty provision is aimed at any consideration which an employee receives, directly or indirectly, in respect of his employment from his employer. It is clear that the contributions made by the employer to the trustees of the pension fund are intended for employees whose interests the trustees must look after. The sums which the employer pays to the trustees of the pension fund and which the trustees of the fund pay out to employees must therefore be regarded as indirect consideration received by the employees. That point of view seems to me to be confirmed by the Court's judgment in *Worringham*.

23. To summarize, I am of the opinion that pensions which are paid through the trustees of a pension fund financed by employers' contributions to employees made compulsorily redundant under an occupational pension scheme which is regarded as a 'contracted-out' scheme constitute 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty.

The intermediate question

24. In its observations the Commission defended the argument that the Court's ruling in *Bilka* went back on the distinction previously drawn in *Burton* between the

'amount' of remuneration (pay for the purposes of Article 119) and 'access' thereto (a working condition covered not by Article 119 but by Articles 117 and 118). If that were not the case, it would in any case be possible to make that distinction only in the event of voluntary redundancy since no problem of 'access' to redundancy payments arises in connection with compulsory redundancy.

Before answering the Court of Appeal's questions concerning the discriminatory nature of the contested system, I shall consider whether the Commission's arguments are well founded. If the Commission is right and the conditions of access to remuneration (including a payment or pension benefit in connection with redundancy) come within Article 119, the third, the fifth and also the fourth questions must, as specified by the national court in its order for reference, be answered from the point of view of Article 119. If not, those questions must be answered in the light of the directives on equal treatment which would then be applicable.

25. It may be of assistance briefly to summarize the facts in *Burton*. Mr Burton was employed by the British Railways Board (BR), a statutory body corporate. In connection with an internal reorganization, BR made an offer of voluntary redundancy to some of its employees on the terms embodied in a collective agreement between management and the recognized trade unions. That agreement provided that only staff aged 60/55 (male/female) or more could avail itself of that offer. Under the voluntary redundancy scheme, eligible staff received an early retirement pension in addition to a cash payment. Mr Burton, who was aged 58, applied for voluntary redundancy on those terms but his application was rejected by BR on the ground that he was under the minimum age specified for male employees.

In paragraph 8 of its judgment the Court stated that:

'Consequently the question of interpretation which has been referred to the Court concerns not the benefit itself, but whether the conditions of access to the voluntary redundancy scheme are discriminatory. That is a matter covered by the provisions of Directive 76/207 to which reference was made by the national court, and not by those of Article 119 of the Treaty or Directive 75/117.'

26. I understand that paragraph of the judgment as meaning that where 'the benefit itself' is involved, Article 119 is applicable. If, on the other hand, the question concerns the conditions of access to the redundancy scheme, then it is not Article 119 but Directive 76/207 which applies, even though there are financial consequences (see below) attaching to those conditions for the employee. However, the Court did not define the term 'benefit' in detail, or even the 'conditions [of access]' to a given scheme.

In *Burton*, the Court gave judgment on a specific condition of access, namely the different age condition according to sex governing entitlement to the advantages provided for by the redundancy scheme on

termination of the employment relationship as a result of voluntary redundancy. The Court's ruling to the effect that this age condition falls within Directive 76/207 and not within Article 119 follows from its judgment in *Defrenne III*,[19] in which it held, in connection with the termination in accordance with the terms of her contract of an air hostess's employment when she reached the age of 40, that:

'in particular, the fact that the fixing of certain conditions of employment — such as a special age-limit — may have pecuniary consequences is not sufficient to bring such conditions within the field of application of Article 119, which is based on the close connection which exists between the nature of the services provided and the amount of remuneration' (paragraph 21 of the decision).

The Court took the view, not only in *Burton* but also in three later judgments (*Roberts*,[20] *Marshall*[21] and *Beets-Proper*[22]), that an age-limit applied for the purpose of terminating an employment relationship constitutes a working condition and more particularly a condition governing dismissal whose validity must be examined in the light of Directive 76/207.

27. In *Bilka* the Court had to deal not with a different age condition according to sex but, as stated earlier (paragraph 19), with a condition for the grant of a supplementary occupational pension introduced by a collective agreement according to which only full-time employees were eligible for that pension. The Court came to the conclusion that benefits paid under that scheme fell within Article 119 and that in fact there was a possibility of discrimination prohibited by that article inasmuch as the scheme excluded part-time employees, who were predominantly women.[23]

The question is thus whether the Court's ruling in *Bilka* is compatible with its earlier ruling in *Burton* and, if not, whether and to what extent *Burton* has been superseded by *Bilka*.

28. At first sight, there is a problem of compatibility. In particular, I fail to see why an age condition imposed for the grant of a pension *cannot* fall within Article 119, whilst a condition concerning full-time employment also imposed for the grant of a pension *can*. In both cases the condition is one which determines 'access' to a pension scheme.[24] As such they must be distinguished from conditions governing pay *stricto sensu* which regulate, for instance, the amount, the components and the method of calculation of remuneration, or in this case

19 — Judgment of 15 June 1978 in Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365.

20 — Judgment of 26 February 1986 in Case 151/84 *Roberts* [1986] ECR 703.

21 — Judgment of 26 February 1986 in Case 152/84 *Marshall* [1986] ECR 723.

22 — Judgment of 26 February 1986 in Case 262/84 *Beets-Proper* [1986] ECR 773.

23 — See also the judgment of 13 July 1989 in Case 171/88 *Rinner-Kühn* [1989] ECR 2743 in which the Court held that Article 119 in principle precludes national legislation which permits employers to exclude part-time (predominantly female) employees from continued payment of wages in the event of illness.

24 — There are differences of course: the condition concerning full-time employment concerns the grant itself, whilst the age condition concerns the time at which the grant begins. That difference is relative: a 'delay' in the case of a retirement or old-age pension is tantamount to 'forfeiture' in the event of the recipient's death. It is also irrelevant in the context of the present case: both conditions relate to access to the scheme.

the redundancy payments, and which in other words govern the 'benefit' itself.

Conditions relating to access to remuneration (or redundancy payments) undoubtedly have repercussions on the 'benefit', inasmuch as they determine (the existence of or the time of granting) the benefit, but that — according to the Court's judgment in *Defrenne III* — is 'not sufficient to bring such conditions within the field of application of Article 119, which is based on the close connection which exists between the nature of the services provided and the amount of remuneration' (paragraph 21 of the judgment cited in paragraph 26 of this Opinion). *Burton* would seem to be consistent with that finding, whilst *Bilka* would seem to diverge from it.

