1. The term 'dismissal' contained in Article 5 (1) of Directive No 76/207 must be given a wide meaning; an age limit for the compulsory redundancy of workers as part of a mass redundancy falls within the term 'dismissal' construed in that manner, even if the redundancy involves the grant of an early retirement pension.

2. In view of the fundamental importance of the principle of equality of treatment for men and women, Article 1 (2) of Directive No 76/207 on the implementation of that principle as regards access to employment and working conditions, which excludes social security matters from the scope of the directive, must be interpreted strictly. It follows that the exception to the prohibition of discrimination on grounds of sex provided for in Article 7 (1)(a) of Directive No 79/7 on the progressive implementation of the principle of equal treatment in matters of social security applies only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

3. Article 5 (1) of Directive No 76/207 must be interpreted as meaning that a contractual provision which lays down a single age for the dismissal of men and women under a mass redundancy involving the grant of an early retirement pension, whereas the normal retirement age is different for men and women, does not constitute discrimination on grounds of sex, contrary to Community law.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN

delivered on 18 September 1985

My Lords,

This case comes to the Court by way of a reference dated 12 March 1984, for a preliminary ruling under Article 177 of the EEC Treaty by the English Court of Appeal, in an action proceeding before that court on appeal from the Employment Appeal Tribunal.

Miss Joan Roberts was employed by Tate & Lyle Industries Limited, previously Tate & Lyle Food and Distribution Limited, (both hereinafter referred to as 'Tate & Lyle') at their Liverpool depot for nearly 29 years until she and the other employees were made redundant on 22 April 1981 when Tate & Lyle closed down that plant. She was then aged 53.

Miss Roberts was a member of Tate & Lyle's occupational pension scheme. Under the scheme the normal retirement age (upon which an employee had to retire and a pension was paid) was 65 for men and 60 for women. On the mass redundancy in Liverpool, severance terms were agreed with the trade union of which Miss Roberts was a member whereby all employees made redundant would be offered a cash payment calculated by reference to a standard formula. It was also agreed that, as an alternative, both men and women would be offered an immediate pension out of the pension scheme up to five years before the date of their entitlement under the scheme. Thus male employees aged 60 and over and female employees aged 55 and over were offered an immediate pension. Male employees aged 55 to 60 then represented to Tate & Lyle that the redundancy arrangements were unfair to them in that a woman within that age bracket was entitled to receive an immediate pension but a man within that age bracket was not. As a result of those representations, Tate & Lyle offered the male employees aged 55 to 60 the option of taking the cash payment calculated by reference to the standard formula or of taking an immediate pension, with the amount of their cash payment reduced. In the result everyone, male and female over 55, could take the immediate pension.

At the date of redundancy Miss Roberts was aged 53. She complains that, whereas a male employee 10 years prior to the normal retirement age for men was entitled to an immediate pension, a female employee 10 years prior to the normal retirement age for women (such as herself) was not entitled. Tate & Lyle reply that Miss Roberts has not been less favourably treated on the grounds of her sex because she has been treated in exactly the same way as a man aged 53: neither of them was entitled to an immediate pension on the mass redundancy.

Miss Roberts brought proceedings claiming that she had been unlawfully discriminated against contrary to the Sex Discrimination Act 1975 and contrary to European Community law, in particular Council Directive No 76/207 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). Her claim was dismissed by an Industrial Tribunal on 7 December 1981 and by the Employment Appeal Tribunal on 30 March 1983. The latter held against her on the grounds that Tate & Lyle's acts were not unlawful because section 6 (4) of the Sex Discrimination Act 1975 validated sex discrimination by employers where it concerned 'provision in relation to retirement' (which it held was here the case) and that Directive No 76/207 was not directly applicable in the courts of the United Kingdom. Miss Roberts appealed against that decision to the Court of Appeal.

The Court of Appeal asked for a preliminary ruling on the following questions:

(1) Whether or not Tate & Lyle discriminated against Miss Roberts contrary to Directive No 76/207 by arranging for male employees who were made redundant to receive a pension

from the occupational pension fund 10 years prior to their normal retirement age of 65 but arranging for female employees (such as Miss Roberts) who were made redundant to receive a pension only five years prior to their normal retirement age of 60, thereby arranging for both men and women to receive an immediate pension at the age of 55.

(2) If the answer to (1) above is in the affirmative, whether or not Directive No No 76/207 can be relied upon by Miss Roberts in the circumstances of the present case in national courts and tribunals notwithstanding the inconsistency (if any) between the Directive No and section 6 (4) of the Sex Discrimination Act 1975.

As to question 1, Miss Roberts is alone in submitting that the arrangements described constitute discrimination prohibited by Directive No 76/207. She relies on Articles 1 (1), 2 (1), 3 (1) and 5 (1) of Directive No 76/207 and the judgment of the Court in Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555. She argues that she is entitled to compare her treatment with that of a man an equivalent number of years prior to normal retirement age and submits that Tate & Lyle have acted in breach of the Directive by allowing women to take an immediate pension only up to five years before normal retirement age but allowing men to take such a pension up to 10 years before normal retirement age.

