

JUDGMENT OF THE COURT  
17 May 1990 \*

In Case C-262/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Court of Appeal in London for a preliminary ruling in the proceedings pending before that court between

**Douglas Harvey Barber**

and

**Guardian Royal Exchange Assurance Group,**

on the interpretation of Article 119 of the EEC Treaty, 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 (Official Journal 1975, L 45, p. 19) and 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 (Official Journal 1976, L 39, p. 40),

THE COURT

composed of: O. Due, President, Sir Gordon Slynn, F. A. Schockweiler and M. Zuleeg (Presidents of Chambers), G. F. Mancini, R. Joliet, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General: W. Van Gerven

Registrar: J. A. Pompe, Deputy Registrar

\* Language of the case: English.

after considering the written observations submitted on behalf of

Mr Barber, by Christopher Carr QC, instructed by Irwin Mitchell, solicitors,

the Guardian Royal Exchange Assurance Group, by David Vaughan QC and Timothy Wormington, barrister, instructed by Jaques & Lewis, solicitors,

the United Kingdom, by J. E. Collins of the Treasury Solicitor's Department, acting as Agent, assisted by Peter Goldsmith QC,

the Commission of the European Communities, by Karen Banks and Julian Currall, members of the Commission's Legal Department, acting as Agents,

having regard to the Report for the Hearing and following the oral procedure conducted on 15 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 30 January 1990,

gives the following

### Judgment

- 1 By an order of 12 May 1988, which was received at the Court on 23 September 1988, the Court of Appeal in London referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning the interpretation of Article 119 of the EEC Treaty, 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 (Official Journal 1975, L 45, p. 19, hereinafter referred to as 'the directive on equal pay') and 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 (Official Journal 1976, L 39, p. 40, hereinafter referred to as 'the directive on equal treatment').

- 2 Those questions arose in a dispute between the late Douglas Harvey Barber and his former employer, the Guardian Royal Exchange Assurance Group (hereinafter referred to as 'the Guardian'), concerning Mr Barber's right to an early retirement pension on being made compulsorily redundant.
  
- 3 It appears from the documents before the Court that Mr Barber was a member of the pension fund established by the Guardian which applied a non-contributory scheme, that is to say a scheme wholly financed by the employer. That scheme, which was a 'contracted-out' scheme, that is to say it was approved under the Social Security Pensions Act 1975, involved the contractual waiver by members of the earnings-related part of the State pension scheme, for which the scheme in question was a substitute. Members of a scheme of that kind paid to the State scheme only reduced contributions corresponding to the basic flat-rate pension payable under the latter scheme to all workers regardless of their earnings.
  
- 4 Under the Guardian's pension scheme, the normal pensionable age was fixed for the category of employees to which Mr Barber belonged at 62 for men and at 57 for women. That difference was equivalent to that which exists under the State social security scheme, where the normal pensionable age is 65 for men and 60 for women. Members of the Guardian's pension fund were entitled to an immediate pension on attaining the normal pensionable age provided for by that scheme. Entitlement to a deferred pension payable at the normal pensionable age was also conferred on members of the fund who were at least 40 years old and had completed 10 years' service with the Guardian when the employment relationship was terminated.
  
- 5 The Guardian Royal Exchange Assurance Guide to Severance Terms, which formed part of Mr Barber's contract of employment, provided that, in the event of redundancy, members of the pension fund were entitled to an immediate pension subject to having attained the age of 55 for men or 50 for women. Staff who did not fulfil those conditions received certain cash benefits calculated on the basis of their years of service and a deferred pension payable at the normal pensionable age.

- 6 Mr Barber was made redundant with effect from 31 December 1980 when he was aged 52. The Guardian paid him the cash benefits provided for in the Severance Terms, the statutory redundancy payment and an *ex gratia* payment. He would have been entitled to a retirement pension as from the date of his 62nd birthday. It is undisputed that a woman in the same position as Mr Barber would have received an immediate retirement pension as well as the statutory redundancy payment and that the total value of those benefits would have been greater than the amount paid to Mr Barber.
- 7 Taking the view that he was a victim of unlawful discrimination based on sex, Mr Barber instituted proceedings in the industrial relations tribunals. When his claim was dismissed at first and second instance, he appealed to the Court of Appeal. That court decided to stay the proceedings and to ask the Court of Justice 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?