29. There are three solutions for overcoming that 'impasse'. However, there is a preliminary point: the reason why problems of delimitation between the scope of Article 119 and that of the directives on equal treatment (in which the scope of the latter overlaps with that of the former) arise so frequently lies of course in the fact that the Court has recognized in its judgments that Article 119 — but not the aforesaid directives — has direct effect as between individuals on certain conditions (see paragraphs 47 and 49 below). If that vital difference were to disappear or diminish in importance, then of course the aforesaid problems of demarcation would also become less serious, if not cease altogether.

Those three solutions are: either the scope of Article 119 is limited, in accordance with *Burton*, to conditions governing pay *stricto sensu* which relate to the amount of remuneration and thus to the benefit itself, in which case the judgment in *Bilka* cannot be regarded as a precedent in that respect; or the scope of Article 119 is to be viewed as encompassing all working conditions which directly or indirectly affect the amount of remuneration and which, in other words, have financial consequences for the employee, in which case *Bilka* may be regarded as foreshadowing an interpretation which breaks with the — on that point restrictive — view taken by the Court in *Defrenne III*; or else *Bilka* and *Defrenne III* are to be reduced to a common denominator from which an interpretation is deduced that gives full effect to that provision whilst taking account of the matters covered by Articles 117 and 118.

I shall now briefly consider each of those solutions in turn.

30. The first solution has the merit of being consistent with the Court's view, as expressed in paragraphs 19 and 20 of its judgment in *Defrenne III* (which precede paragraph 21, set out in paragraph 26 of this Opinion), that:

'in contrast to the provisions of Articles 117 and 118, which are essentially in the nature of a programme, Article 119, which is limited to the question of pay discrimination between men and women workers, constitutes a special rule, whose application is linked to precise factors.

In these circumstances it is impossible to extend the scope of that article to elements of the employment relationship other than those expressly referred to'.

In the paragraphs that follow paragraph 21, other reasons are given to justify a narrow interpretation of that kind: Article 119 relates to a given factor, namely equal pay for equal work, and not to the other conditions of appointment and employment in which at times the special position of women at work is taken into account; an extension of the wording of Article 119 may jeopardize the direct applicability of that provision and constitute interference with the areas reserved by Articles 117 and 118 to the authorities referred to therein.

Two factors militating against that solution are that on the whole it involves a restrictive interpretation of the scope of Article 119 — whereas the Court, once it is within that sphere, takes a broad view as regards the components which come within the concept of 'pay' — and that this interpretation is less consistent with the principle of equality in all respects between male and female employees, whose fundamental importance the Court has repeatedly emphasized [25] and applied [26] in order to give, according to the circumstances, a narrow or a wide interpretation of concepts of Community law.

31. The second solution, in which *Bilka* would be viewed as a start in the process of bringing within Article 119 all working conditions which may have financial consequences and thus directly or indirectly affect an employee's pay, is of course characterized by contrasting advantages and disadvantages. A factor in its favour is that it endows Article 119 with the broadest possible scope in accordance with the principle of equality, and that emphasis is laid not on the 'special' or 'exceptional' nature of Article 119 by comparison with the general provisions of Articles 117 and 118, but instead on the legally binding character of Article 119 compared with the provisions of Articles 117 and 118, which are 'essentially in the nature of a programme' (as in *Defrenne III*), in order to give the greatest possible effect to Article 119.

The drawbacks to that solution are that it does not provide, any more than the previous solution, a satisfactory criterion for distinguishing Article 119 from Articles 117 and 118 — the criterion of the direct or indirect effect on pay is not so explicit, although it may perhaps be easier to apply than the distinction between the 'benefit itself' and the 'conditions of access' to remuneration — and that it leads to the consequence that the area reserved by Articles 117 and 118 to the Member States and the Commission is encroached upon.

32. The third solution, which remains to be considered, consists in reducing the *Bilka* judgment and the previous case-law to a common denominator.

I would remind the Court that the judgments in *Defrenne III*, *Burton*, *Marshall*, *Beets-Proper* and apparently in *Roberts* as well, are all connected with an (age) condition or (age) limit regarding the termination of an employment relationship. That condition or limit was intended to select employees with whom the employment relationship was to be

25 — See *inter alia* the judgment of 20 March 1984 in Joined Cases 75 and 117/82 *Razzouk and Beydoun* [1984] ECR 1509, paragraph 16.

26 — See, for instance, paragraph 36 of the judgment in *Marshall*, cited above in footnote 21.

terminated on certain financial conditions. Viewed in those terms, the age condition or age-limit is clearly revealed as a working condition, more particularly as a condition governing dismissal or, in a wider context, termination, that is to say a condition for the selection of employees whose employment relationship is to be terminated.[27] If, on the other hand, the age condition or limit does not play such a role but relates, as in this case, to the grant of a terminal payment or a pension to employees the termination of whose employment relationship has already been decided upon on the basis of other (supposedly non-discriminatory) factors, then it constitutes a condition governing pay which comes within Article 119.[28] *Bilka*, in which no age condition was involved, was also concerned with the grant of entitlement to a pension (as was the recent judgment in *Rinner-Kühn* where a condition for the payment of remuneration in the event of illness was brought within Article 119).

Essentially, the distinction does amount to bringing within Article 119 working conditions (including conditions governing dismissal or other forms of redundancy) which directly govern access to, that is to say the grant of, remuneration (including a payment or pension benefit in connection with redundancy), but not the conditions precedent thereto which govern the inception, continuation or termination of the employment relationship, even though those conditions are attended by financial consequences or accompanied by financial provisions (such as terminal payments or pension benefits).

The attractiveness of that compromise lies in the fact that it gives full effect to the scope of Article 119 by bringing within it all the conditions governing pay in the broad (though not unreasonably broad) sense, and does not restrict the scope of that provision strictly to conditions which determine the amount, the components or the method of calculation of pay, that it follows the Court's judgments and that it does not impinge upon the scope of Articles 117 and 118 excessively. That compromise constitutes a restriction of the second solution, which is far too wide — and in my view insufficiently supported by the Treaty provisions — inasmuch as it does not bring within Article 119 all working conditions which are directly or indirectly capable of affecting pay, but only those which govern the grant of (a component of) pay and are thus to be distinguished from those which govern a factor other than pay (for instance the termination of the employment relationship), even though that factor may bring a financial provision into operation.

33. It may be apparent from the foregoing that my preference goes to the third

27 — See, in particular, paragraph 32 of the judgment in *Marshall*, cited above in footnote 21.