Tate & Lyle, the Commission, and the United Kingdom all take the opposite view, i.e. that the arrangements described did not constitute discrimination contrary to the Directive. Tate & Lyle's case is that it has treated men and women of the same age equally, and that therefore there can be no discrimination. The United Kingdom submits that on the facts before the Court there is no *prima facie* unequal treatment and ostensibly equal treatment; in those circumstances the Court need look no further unless a reason is advanced for supposing that despite the ostensible equality of treatment there is in fact unequal treatment. The only such reason appears to be the appellant's reliance on the *Burton* judgment interpreted in a way which, the United Kingdom submits, is not sustainable. In *Burton* the difference in treatment, in so far as concerned access to benefits, was found not to be discriminatory where the difference sprang from the fact that the minimum pensionable age under the national legislation was not the same for men as for women; but, in the submission of the United Kingdom, the Court did not hold in *Burton* that the principle of equal treatment could *only* be met in respect of the imposition of age conditions by the linking of any such conditions to the minimum pensionable age under national legislation. The Commission adopts a similar line, arguing that the correct criterion is 'absolute' age, not 'relative' age as submitted by Miss Roberts. It bases this conclusion on a broader policy consideration that in the long term the difference in male and female pensionable ages should disappear, both in public and in private pension schemes. It submits that if Miss Roberts were to succeed in her claim, the age difference would once again be restored, which would reinforce a phenomenon which will only cease to cause complaint when it is eliminated. The Commission submits that *Burton* cannot be relied on to support Miss Roberts' argument. That case illustrates a situation of discrimination which is at present exempted from prohibition by Article 7 of Council

Directive No 79/7 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).

Denmark submits no observations on question 1, and confines its remarks to question 2.

As to question 2, Miss Roberts is once again alone, this time in submitting that Articles 1 (1), 2 (1), 3 (1) and 5 (1) of Directive No 76/207 may be relied upon by her in national courts as against a private employer (or in other words have 'horizontal direct effect'). She so contends because (1) the Directive imposes unconditional and sufficiently precise obligations, (2) such a direct effect is essential if the Directive is to fulfil its object to protect the fundamental human right to equal treatment in employment without sex discrimination, (3) the Court and Advocate General Capotorti suggested in Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365 ('*Defrenne (No 3)*') that the Directive has such a direct effect (at paragraphs 30, 31 and 33 of the decision and Opinion at p. 1388), (4) Article 6 of the Directive itself suggests that the Directive has such a direct effect, and (5) to deny such a direct effect to the Directive would lead to arbitrary consequences. Miss Roberts emphasises that to accept that the relevant provisions of the Directive have horizontal direct effect by reason of its special content and purpose to protect a fundamental human right would not imply that other Directives similarly have such a direct effect.

Tate & Lyle submit that the second question should be answered as follows: 'If there were discrimination (which is denied), Directive No 76/207 cannot be relied upon by Miss Roberts in the circumstances of the present case'. It contends that section 6 (4) of the Sex Discrimination Act is in conformity with Community law and covers Tate & Lyle's action. Both Tate & Lyle and the United Kingdom Government contend that if the second question has to be answered, Miss Roberts cannot rely on the Directive because this can only be relied on against a Member State which has failed to implement it and because in any event it is not clear, precise and unconditional in its terms. They rely on Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891 and Case 79/83 *Harz* v *Deutsche Tradax* [1984]/ECR 1921.

Denmark submits that the Court should answer the second question by saying that the principle of equality of treatment between men and women laid down in Council Directive No 76/207 does not have direct effect in the Member States to the detriment of individuals. It may only be relied on as against a Member State which has failed to implement it. No obligations are imposed on individuals. The fact that directives do not have to be published indicates that they are unenforceable against individuals. If that were not so great legal uncertainty would result.

The Commission says nothing about the direct effect of directives. Since it proposes that the first question should be answered in the negative it considers that there would be no need to consider the second question.

Directive No 76/207 provides:

Article 1 (1)

'The purpose of this Directive No is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

Article 2 (1)

'For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.'

Article 5 (1)

'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

Under Tate & Lyle's pension scheme in force at the relevant time, entitlement to pension arose as a general rule when the employee retired at his or her normal retirement date; normal retirement date was taken as the last day of the month in which the employee reached the age of 65 if a man, or 60 if a woman. As is not uncommon, pensionable age (the age at which a person becomes entitled to a pension) and normal retirement age or date (the age or date at which it is normal for employees to be required to retire by their employer in the absence of special circumstances) coincide. They do not necessarily have to do so. The Tate & Lyle pensionable ages are the same as those taken for the purposes of the State pension scheme though there is according to information supplied by the Commission, and so far as I am aware, no general compulsory retirement age in the United Kingdom. The initial decision to grant pensions to men at 60 and to women at 55 was obviously linked to these ages.

The case does not, however, as I see it, concern retirement or early retirement but redundancy — the dismissal of an employee whose job has ceased to exist (section 81 of the Employment Protection (Consolidation) Act 1978) and the conditions of access to benefit on redundancy. Accepting that section 6 (4) of the Sex Discrimination Act of 1975 can be of no assistance and that Article 119 of the EEC Treaty is not relevant since the amount of benefit is not in issue, Miss Roberts seeks to rely on Directive No 76/207 which should have been but was not implemented at the time relevant to this case.

