

**JUDGMENT OF THE COURT**  
**26 February 1986 \***

In Case 262/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] for a preliminary ruling in the proceedings pending before that court between

**Vera Mia Beets-Proper**, residing in Amsterdam,

and

**F. Van Lanschot Bankiers NV**, whose registered office is in 's-Hertogenbosch,

on the interpretation of 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),

**THE COURT**

composed of: Lord Mackenzie Stuart, President, U. Everling and K. Bahlmann (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn

Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

the appellant in the main proceedings, by I. G. F. Cath, of the Brussels Bar,

the respondent in the main proceedings, by C. D. van Boeschoten, of the Hague Bar, during the written procedure, and by G. M. M. den Drijver, Advocaat, during the oral procedure,

\* Language of the Case: Dutch.

the Government of the Kingdom of Denmark, by L. Mikaelsen, of the Ministry of Foreign Affairs, acting as Agent, during the written procedure,

the Government of the Kingdom of the Netherlands, by I. Verkade, of the Ministry of Foreign Affairs, acting as Agent, during the written procedure,

the United Kingdom, by S. J. Hay, of the Treasury Solicitor's Department, London, acting as Agent, during the written procedure, and by P. Goldsmith, Barrister-at-law during the oral procedure,

the Commission of the European Communities, by J. R. Currall, a member of its Legal Department, acting as Agent, assisted by F. Herbert, of the Brussels Bar,

after hearing the Opinion of the Advocate General delivered at the sitting on 18 September 1985,

gives the following

## JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

## Decision

- 1 By an order of 2 November 1984, which was received at the Court on 9 November 1984, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of 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).
- 2 The question was raised in the course of proceedings between V. M. Beets-Proper (hereinafter referred to as 'the appellant') and F. Van Lanschot Bankiers NV

(hereinafter referred to as 'the respondent') concerning the compatibility of the appellant's dismissal with Article 1637ij of the Netherlands Civil Code and with Community law.

- 3 The appellant worked as a secretary with Vermeer & Co. bankers, of Amsterdam, from 1969 until that company's amalgamation in 1972 with the respondent, and from then until the end of August 1982 with the latter. The employment relationship between the parties was governed by the collective labour agreement for the banking sector for the years 1980 and 1981 and the pension scheme of the 'F. Van Lanschot Pension Fund'.
- 4 Article 3 of that scheme provides that the persons affiliated to it are entitled to an old-age pension 'from the date of retirement'. That date is defined in Article 1 as 'the first day of the month following the month in which a person affiliated to the scheme attains the age of 65 in the case of a man and 60 in the case of a woman'.
- 5 Since the appellant reached the age of 60 in August 1982, the respondent took the view that the employment relationship automatically ended on 1 September 1982 by virtue of an implied condition to that effect in the contract of employment, without the need for any notice of dismissal. By a letter dated 2 August 1982 the respondent informed the appellant that she was entitled to an old-age pension together with a supplementary pension payable until she attained the age of 65. She has not been admitted to work since 1 September 1982.
- 6 In May 1981 the appellant had expressed her wish to continue her employment, possibly on a part-time basis, after the date on which she was due to retire. In November 1981 the respondent had informed her that her wish could not be satisfied.
- 7 By a writ of 16 September 1982 the appellant applied to the president of the Arrondissementsrechtbank [District Court], Amsterdam, for an interlocutory injunction requiring the respondent to allow her to resume her work as an executive secretary in the respondent's offices and to pay her salary from 1 September 1982 until such time as the contract of employment should be terminated in a legally valid manner.