28 — *Roberts* as well, as is clear from paragraph 33 of the judgment, was concerned with a (similar) age condition for the grant of an early retirement pension (and not, as might be inferred from paragraphs 30 and 32 of the judgment, with an age-limit for compulsory redundancy). Admittedly, the Court did not examine that (similar) age condition from the point of view of Article 119 but described it as a condition governing dismissal within the meaning of Article 5 of Directive 76/207/EEC since the Court was asked only whether Mrs Roberts had been treated in a manner that was contrary to that directive. The application of Article 119 would not have been to her advantage since she had received the same terminal payments as male employees of the same age (see paragraphs 42 and 43 below). Article 119 and Directive 76/207/EEC are not mutually exclusive (see the first recital in the preamble to Directive 76/207/EEC). Accordingly the decision that the age condition in *Roberts* comes within Directive 76/207/EEC does not bear the inference that Article 119 cannot be applied at the same time

(compromise) solution: it endows Article 119 with a broad but not excessively broad scope and follows the Court's judgments. It brings this case within Article 119 of the EEC Treaty inasmuch as the age condition here does not have as its purpose to select staff whose employment relationship is to be terminated (in which case it would fall within the directive on equal treatment as a condition governing dismissal, see paragraph 38 *et seq.* below) but does constitute a condition for the grant of a payment or pension benefit in connection with redundancy which takes effect once the employment relationship has been terminated (in this case as a result of the closure of the office in which Mr Barber worked affecting all those who were employed there, men and women alike).[29]

In the event that the Court should disagree with my Opinion and take the view that conditions of access to remuneration must without distinction — and therefore including the age condition at issue in these proceedings — be appraised exclusively in the light of the directives on equal treatment (and that none of those conditions falls within Article 119), I shall now follow a two-pronged approach also in order to help evaluate the consequences of that choice, that is to say I shall consider both the possibility of applying Article 119 and the possibility of applying the directives on equal treatment. That will also involve a brief consideration of the temporal effect of a ruling given by the Court in the event of the application of Article 119 to cases such as this (see paragraph 37 below).

34. My answer to the intermediate question as a whole is that working conditions (such as an age condition) which directly govern access to, that is to say the grant of, pay (including a payment or pension benefit in connection with redundancy) come within the scope of Article 119, whereas working conditions (such as an age condition) which govern *(inter alia)* the termination of the employment relationship fall within the directives on equal treatment, even though such termination is attended by financial consequences or brings financial provisions into operation.

Questions 3 and 5

35. The third question starts from the premise that in the present case a man and woman of the same age who are made redundant in the same circumstances are treated differently. Part a refers to a situation in which a woman receives an immediate pension whereas a man is entitled only to a deferred pension. Part b disregards that difference but refers to a situation in which the total value of all the benefits is greater in the case of a redundant woman than in the case of a redundant man. The Court of Appeal wishes to ascertain whether those differences of treatment are contrary

29 — It follows from this view that I need not consider the Commission's alternative contention (see paragraph 24 above) according to which, on the assumption that the age condition does *not* fall within Article 119 — a conclusion which I have not come to in this case — such a decision must be restricted to cases of voluntary redundancy and cannot in any event apply to compulsory redundancy inasmuch as no problem of 'access' arises in those circumstances (but see paragraph 39 below, where the distinction is relevant — though not in this case — because of Article 4(a) of Directive 86/378/EEC). As is apparent from my Opinion, I consider that the distinction to be drawn is a different one and does not lie, as the Commission has suggested, in the fact that the initiative to terminate the contract of employment is taken by the employer or by the employee.

to the principle of equal pay laid down in Article 119.

The fifth question is difficult to comprehend. I understand it as meaning that the Court of Appeal seeks to ascertain whether the difference in treatment established is discriminatory where it is the result of a provision of the specific occupational scheme adopted by the Guardian which treats an employee in connection with a redundancy as if he or she were being retired on the ground that he or she was made redundant within the seven years before the normal pensionable age (which, we are given to understand, also differentiates on grounds of sex and, in particular, is earlier in the case of women, in accordance with the age laid down in United Kingdom legislation for receipt of the State pension). Essentially, therefore, it is necessary to ascertain whether an occupational scheme which lays down in connection with redundancy a different age condition according to sex for the grant of an immediate pension is contrary to Community law where that age condition reflects a different age condition according to sex which is laid down by the occupational scheme but also, it would appear from the United Kingdom legislation, by the State scheme for the grant of an old-age or retirement pension.

Questions 3(a) and 5

36. In this case the difference of treatment can be traced back to the different age condition according to sex laid down in the Severance Terms. According to the view expressed above, an age condition of that kind falls within Article 119 where, as in this case, it directly concerns the grant of pension rights. None the less, as I have stated (in paragraph 33) I shall also consider the possibility that, according to the Court, that condition must be assessed in the light of the directives on equal treatment.

1. Applicability of Article 119

37. If, as argued above (paragraph 34), Article 119 is regarded as being applicable to a different age condition according to sex, such as that contained in the Severance Terms, there is no difficulty in establishing unlawful discrimination. It is clear in those circumstances that a different age condition according to sex constitutes overt discrimination.

If the Court goes along with that possibility of applying Article 119, a problem of temporal effect may arise in connection with the pensionable age for the grant of an old-age or retirement pension. The Council's conviction, particularly when it adopted Directive 86/378 on equal treatment in occupational social security schemes, was that Article 119 did not apply to an age condition of that kind and, in keeping with that conviction, it permitted for the time being the adoption of a different pensionable age according to sex in Article 9(1)(a) of that directive (see paragraph 38 below). This could be a ground, in line with the assumption made by the Court in *Defrenne II*, for making a reservation on account of the principle of legal certainty concerning the temporal effect of the new interpretation advocated as regards specifically the age condition referred to in the aforesaid provision. In this case, however, there is no need for that

since it will become apparent when Article 9 is examined (paragraph 39) that it is inapplicable in connection with compulsory redundancy.

2. Applicability of the directives on equal treatment

38. Which directive on equal treatment is applicable then? That question arises as a result of the exception available to Member States which Article 7(1)(a) of Directive 79/7 and Article 9(1)(a) of Directive 86/378 — the directives on equal treatment in social security matters — lay down with regard to the determination of an age for the grant of an old-age or retirement pension (see paragraph 37 above as regards the latter provision). Directive 76/207, on the other hand, which is concerned with equal treatment as regards working conditions, does not contain such an exception.