(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?'

8 Mr Barber died while these proceedings were in progress. Since the Court of Appeal permitted his widow and executrix, Mrs Pamela Barber, to continue the proceedings in her name, for and on behalf of Mr Barber's estate, these proceedings for a preliminary ruling followed the usual course.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant provisions of Community law, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

### **The first question**

10 In its first question the Court of Appeal seeks to ascertain, in substance, whether the benefits paid by an employer to a worker in connection with the latter's compulsory redundancy fall within the scope of Article 119 of the Treaty and the directive on equal pay or within the scope of the directive on equal treatment.

- 11 The Court has consistently held (see, in particular, its judgment of 31 March 1981 in Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911, paragraph 22) that the first of those two directives, which is designed principally to facilitate the application of the principle of equal pay outlined in Article 119 of the Treaty, in no way alters the content or scope of that principle as defined in the latter provision. It is therefore appropriate to consider, in the first place, whether Article 119 applies in circumstances such as those of this case.
- 12 As the Court has held, the concept of pay, within the meaning of the second paragraph of Article 119, comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer (see, in particular, the judgment of 9 February 1982 in Case 12/81 *Garland v British Rail Engineering* [1982] ECR 359, paragraph 5). Accordingly, the fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being in the nature of pay, within the meaning of Article 119 of the Treaty.
- 13 As regards, in particular, the compensation granted to a worker in connection with his redundancy, it must be stated that such compensation constitutes a form of pay to which the worker is entitled in respect of his employment, which is paid to him upon termination of the employment relationship, which makes it possible to facilitate his adjustment to the new circumstances resulting from the loss of his employment and which provides him with a source of income during the period in which he is seeking new employment.
- 14 It follows that compensation granted to a worker in connection with his redundancy falls in principle within the concept of pay for the purposes of Article 119 of the Treaty.
- 15 At the hearing, the United Kingdom argued that the statutory redundancy payment fell outside the scope of Article 119 of the Treaty because it constituted a social security benefit and not a form of pay.

16 In that regard it must be pointed out that a redundancy payment made by the employer, such as that which is at issue, cannot cease to constitute a form of pay on the sole ground that, rather than deriving from the contract of employment, it is a statutory or *ex gratia* payment.

17 In the case of statutory redundancy payments it must be borne in mind that, as the Court held in its judgment of 8 April 1976 in Case 43/75 *Defrenne v Sabena* [1976] ECR 455, paragraph 40, Article 119 of the Treaty also applies to discrimination arising directly from legislative provisions. This means that benefits provided for by law may come within the concept of pay for the purposes of that provision.

18 Although it is true that many advantages granted by an employer also reflect considerations of social policy, the fact that a benefit is in the nature of pay cannot be called in question where the worker is entitled to receive the benefit in question from his employer by reason of the existence of the employment relationship.

19 In the case of *ex gratia* payments by the employer, it is clear from the judgment of 9 February 1982 in Case 12/81 *Garland*, cited above, paragraph 10, that Article 119 also applies to advantages which an employer grants to workers although he is not required to do so by contract.

20 Accordingly, without there being any need to discuss whether or not the directive on equal treatment is applicable, the answer to the first question must be that the benefits paid by an employer to a worker in connection with the latter's compulsory redundancy fall within the scope of the second paragraph of Article 119, whether they are paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis.

### The second question

21 In view of the answer given to the first question, the second question must be understood as seeking in substance to ascertain whether a retirement pension paid

under a contracted-out private occupational scheme falls within the scope of Article 119 of the Treaty, in particular where that pension is awarded in connection with compulsory redundancy.