- 8 The appellant also submitted a complaint to the *Commissie Gelijke Behandeling van Mannen en Vrouwen bij de Arbeid* [Commission on Equal Treatment of Men and Women in Employment at Work], established by the *Wet gelijk loon voor vrouwen en mannen* [Law on equal pay for men and women] (*Staatsblad* 1975, 129). In its opinion of 14 February 1983 on that complaint, the Commission concluded 'that a direct distinction is made, to the disadvantage of the applicant, between men and women with regard to the termination of the contract of employment by the application of different age limits'.
- 9 After the dismissal of the appellant's application by the Arrondissementsrechtbank she appealed to the Gerechtshof [Regional Court of Appeal], Amsterdam, which, by judgment of 19 May 1983, confirmed the judgment of the lower court on the ground 'that the exception referred to in the second sentence of paragraph (1) of Article 1637ij [of the Civil Code] is applicable in this case'.
- 10 Article 1637ij of the Netherlands Civil Code provides as follows:
- '(1) As regards the conclusion of a contract of employment, staff training, the terms of employment, promotion and the termination of the contract of employment, an employer may not make any distinction between men and women, either directly or indirectly, for example by reference to marital status or family circumstances. The terms of employment do not include benefits or entitlements under pension schemes. The first sentence of this paragraph shall not apply in those cases in which an employee's sex is a decisive factor.
  - (2) Any clause which is contrary to the first sentence of paragraph (1) shall be void.
  - (3) The first sentence of paragraph (1) shall not apply as far as concerns clauses relating to the protection of women, in particular in connection with pregnancy and maternity.
  - (4) The first sentence of paragraph (1) shall not apply as far as concerns clauses which are intended to place employees of a particular sex in a privileged position in order to eliminate factual inequalities.
  - (5) The termination of a person's employment by an employer on account of the fact that the employee has invoked the provisions of paragraph (1), whether before a court or otherwise, shall be void. An employee shall be entitled to invoke the nullity of the termination of his employment during a period of two months after he was given notice or after his employment was terminated

if his employer terminated it otherwise than by giving notice. He shall do so by serving notice on the employer. The termination of employment referred to in the first sentence of this paragraph shall not make the employer liable in damages.

- (6) When concluding or terminating a contract of employment, an employer may not make any distinction between married and unmarried persons.'
- 11 The Gerechtshof, Amsterdam, based its judgment on the existence of a 'close connection between the termination of the contract of employment and the commencement of the pension', and in particular on the fact that the respondent's female employees, who retire at the age of 60, acquire pension rights, on a non-contributory basis, at a rate of 2% of the basic salary for each year of service, whereas male employees, whose retirement age is fixed at 65, acquire such rights at the rate of 1.75%.
- 12 The appellant brought an appeal on a point of law against that judgment before the Hoge Raad der Nederlanden, which referred the following question to the Court of Justice for a preliminary ruling:

'Does Council Directive No 76/207/EEC of 9 February 1976 allow the Member States the freedom not to include among the conditions of employment in respect of which equal treatment for men and women must be laid down pursuant to that directive an express or implied condition concerning the termination of the contract of employment on the ground of the age attained by the employee, where that condition relates to the age at which the employee becomes entitled to a pension?'

### Relevant legal provisions

- 13 Article 1 (1) of Directive No 76/207 provides as follows:

'The purpose of this directive 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".'

14 Article 2 (1) of the directive provides that:

‘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.’

15 Article 5 (1) of the directive provides that:

‘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.’

16 Article 1 (2) of the directive provides that:

‘With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.’

17 Pursuant to the last-mentioned provision, the Council adopted Directive No 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), which Member States were to transpose into national law, according to Article 8 (1) thereof, within six years of its notification. The directive applies, according to Article 3 (1) thereof, to:

‘(a) statutory schemes which provide protection against the following risks:

sickness,

invalidity,

old age,

accidents at work and occupational diseases,

— unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).'

18 According to Article 7 (1) thereof, the directive is to be:

‘without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

....

19 With regard to occupational social security schemes, Article 3 (3) of the directive provides that with a view to ensuring implementation of the principle of equal treatment in such schemes ‘the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application’. On 5 May 1983 the Commission submitted to the Council a proposal for a directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes (Official Journal 1983, C 134, p. 7). The proposed directive would, according to Article 2 (1) thereof, apply to ‘benefits intended to supplement the benefits provided by statutory social security schemes or to replace them’. The Council has not yet responded to that proposal.

20 It is evident from the documents before the Court that Article 7 of the *Algemene Ouderdomswet* [General Law on Old-Age] (for the version in force at the material time, see *Staatsblad* 1956, 281; for the version now in force, see *Staatsblad* 1985, 181) lays down a single pensionable age for persons of either sex, namely 65.

21 Observations were submitted to the Court in this case by the Government of the Kingdom of the Netherlands, the Government of the Kingdom of Denmark, the United Kingdom and the Commission, in addition to the appellant and the respondent.