In my view, the age condition contained in the Guardian's Severance Terms falls within Article 5(1) of Directive 76/207, which provides as follows:

'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' (emphasis added).

That provision has been further defined by the Court *inter alia* in *Roberts*. In that judgment the Court stated that the term 'dismissal' in that provision must be widely construed, so widely that, according to the Court, it includes a mass redundancy as well and, more particularly, an age condition for the grant of a pension in connection with a redundancy of that kind (see footnote 28 above and paragraphs 42 and 43 below).[30]

39. In its observations, the Guardian contends that the Severance Terms fall within the scope of Directive 86/378, that is to say the social security directive on occupational schemes, and therefore the only one which is relevant for these purposes (Directive 79/7 is concerned with statutory social security schemes). In that connection, the Guardian relies on the third indent of Article 4(a), which states that the directive applies to:

'(a) occupational schemes which provide protection against the following risks:

...

...

old age, *including early retirement*,

...

...' (emphasis added).

30 — In *Burton*, cited in footnote 3, the Court considered that the term 'dismissal' also covered a case of voluntary redundancy. The Council has since adopted Directive 86/378/EEC which applies *inter alia* to schemes which provide protection in the event of early retirement (see paragraph 39).

According to the Guardian, that article must be read in conjunction with the aforesaid exception available to Member States which is provided for by Article 9(1)(a) of the same directive. In its view, the United Kingdom took advantage of the possibility offered by that article in order to depart from the principle of equal treatment as regards the determination of an age condition for the grant of a pension, as provided for in the contested Severance Terms.

What are we to make of this? In the first place, it must be remembered that Directive 86/378 was adopted by the Council some considerable time after the events material to this case. Furthermore, in my view, the aforesaid provision of Article 4 is not in any event applicable to a situation such as this where the employee was made redundant by his employer. The expression 'early retirement' refers exclusively to schemes concerning voluntary termination of the employment relationship and does not apply to compulsory redundancy. Therefore, as regards the latter (which is clearly a condition governing dismissal and consequently a working condition, governed by Directive 76/207, in contrast to the former which is much closer to social security), the exception referred to in Article 9 of Directive 86/378 cannot be relied upon. That is particularly the case since, as the Court expressly decided in connection with the corresponding provision in Article 7(1) of Directive 79/7, social security matters are excluded from the scope of Directive 76/207 and must therefore be interpreted strictly (see the quotation and reference in paragraph 42 below). That decision also applies to Article 9(1) of Directive 86/378 which must for the same reason be interpreted strictly.

I am therefore of the opinion that the difference of treatment at issue here — in the context of the possibility of applying the directives on equal treatment — must be assessed on the basis of Article 5(1) of Directive 76/207. According to that provision, the same conditions governing dismissal must be applied to men and women.

40. It remains to be considered whether the prohibition of discrimination laid down in Article 5(1) of Directive 76/207 — in the context of the possibility under consideration — is applicable if the different age condition according to sex contained in the Severance Terms is a reflection of the different age condition according to sex laid down by both the occupational pension scheme and the statutory pension scheme for the grant of an old-age or retirement pension. That is the subject-matter of the fifth question, as I understand it. In order to answer that question I shall rely on the Court's rulings in *Burton* and *Roberts*, which, on that point, however, would appear to suggest a trend.

41. In paragraphs 10 to 16 of its judgment in *Burton*, the Court followed a reasoning process which I would summarize as follows. It starts from the premise that, in deciding whether a difference in treatment between men and women is discriminatory, account must be taken of the relationship between the measures at issue and the national provisions on the normal pensionable age. Under United Kingdom legislation the minimum qualifying age for a State retirement pension is 60 for women and 65 for men and that difference in treatment is in conformity with Article 7(1)(a) of Directive 79/7. The contested

retirement scheme established by the British Railways Board enables a worker who leaves his employment at any time during the five years before he reaches normal pensionable age to receive certain benefits. The only difference between the benefits for men and those for women thus stems from the fact that the retirement scheme is tied to the pension scheme governed by United Kingdom social security provisions. In those circumstances, the Court states, the retirement scheme cannot be regarded as discriminatory within the meaning of Directive 76/207.

42. The situation in *Roberts* was different. That case was concerned with the application of a redundancy scheme which Tate & Lyle Industries Ltd had established in conjunction with the union in connection with a mass redundancy following the closure of a depot. Under that scheme, all employees over the age of 55 who were made redundant, whether male or female, received an immediate pension in addition to a cash payment. According to Mrs Roberts, who was aged 53 at the date of redundancy, that scheme was discriminatory since a male employee made redundant was entitled to receive an immediate pension 10 years before the normal pensionable age for men, whereas a female employee made redundant was not so entitled until five years before the normal pension date for women.

In that case, the Court proceeds on the basis of the following consideration (paragraph 33 of the judgment):

'Even though the retirement scheme at issue does not prima facie discriminate between men and women with regard to the conditions for dismissal, it is still necessary to consider whether the fixing of the same age for the grant of an early pension nevertheless constitutes discrimination on grounds of sex in view of the fact that under the United Kingdom statutory social security scheme the pensionable age for men and women is different.'

The Court's subsequent reasoning in *Roberts* (paragraphs 34 to 36) can be summarized as follows. As in *Burton*, the Court acknowledges that national legislation may, in accordance with Article 7 of Directive 79/7, derogate from the principle of equal treatment. Relying on the fundamental importance of that principle and referring to Article 1 of Directive 76/207, the Court states, however, that social security matters governed by Directive 79/7 are excluded from the scope of Directive 76/207 and must therefore be interpreted strictly. Consequently, the exception provided for in Article 7(1)(a) of Directive 79/7 applies only:

'to the determination of pensionable age for the purposes of granting old-age and retirement pensions and to the consequences thereof for other *social security* benefits' (the words 'social security' were added by the Court to the text of the provision in question).

The Court goes on to decide that the case is concerned not with social security benefits but with 'dismissal' within the meaning of Article 5 of Directive 76/207:

'In those circumstances the grant of a pension to persons of the same age who are made redundant amounts merely to a collective measure adopted irrespective of the sex of those persons in order to guarantee them all the same rights.'

43. In *Roberts*, therefore, the Court expressly states that a scheme which makes the grant of a pension in connection with redundancy subject to the same age condition for men and women is not discriminatory, even though in the Member State concerned there is a national pension scheme in force providing for different pensionable ages according to sex. In other words, the connection between the statutory scheme and the redundancy scheme referred to in *Burton* is not mandatory. The only question which is still unresolved, after the judgment in *Roberts*, is whether that connection is still permitted by Community law.