It seems that this was an express dismissal on the closure of the Liverpool plant, (unlike the *Burton* case where there was a voluntary redundancy scheme which the Court was prepared to treat as a dismissal). It is therefore relevant to ask whether an

employee in the position of Miss Roberts can be said to have been guaranteed the same working conditions, including the conditions governing dismissal, without discrimination on grounds of sex.

In my opinion, if on dismissal women and men are offered a pension at the same age, *prima facie* they are not discriminated against on the grounds of sex, if they are otherwise guaranteed the same conditions within the meaning of Article 5 (1) of the Directive.

It is contended, however, that the Court's decision in *Burton* leads to the opposite conclusion. That case it is said establishes that it is lawful, and not contrary to Article 5 (1), for the State to have different pensionable ages for men and women; to tie the date of a private pension scheme to those dates is equally lawful; to tie an option to retire to a period taken by reference to the State pensionable ages is equally lawful so long as the amounts of benefit are the same. Accordingly since here the company, without being advised to do so, took the different pensionable ages for men and women adopted under the State scheme for its private scheme, it must be consistent. It cannot vary the normal pension arrangements other than on a relative basis. Men may take a pension on dismissal 10 years earlier than normal pensionable age, so must women be able to do so.

In my opinion, Directive No 79/7 is dealing with social security in the strict sense and not with retirement schemes in general. Article 3 makes it plain that the Directive applies to 'statutory schemes' and to 'social assistance'. The power to exclude from the scope of Directive No 79/7 (not from other Directives) given by Article 7, is, as I read it, limited to old age and retirement pensions and the possible consequences thereof for other benefits within the social security scheme. No such power is given in respect of private occupational schemes.

The Council stated that it would adopt provisions dealing with the scope and application of the principle of equal treatment in 'occupational schemes', which Tate & Lyle's scheme is. In the proposals for such other provisions the fixing of different retirement ages on the basis of sex was included as being a provision contrary to the principle of equal treatment (Official Journal 1983, C 134, p. 7).

For present purposes, however, leaving aside the question as to whether under Article 119 of the Treaty a private pension is to be treated as deferred pay, I am prepared to assume that it is not contrary to either of the Directives to which I have referred for different ages of entitlement to be fixed for men and women in respect of normal retirement pensions under private schemes.

It does not in my view, follow that differentials so taken for retirement pensions must be adopted in other circumstances. If in situations other than normal retirement men and women are given access to the same payment at the same age that is not discriminatory within the meaning of Article 5 (1) of Directive No 76/207 even if their retirement pensions are fixed at

different ages. I do not read the decision in *Burton* as saying that if different ages are adopted for retirement pensions, which even if discriminatory are not unlawfully discriminatory, contrary to Article 5 (1) of Directive No 76/207 then the employer *must* stay with the differential adopted when calculating payments to be made at an earlier stage than normal pensionable age or retirement age.

The contrary result would have the effect of extending a discrimination which is currently tolerated in respect of retirement pensions but which clearly the Community is working, albeit slowly, to eliminate. Article 7 (2) itself requires Member States to review from time to time whether exclusions introduced under Article 7 (1) are justified in the light of social developments. On information supplied by the Commission it seems that only Belgium, Greece, Italy and the United Kingdom still maintain different pensionable ages for men and women in their State schemes.

Accordingly, in my view, what was apparently equal treatment on dismissal for the purposes of Article 5 (1) does not cease to be so because differentials upon retirement may be excluded from the principle of equal treatment by virtue of provisions in relation to State retirement pensions under Article 7 (1) of Directive No 79/7 (or implied rights in respect of other pension schemes). I would hold that for an employer to provide, when dismissing employees for redundancy, that men and women should receive a pension at the same age, is not discriminatory within the meaning of Article 5 (1) of Directive No 76/207 even though in the result men receive such pensions at a time which is earlier in relation to their normal pensionable age than that applicable to the case of women.

In view of the answer which I propose to the national court's first question, its second question does not fall to be answered. If it did, I should answer it to the effect that if the national court holds that there is a conflict between the Directive and prior national legislation then the question arises as to whether the provisions of the Directive can be relied upon in proceedings before the national court. Bearing in mind that the defendant in the present proceedings is a private undertaking, I would answer that question to the effect that the provisions of Community directives may not be relied upon before national courts against persons other than the State, for the reasons which I give in my Opinion in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986] ECR 725 to which I refer.

Accordingly the questions referred to this Court by the Court of Appeal should in my opinion be answered as follows:

It is not contrary to Directive No 76/207 for an employer to arrange for both men and women who are made redundant to receive an immediate pension at the age of 55, albeit this means that male employees who are made redundant receive a

pension from the employer's occupational pension fund 10 years prior to their normal retirement age of 65 but that female employees who are made redundant receive a pension only five years prior to their normal retirement age of 60.

The costs of the parties to the main action fall to be dealt with by the national court. The costs incurred by the Government of Denmark, the Government of the United Kingdom and the Commission are not recoverable.