- 22 It must be pointed out in that regard that, in its judgment of 25 May 1971 in Case 80/70 *Defrenne v Belgium* [1971] ECR 445, paragraphs 7 and 8, the Court stated that consideration in the nature of social security benefits is not in principle alien to the concept of pay. However, the Court pointed out that this concept, as defined in Article 119, cannot encompass 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 compulsorily applicable to general categories of workers.
- 23 The Court noted that those schemes afford the workers the benefit of a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy.
- 24 In order to answer the second question, therefore, it is necessary to ascertain whether those considerations also apply to contracted-out private occupational schemes such as that referred to in this case.
- 25 In that regard it must be pointed out first of all that the schemes in question are the result either of an agreement between workers and employers or of a unilateral decision taken by the employer. They are wholly financed by the employer or by both the employer and the workers without any contribution being made by the public authorities in any circumstances. Accordingly, such schemes form part of the consideration offered to workers by the employer.
- 26 Secondly, such schemes are not compulsorily applicable to general categories of workers. On the contrary, they apply only to workers employed by certain under-

takings, with the result that affiliation to those schemes derives of necessity from the employment relationship with a given employer. Furthermore, even if the schemes in question are established in conformity with national legislation and consequently satisfy the conditions laid down by it for recognition as contracted-out schemes, they are governed by their own rules.

27 Thirdly, it must be pointed out that, even if the contributions paid to those schemes and the benefits which they provide are in part a substitute for those of the general statutory scheme, that fact cannot preclude the application of Article 119. It is apparent from the documents before the Court that occupational schemes such as that referred to in this case may grant to their members benefits greater than those which would be paid by the statutory scheme, with the result that their economic function is similar to that of the supplementary schemes which exist in certain Member States, where affiliation and contribution to the statutory scheme is compulsory and no derogation is allowed. In its judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus v Weber von Hartz* [1986] ECR 1607, the Court held that the benefits awarded under a supplementary pension scheme fell within the concept of pay, within the meaning of Article 119.

28 It must therefore be concluded that, unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of Article 119 of the Treaty.

29 That interpretation of Article 119 is not affected by the fact that the private occupational scheme in question has been set up in the form of a trust and is administered by trustees who are technically independent of the employer, since Article 119 also applies to consideration received indirectly from the employer.

30 The answer to the second question submitted by the Court of Appeal must therefore be that a pension paid under a contracted-out private occupational scheme falls within the scope of Article 119 of the Treaty.

### The third and fifth questions

- 31 In these questions the Court of Appeal seeks in substance to ascertain, in the first place, whether it is contrary to Article 119 of the Treaty for a man made compulsorily redundant to be entitled only to a deferred pension payable at the normal pensionable age when a woman in the same position receives an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme. Secondly, the Court of Appeal wishes to ascertain, in substance, whether equal pay must be ensured at the level of each element of remuneration or only on the basis of a comprehensive assessment of the consideration paid to workers.
- 32 In the case of the first of those two questions thus formulated, it is sufficient to point out that Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality. Accordingly, it is contrary to Article 119 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme.
- 33 As regards the second of those questions, it is appropriate to refer to the judgments of 30 June 1988 in Case 318/86 *Commission v France* [1988] ECR 3559, paragraph 27 and of 17 October 1989 in Case 109/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199, paragraph 12, in which the Court emphasized the fundamental importance of transparency and, in particular, of the possibility of a review by the national courts, in order to prevent and, if necessary, eliminate any discrimination based on sex.
- 34 With regard to the means of verifying compliance with the principle of equal pay, it must be stated that if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of Article 119 would be diminished as a result. It follows that genuine transparency, permitting an effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women.

35 The answer to the third and fifth questions submitted by the Court of Appeal must therefore be that it is contrary to Article 119 of the Treaty for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal pensionable age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme. The application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers.

#### The fourth question

36 The national court also asks, in its fourth question, whether Article 119 of the Treaty and the directive on equal pay have direct effect in the circumstances of this case.

37 In view of the answer given to the first question, it is unnecessary to discuss the effects of the directive on equal pay. As for Article 119, it is appropriate to refer to the established case-law, which was reviewed by the Court in particular in its judgment of 31 March 1981 in Case 96/80 *Jenkins*, cited above, paragraph 17, and according to which that provision applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit their application.