In my view, that question must be answered in the negative for the same reasons as those on which the decision in *Roberts* is based, namely that the exception in Article 7 of Directive 79/7 must be interpreted strictly and that it is possible to derogate from the principle of equal treatment only as regards the determination of the normal pensionable age and the implications thereof for other social security benefits but not as regards the conditions governing dismissal which are referred to in Article 5 of Directive 76/207. That argument applies, in my view, to all conditions governing dismissal including — in the context of the possibility of applying that directive, now under consideration — the age condition for the grant of a pension in connection with redundancy. The answer to the question raised in paragraph 40 above is therefore as follows: the fact that a different pensionable age is provided for under the State pension scheme — in accordance with the exception laid down in Article 7 of Directive 79/7 — and, in connection therewith, under an occupational pension scheme is not capable of affecting the interpretation of Article 5(1) of Directive 76/207.

44. To summarize, I suggest that the Court should answer Questions 3(a) and 5 as follows:

'(1) If, as I advocate, Article 119 of the EEC Treaty is considered applicable: Article 119 precludes an occupational scheme from laying down a different age condition according to sex for the grant in connection with compulsory redundancy of an immediate pension which is to be regarded as 'pay'.

(2) If, alternatively, Article 119 is not considered applicable: a different age condition according to sex which is laid down by an occupational scheme for the grant of an immediate pension in connection with compulsory redundancy constitutes a discriminatory condition governing dismissal which is prohibited by Article 5(1) of Directive 76/207.'

Question 3(b)

45. I would remind the Court that the Guardian's Severance Terms accord redundant employees who are not entitled to an immediate pension a higher terminal payment. The parties to the main proceedings are agreed, however, that the

value of an immediate pension — the actuarial value as I understand it — is greater than the amount of the higher terminal payment. In Question 3(b) the Court of Appeal wishes to ascertain whether discrimination contrary to Community law exists where the total value of the benefits received by a redundant female employee is greater than the total value of the benefits received by a male employee.

46. In so far as the question relates to the difference established in the total amount of benefits for men and women of the same age it can be answered in the same manner as in paragraph 44 above.

However, the question raises an additional problem, in so far as it suggests that, in the event of Article 119 being applicable, the principle of equal pay contained therein is not infringed provided that the total value of the benefits is the same, even though it is made up of components which differ according to sex but are mutually compensating.

In my view the principle of equal pay implies equality at the level of each component of remuneration. If it were otherwise, the enforceability of that principle by the courts would be seriously jeopardized. The courts would then have to evaluate and compare the most diverse advantages which employers confer on their employees. That may call for a complex factual analysis which would not guarantee the equality of total pay as effectively as the equality of each component separately, which is easier to verify.[31]

I therefore suggest supplementing the answer given to the previous question as follows: the principle of equal pay implies equality at the level of each component of remuneration.

Question 4

47. In its fourth question, the Court of Appeal wishes to ascertain whether Article 119 of the EEC Treaty and the directive on equal pay have direct effect in the circumstances of this case.

Formulated in those terms — in connection with Article 119 (and the implementing directive) — the question does not raise any particular difficulties. It is established case-law since the Court's judgment in *Defrenne II* that Article 119 has direct effect, also as between individuals, where there is direct discrimination which may be identified by reference to the criteria laid down by Article 119 on the basis of a purely legal analysis (paragraph 21 of the decision). As shown earlier, discrimination can be established entirely by reference to the criteria laid down by Article 119, which have been elucidated by the Court in its decisions, and therefore on the basis of a legal analysis. The fact that the discrimi-

31 — The approach of the British courts is the same. In *Hayward* v *Cammell Laird* (No 2), [1988] ICR 464, the House of Lords considered that Article 1 of Directive 75/117/EEC cannot be understood as meaning that, where pay as a whole is the same for men and women, it is of no importance that some components of that pay discriminate in favour of women provided that this is compensated for by equally discriminatory pay components in favour of men.

nation established lay in a condition of access to pay (that is, an age condition) means that such discrimination is not indirect since it is clearly and unequivocally based directly on the difference between men and women.

48. As I have stated (paragraph 24 *et seq.*) in connection with the intermediate question, it is my opinion that the age condition at issue falls within the scope of Article 119. None the less I wish to consider, in the event that the Court should disagree with that opinion and consequently in the alternative, whether Article 5 of Directive 76/207 which would in my view be applicable in that case (see paragraph 38 *et seq.* above) also has direct effect. An affirmative answer to that question would mean that, in the proceedings pending before the national court against his previous employer, the Guardian, Mr Barber would be able to rely on the principle of equal treatment referred to in Article 5 of the directive, with the result that Section 6(4) of the Sex Discrimination Act 1975, according to which the prohibition of discrimination provided for therein is inapplicable to 'provision in relation to death or retirement', would have to be disregarded by the national court.

When the question is answered, it must be borne in mind that the unequal treatment at issue here arises from the Severance Terms which form part of the contracts of employment concluded by the Guardian with its employees and relates to the Guardian's occupational pension scheme which is recognized by the competent United Kingdom authority (the Occupational Pensions Board) as a 'contracted-out' scheme within the meaning of the Social Security Pensions Act 1975 (see paragraph 3 *et seq.* above). Furthermore, the authorities (in this case the Inland Revenue) also confer tax advantages on occupational pension schemes if they fulfil certain specified conditions.[32]

49. In its judgment in *Marshall*, the Court stated, precisely in connection with the same directive as is now under consideration (76/207), that:

'A directive may not of itself impose obligations on an individual and . . . a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual' (paragraph 48 of the decision).

In that judgment the Court reportedly[33] relied on the doctrine of estoppel or the *nemo auditur* principle,[34] according to which a Member State (upon whom a directive has imposed obligations) which has failed to transpose the directive into national law within the prescribed period, or

32 — See in Part III of the Report for the Hearing the United Kingdom's answer to a question from the Court concerning the tax advantages connected with occupational pension schemes.

33 — P. E. Morris: 'The direct effect of directives — Some recent developments in the European Court', *Journal of Business Law*, 1989, p. 233 *et seq.* and p 309 *et seq.* in particular at p 310.

34 — The principle of *nemo auditur propriam turpitudinem allegans* is more widespread than the common law doctrine of estoppel. The *nemo auditur* principle is more clearly aimed at default whereas the doctrine of estoppel can, amongst other things, (also) refer to a contradiction in one's own conduct and the expectations thereby aroused in, and acted on by, another

has done so incorrectly, cannot rely on its default *vis-à-vis* individuals who invoke provisions of the directive against it. In the same judgment the Court made it clear, however, that 'Member State' means not only the State *qua* public authority but also *qua* employer and also includes (independent) organs of the State [35] (but it did not define what the latter term is to be understood as meaning [36]). Since *Marshall* was concerned (according to the national court in that case) with a public authority, the Court took the view that Article 5(1) of the directive actually had direct effect in that case since it is 'sufficiently precise to be relied on by an individual' (paragraph 52 of the decision).

In later judgments the Court has confirmed that a directive cannot of itself impose obligations on individuals and that a provision of a directive may not be relied upon as such against an individual. [37] Where it is sufficiently precise, however, it may relied upon by individuals against a Member State but also against public authorities. It is against that background that the direct effect of Article 5(1) of Directive 76/207 must be examined in proceedings against individuals.

50. Before embarking upon that examination I would point out that, even if that article does not have direct effect as between individuals, it is for the national court, in the words used by the Court in its judgment in *Von Colson and Kamann*, [38] to:

'interpret and apply the legislation adopted for the implementation of the directive [that case too, I would add, was concerned with Directive 76/207/EEC] in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law' (paragraph 3 of the operative part of the decision).

That obligation on the part of the national judicial authorities has been reaffirmed in a number of later judgments. [39]

In those circumstances we are concerned not with the direct effect of the directive in question as between individuals but with the natural effect of national law as interpreted by the courts in accordance with Community law. [40] This means, in my view, that such an interpretation in conformity with the directive may not be restricted to the interpretation of national legislation subsequent to the adoption of the directive concerned or national legislation specially enacted for transposing the directive into national law. [41] Frequently, national implementing legislation will be involved — as in *Von Colson* — but that

35 — See also the judgment of 15 May 1986 in Case 222/84 *Johnston* [1986] ECR 1651, paragraph 56).

36 — A further question on that point in Case C-188/89 *Foster and Others* v *British Gas*, judgment of 12 July 1990 [1990] ECR I-3313.

37 — Judgments of 12 May 1987 in Joined Cases 372 to 374/85 *Traen* [1987] ECR 2141, paragraph 24, of 11 June 1987 in Case 14/86 *Pretore di Salò* v *Persons unknown* [1987] ECR 2545, paragraph 19 and of 8 October 1987 in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9.

38 — Judgment of 10 April 1984 in Case 14/83 *Von Colson and Kamann* [1984] ECR 1891. See also the judgment of the same date in Case 79/83 *Harz* [1984] ECR 1921.

39 — See the judgments cited above in *Johnston* (paragraph 53) and *Kolpinghuis Nijmegen* (paragraph 12), in addition to the judgments of 20 September 1988 in Case 31/87 *Gebroeders Beentjes* [1988] ECR 4635, paragraph 39 and of 7 November 1989 in Case 125/88 *Nijman* [1989] ECR 3533, paragraph 6).

40 — See the Opinion of 14 November 1989 of Mr Advocate General Darmon in Cases 177/88 and 179/88.

41 — See, however, the Opinion of Advocate General Sir Gordon Slynn in *Marshall*, cited above in footnote 21.

need not be the case. It is difficult to justify a restriction of the requirement of interpretation in conformity with the directive to the implementing legislation itself (quite apart from the difficulty of determining whether or not a given national provision has been enacted for the purpose of transposing a directive into national law) since the directive has, as from the time of its adoption and *a fortiori* as from the expiry of the period prescribed for its transposition into national law, become part of Community law and as such takes precedence over *all* provisions of national law.

The Court's aforesaid judgment in *Von Colson* is particularly instructive in regard to this case not only because that case as well was concerned with Directive 76/207 but also because the German national court drew the conclusion from that judgment that it was not empowered to interpret a specific provision of German law in accordance with the normal methods of interpretation customarily applied under the German legal system but, on the contrary, was required to interpret it in a strictly literal manner thereby enabling a solution in closer conformity with the directive and based on a general provision of national law to be arrived at.[42] Hence it would appear that Community law may set limits to certain methods of interpretation applied under a national legal system, without of course being able to compel the national court to give an interpretation *contra legem*.[43]

51. In considering the question of the direct effect of Article 5(1) of Directive 76/207 as between individuals I shall concentrate on two points. The first point is whether that provision must be given horizontal direct effect in the specific circumstances of this case (see the second and third subparagraphs of paragraph 48 above) also in view of the role played by the public authorities in relation to 'contracted-out' schemes (see paragraph 52 below). The second point, which is distinct from the first, is whether that provision has direct effect as between individuals on the basis of other rules and, in particular, provisions of international law which form part of Community law (see paragraph 53 below). Before dealing with those questions, I wish to consider the concept of 'horizontal direct effect'.

The direct effect of a provision as between individuals, known as horizontal direct effect, is an indeterminate and equivocal term that I shall not attempt to define here. In its judgment in *Defrenne II* the Court apparently considered in connection with Article 119 of the EEC Treaty that a provision has horizontal effect when it imposes obligations not only on the Member States but also on individuals, in that case the employers, to which correspond rights conferred on other individuals, in that case the employees. The Court stated that Article 119

'also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals' (paragraph 39 of the decision).

It may appear from that passage that, since Article 119 is 'mandatory in nature' (ibid.), the Court treated it as imposing on individuals as well an obligation to comply in contractual relations with the prohibition of

42 — Judgment of the Arbeitsgericht Hamm of 6 September 1984 *Der Betrieb* 1984, p. 2700

43 — See Y. Galmot and J.C. Bonichot: 'La Cour de justice des Communautés européennes et la transposition des directives en droit national', *Revue française de droit administratif*, 1988, p. 1 *et seq.*, in particular at p. 22

discrimination which that provision lays down. In *Marshall* the Court interpreted horizontal effect in the same terms but then denied that a provision in a directive had such an effect on the ground that, however precise it may be, it cannot impose any obligations on individuals with the result that other individuals cannot rely on that provision against them either.

None the less, as a result of the fact that in *Marshall* the direct effect of a directive *vis-à-vis* a Member State was based on that State's failure to transpose the directive into national law (paragraph 49 above), the question of the horizontal direct effect of the provisions of a directive was viewed from another angle and in this case that question has to be reformulated in regard to relations between individuals as well. Now the question is not specifically whether Article 5(1) of Directive 76/207 imposes on the Guardian obligations to which the rights conferred on Mr Barber correspond — the provision does not do that of itself — but whether Mr Barber can rely as against the Guardian on the failure of a Member State which is in default to comply with *its* obligation to implement Community law, if Mr Barber's rights had been impaired thereby.