38 If a woman is entitled to an immediate retirement pension when she is made compulsorily redundant, but a man of the same age is entitled in similar circumstances only to a deferred pension, then the result is unequal pay as between those two categories of workers which the national court can itself establish by considering the components of the remuneration in question and the criteria laid down in Article 119.

39 The answer to the fourth question must therefore be that Article 119 of the Treaty may be relied upon before the national courts and it is for those courts to

safeguard the rights which that provision confers on individuals, in particular where a contracted-out pension scheme does not pay to a man on redundancy an immediate pension such as would be granted in a similar case to a woman.

### Effects of this judgment *ratione temporis*

- 40 In its written and oral observations, the Commission has referred to the possibility for the Court of restricting the effect of this judgment *ratione temporis* in the event of the concept of pay, for the purposes of the second paragraph of Article 119 of the Treaty, being interpreted in such a way as to cover pensions paid by contracted-out private occupational schemes, so as to make it possible to rely on this judgment only in proceedings already pending before the national courts and in disputes concerning events occurring after the date of the judgment. For its part the United Kingdom emphasized at the hearing the serious financial consequences of such an interpretation of Article 119. The number of workers affiliated to contracted-out schemes is very large in the United Kingdom and the schemes in question frequently derogate from the principle of equality between men and women, in particular by providing for different pensionable ages.
- 41 As the Court acknowledged in its judgment of 8 April 1976 in Case 43/75 *Defrenne*, cited above, it may, by way of exception, taking account of the serious difficulties which its judgment may create as regards events in the past, be moved to restrict the possibility for all persons concerned of relying on the interpretation which the Court, in proceedings on a reference to it for a preliminary ruling, gives to a provision. A restriction of that kind may be permitted only by the Court in the actual judgment which gives the ruling on the interpretation requested.
- 42 With regard to this case, it must be pointed out that Article 7(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979, L 6, p. 24) authorized the Member States to defer the compulsory implementation of the principle of equal treatment with regard to the determination of pensionable age for the purposes of granting old-age pensions and the possible consequences thereof for other benefits. That exception has been incorporated in Article 9(a) of Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupa-

tional social security schemes (Official Journal 1986, L 225, p. 40: corrigendum published in Official Journal 1986, L 283, p. 27), which may apply to contracted-out schemes such as the one at issue in this case.

43 In the light of those provisions, the Member States and the parties concerned were reasonably entitled to consider that Article 119 did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere.

44 In those circumstances, overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pension schemes. It is appropriate, however, to provide for an exception in favour of individuals who have taken action in good time in order to safeguard their rights. Finally, it must be pointed out that no restriction on the effects of the aforesaid interpretation can be permitted as regards the acquisition of entitlement to a pension as from the date of this judgment.

45 It must therefore be held that the direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

### Costs

46 The costs incurred by the United Kingdom and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Court of Appeal in London, by an order of 12 May 1988, hereby rules as follows:

- (1) The benefits paid by an employer to a worker in connection with the latter's compulsory redundancy fall within the scope of the second paragraph of Article 119 of the EEC Treaty, whether they are paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis.
- (2) A pension paid under a contracted-out private occupational scheme falls within the scope of Article 119 of the Treaty.
- (3) It is contrary to Article 119 of the Treaty for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal retirement age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme. The application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers.
- (4) Article 119 of the Treaty may be relied upon before the national courts. It is for those courts to safeguard the rights which that provision confers on individuals, in particular where a contracted-out pension scheme does not pay to a man on redundancy an immediate pension such as would be granted in a similar case to a woman.
- (5) The direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension, with effect from a date prior to that of this

**judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.**

Due	Slynn	Schockweiler	Zuleeg
Mancini	Joliet	O'Higgins	
Moitinho de Almeida	Rodríguez Iglesias	Grévisse	Díez de Velasco

Delivered in open court in Luxembourg on 17 May 1990.

J.-G. Giraud  
Registrar

O. Due  
President