52. The question of the horizontal direct effect of a provision in a directive has therefore been recast as whether it is possible for an individual (namely Mr Barber) to rely on a Member State's failure to comply with a directive which is binding upon it in proceedings against another individual (namely the Guardian), or conversely whether the last-mentioned individual may take advantage of a Member State's default in order to deprive another individual (his employee) of a lawful advantage based on Community law. That is the question of the effect of the provisions of a directive with regard to third parties. [44]

As stated earlier (in paragraph 49), the thrust of the Court's case-law is that a Member State may not rely on its own default as against an individual. However, that default is broadly construed: on the one hand, certain consequences follow where the Member State acts *qua* employer and thus in a 'capacity governed by private law', that is to say in a horizontal relationship with its employees; and on the other, individuals, in this case the employees, are also allowed to rely on that default *vis-à-vis* independent public authorities of the Member State which are not themselves responsible for failure of the latter to transpose a directive into national law. The *nemo auditur* principle has thus acquired a far-reaching ambit (not connected with personal default), with the result that the directive has to a degree been endowed with effect with regard to third parties, in particular to the detriment of the aforesaid public authorities.

Does that case-law have to be extended in the sense that even an individual who is in no way connected with the public authorities may not derive any advantage in his relations with other individuals from a Member State's default and must therefore refrain from relying on a (statutory or contractual) provision which is contrary to the directive? It cannot be ruled out that the

44 — 'Third-party' effect ('Drittwirkung') is generally understood as meaning that the provision in question (whether it is a contractual provision, a Treaty provision or a provision in a directive) can also affect the rights of a 'third party', that is to say a person other than the one upon whom it directly imposes (special) obligations or confers (special) rights (for instance by imposing a general duty of forebearance upon him).

nemo auditur principle (or doctrine of estoppel) may be interpreted as a general prohibition on taking advantage of another's default, *once* that principle is endowed with such a wide effect, as in the aforesaid case-law, that it no longer relates to a 'personal' default on the part of the Member State in its capacity as *law*maker.

Having regard to the Court's case-law, however, I do not propose that this further step be taken. So far the Court has restricted the effect of the *nemo auditur* principle and/or doctrine of estoppel (and thus the effect with regard to third parties of the provisions of a directive) to individuals who are connected with the public authorities and for whose actions the State consequently bears a degree of responsibility. To be sure, *if* in this case we were dealing with a discriminatory private redundancy scheme approved as such by the public authorities or, *a fortiori*, declared generally binding, that case-law would in my view have to be applied *because* the authorities would then be (co-)responsible for that scheme. However, here we are concerned with a specific redundancy scheme which, admittedly, relates to an occupational pension scheme that is regarded by the public authorities as a 'contracted-out' scheme and qualifies for tax advantages but which as such has not by any means been approved by the public authorities. Furthermore, in recognizing the underlying occupational pension scheme and conferring tax advantages, the authorities have not laid down any discriminatory conditions but have merely tolerated them, which distinguishes this case from *Marshall* and *Johnston* since in those cases the competent local authorities had in fact adopted discriminatory measures.

To extend also to relationships governed purely by private law the application of the principle of *nemo auditur propriam turpitudinem allegans* on the basis of a Member State's default, so that it loses its original meaning altogether, strikes me as inappropriate — unless the Court wishes to override its decision in *Marshall* — since that would come very close to endowing the provisions of a directive with full horizontal direct effect (even though such an extension could be distinguished in theory [45]). Granted, that standpoint would help to prevent a great many of the problems which now arise in the field under consideration: the unequal treatment of employers in the public and private sectors (an economic problem) and above all of workers employed by public or private employers (a social problem) would be eliminated as a result, and awkward problems of delimitation would be avoided, in connection with the term 'State', between the public sector and the private sector, problems which are further aggravated by the fact that workers employed by the same public utility institution or undertaking may, depending on whether it is privatized or nationalized, find themselves at one moment in the private sector and at the next in the public sector. It must be remembered, however, that those problems would not arise in this case if the Court were to accept my primary argument that Article 119 is applicable to the unequal treatment at issue here.

45 — As stated in paragraph 51 above, it can be distinguished on the ground that it would involve only a generalized 'third-party' effect (which is now accepted by the Court only where it is to the detriment of the public authorities) and not direct effect *stricto sensu* based on the existence of a personal obligation on the part of the individual/employer.

53. The second question, referred to in paragraph 51, is whether a provision in a directive which does not of itself impose any obligations on individuals does take effect as between individuals in the light of a fundamental principle, in this case the equality of men and women, as laid down by provisions of international law prohibiting discrimination on grounds of (*inter alia*) sex, in so far as they form part of Community law. That brings to mind, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the International Covenants concluded within the framework of the United Nations Organization on Civil and Political Rights and on Economic, Social and Cultural Rights, both of 19 December 1966.[46]

That question was passed over in silence in the parties' written observations and was scarcely touched upon at the hearing. I shall therefore confine myself to setting it in its proper context. Should the Court's ruling presuppose an answer to that question, then the parties before the Court must be given an opportunity to state their views on it.

All in all, the question is not whether a directive acquires horizontal direct effect or, to be more precise, effect with regard to third parties, as a result of a provision of international law: if a provision of international law actually takes effect as between individuals in the Community's legal system, that is on the basis of its own ambit. A directive can help to render a provision of international law more precise within the Community thereby removing a possible obstacle to the effect of that provision with regard to third parties (its lack of precision) within the Community and in a given sphere.

The question of the effect with regard to third parties of, in particular, the European Convention has been fairly thoroughly researched in the relevant literature of the Member States, particularly those which draw a clear-cut distinction between private law and public law. I shall confine myself to a single quotation (leaving out the footnotes) concerning that Convention since it seems to me, even now, to summarize the problem correctly.[47]

'Summarizing, one may conclude that "Drittwirkung" does not ensue imperatively from the Convention. On the other hand, nothing in the Convention prevents the States from conferring "Drittwirkung" upon the fundamental rights and freedoms within their national legal systems in so far as they lend themselves to it. In some States "Drittwirkung" of the rights and freedoms guaranteed by the Convention is already recognized, whilst in other States this "Drittwirkung" at least is not excluded in principle. A view in conformity with this tendency is that it may be inferred from the changing social circumstances and opinions that the purport of the Convention *is going to be* to secure a certain minimum guarantee to the individual also in his relations with

46 — Articles 2 and 26 of the first Covenant and Articles 3 and 7 of the second relate to the fundamental right under discussion here. Those Covenants have been ratified between 1976 and now by all the Member States (the sole exceptions being Greece in the case of the first Covenant and Ireland in the case of the second).

47 — P. Van Dijk en G. J. H. van Hoof: *De Europese conventie in theorie en praktijk*, 1979 (2nd edition: 1982), at pp. 15 and 16. The 1982 edition was translated into English in 1984 under the title: *Theory and Practice of the European Convention on Human Rights*. The passage quoted is to be found at pp. 16 and 17.

other persons. It would seem that in the spirit of the Convention a good deal may be said for this view, although in the case of such an interpretation after the fact one must always consider whether one does not thus assign to the Convention an effect which is unacceptable to (a number of) the Contracting States, and consequently is insufficiently supported by their implied mutual consent.'

It is generally assumed, also by the authors cited above, that it depends on the nature and the formulation of each individual right whether it can be given effect with regard to third parties. It seems to me that equal treatment of men and women at work is amongst those fundamental rights which deserve to be endowed with that effect to a greater extent than other such rights. That right produces its effect in full only where it is not restricted to vertical relationships, that is to say those between officials and the authorities which employ them, but also takes effect with regard to all horizontal relationships. A factor militating against that, however, is that the general prohibition of discrimination in Article 14 of the European Convention is regarded not as an autonomous provision — although a trend away from that view is visible — but as affording protection only in conjunction with other provisions of the Convention.[48] Article 26 of the International Covenant on Civil and Political Rights, on the other hand, would appear to be an autonomous provision.[49]

Ultimately it is for the Member States to determine, on their own responsibility (sanctioned by international law), how to comply with their obligations under Treaties. In connection with the European Convention, to which the Court attaches particular importance for the interpretation of the fundamental rights forming part of Community law, that would seem to imply that it is for the Court, by way of a uniform interpretation valid throughout the Community,[50] to establish the scope and effect of the Convention's provisions, and thus also to ascertain whether the fundamental rights recognized in the Convention must be endowed with effect with regard to third parties, *in areas covered by Community law*. In that regard the Court will clearly take into account, on the one hand, the significance of the fundamental right in question — in this case the equal treatment of men and women — in the Community's legal system and, on the other, the constitutional traditions (and sense of justice) in the Member States. The same holds true, in my view, for the two aforesaid International Covenants whose significance for the interpretation of fundamental rights under

48 — See the work cited in footnote 47, p. 339 *et seq.* (Dutch edition), p. 386 *et seq.* (English edition).

49 — See Decisions Nos 172/1984, 180/1984 and 182/1984 of the competent committee of 7 April 1987, published in the *Report of the Human Rights Committee*, UN/GAOR/42nd Session, Suppl. 40 (A/42/40) 1987, pp. 139 to 169 (in particular, paragraphs 12.1 to 12.5 of the first decision)

50 — See, in connection with the GATT provisions, the judgment of 16 March 1983 in Case 266/81 *SIOT* [1983] ECR 731, paragraph 28.

Community law has been acknowledged by the Court in recent judgments.[51]

Finally, apart from the foregoing, there is the question of the extent to which the fundamental right in question may be relied upon before the Court for the purpose of examining the validity not only of measures emanating from the Community authorities — which is self-evident[52] — but also of measures emanating from the national authorities and adopted in implementation of, or within areas covered by, provisions of Community law.[53]

As I said earlier, I wish to leave it at that for the reasons given at the beginning of this paragraph.

54. To summarize, I am of the opinion that the answer to the fourth question must be, if the Court considers Article 119 to be applicable, that in the circumstances of the case that provision has direct effect as between individuals as well but, if the Court considers the provisions of Directive 76/207 to be applicable, that in the circumstances of the case those provisions have no such effect, which does not preclude the national court from being required to interpret the relevant national legislation, in this case Section 6(4) of the Sex Discrimination Act 1975, in conformity with the ruling in the Court's judgment concerning the scope of Directive 76/207, and more particularly Article 5(1) thereof.

Conclusion

55. In the light of the foregoing I suggest that the Court answer the questions submitted for a preliminary ruling as follows:

'(1) A terminal payment, including the statutory minimum redundancy payment, which is paid by an employer on the basis of an occupational scheme to employees made compulsorily redundant by him, constitutes "pay" within the meaning of the second paragraph of Article 119 of the EEC Treaty.

(2) Pensions which are paid through the trustees of a pension fund financed by employers' contributions to employees made compulsorily redundant under an occupational pension scheme which is regarded as a "contracted-out" scheme constitute "pay" within the meaning of the second paragraph of Article 119 of the EEC Treaty.

51 — See the judgments of 18 October 1989 in Case 374/87 *Orkem* [1989] ECR 3283, paragraphs 18 and 31 and in Case 27/88 *Solvay* [1989] ECR 3355, paragraphs 15 and 28.

52 — See the Opinion of Mr Advocate General Capotorti in Case 149/77 *Defrenne III* [1978] ECR 1380, at p. 1386.

53 — See, for the same view, P. Pescatore: 'Bestand und Bedeutung der Grundrechte im Recht der Europäischen Gemeinschaften', *Europarecht*, 1979, p. 1 *et seq.*, in particular at p. 10. For further references, see my Opinion of 5 December 1989 in Case C-326/88 *Hansen* (judgment of 10 July 1990, judgment of 10 July 1990 [1990] ECR I-2911), paragraph 11.

(3) The principle of equal pay which is referred to in the first paragraph of Article 119 of the EEC Treaty implies equality at the level of each component of remuneration.

Primarily

(4) Article 119 of the EEC Treaty precludes an occupational scheme from laying down a different age condition according to sex for the grant in connection with compulsory redundancy of an immediate pension which is to be regarded as "pay".

(5) In the circumstances of this case, Article 119 of the EEC Treaty has direct effect as between individuals as well.

Alternatively

(4) A different age condition according to sex which is laid down by an occupational scheme for the grant of an immediate pension in connection with compulsory redundancy constitutes a discriminatory condition governing dismissal which is prohibited by Article 5(1) of Directive 76/207/EEC.

(5) Article 5(1) of Directive 76/207/EEC does not have direct ffect as between individuals in the circumstances of this case; however, it is for the national court to interpret the relevant national legislation, in this case Section 6(4) of the Sex Discrimination Act 1975, in conformity with the ruling in the Court's judgment concerning the scope of Article 5(1) of Directive 76/207/EEC.'