### The question referred to the Court

- 22 The appellant, the Danish Government and the Commission considered that the reply to the question must be in the negative.
- 23 In essence the appellant contends that the case before the Court concerns a difference of treatment not with regard to the conditions for the grant of an old-age and retirement pension, in respect of which an age differential may be maintained provisionally under Article 1 (2) of Directive No 76/207 and Article 7 (1) of Directive No 79/7, but with regard to the conditions governing dismissal within the meaning of Article 5 (1) of Directive No 76/207.
- 24 In the appellant's view, since the Community legislature intended the principle of equality of treatment for men and women to be applied as extensively as possible in employment matters as a fundamental principle of Community law, the expression 'conditions of employment' must be construed widely so as to encompass the conditions on which a contract of employment is terminated, whereas the exception to that principle must be interpreted narrowly and extends to pension benefits only.
- 25 According to the appellant, an express or implied condition concerning the termination of a contract of employment does not cease to be a 'condition of employment' because it relates to the age at which the employee becomes entitled to an old-age pension, since a link between those two fields is unknown to Community law. Furthermore, such a link may not be deduced from the Court's judgment of 16 February 1982 (Case 19/81 *Burton v British Railways Board* [1982] ECR 555), which concerned the different question of the conditions of access to a voluntary redundancy scheme.
- 26 The Commission likewise contends that the termination of a contract of employment, whether by way of dismissal or automatically, is included in the concept 'conditions of employment' and does not fall within the exceptions to the principle of equality of treatment referred to in Article 2 of Directive No 76/207 or within the scope of Directive No 79/7. In that connection it states that in the national legal systems termination of a contract of employment also falls within the sphere of labour law rather than of social security law. The fact that the termination of such a contract coincides with the retirement age cannot have the effect of excluding it from the scope of Directive No 76/207.



- 27 The Danish Government, which in essence shares that view, adds that when implementing Directive No 76/207 in national law the Danish legislature interpreted the prohibition of discrimination contained in Article 5 (1) of the directive as meaning that the age at which a person's contract of employment terminates for the purposes of retirement can no longer vary according to the employee's sex.
- 28 In contrast, the respondent contends that in order to resolve the question whether or not the difference in treatment in question is discriminatory, within the meaning of Directive No 76/207, it is necessary to take into account, in accordance with the judgment in the *Burton* case, the link which the respondent considers to exist between the contractual provisions applicable in this case and the rule on pensionable age under the occupational retirement scheme.
- 29 In that connection the respondent points out that its pension scheme provides that members of the scheme become entitled to a pension at the age of 65 in the case of male employees and at the age of 60 in the case of female employees and that the fixing of different ages for compulsory termination of the contract of employment is directly linked to that difference in pensionable age since, under Netherlands law, termination of the contract of employment is the immediate and automatic consequence of the operation of the pension scheme and the reaching of pensionable age. A contract of employment for an unlimited period has a maximum term determined by reference to pensionable age, so that it terminates automatically on the date at which the pension becomes payable; it is therefore unnecessary to include an express term to that effect in the contract. Consequently, as long as pension schemes provide for pensionable ages which are different for men and women, their contracts of employment will terminate at different ages.
- 30 In the respondent's opinion, it follows from the judgment in the *Burton* case that, in view of that link between pensionable age and retirement age, the difference of treatment accorded to men and women in this case does not fall within the prohibition of discrimination contained in Directive No 76/207 but is compatible with Community law in so far as the Member States retain the power, by virtue of the exception in favour of social security matters contained in Article 1 (2) of Directive No 76/207, to fix different retirement ages for men and women.
- 31 It is possible to conclude, in the respondent's view, that Directive No 76/207 leaves the Member States free not to include, among the conditions of employment in respect of which equal treatment for men and women must be laid down

pursuant to that directive, an express or implied condition concerning termination of the contract of employment on the ground of the age attained by the employee where that condition is linked to the age at which the employee becomes entitled to a pension.

- 32 The Government of the Netherlands and the United Kingdom are also of the opinion that the difference in treatment in question is not contrary to Community law in view of the link between termination of the contract of employment and the retirement age fixed in the pension scheme and in view of the fact that there is no directive providing that such an age differential in occupational social security schemes is discriminatory.
- 33 The Netherlands Government also contends that in view of the close relationship between the date of termination of the contract of employment, on the one hand, and the date of retirement and the terms of the pension scheme, on the other, any other interpretation could have the effect of forcing employers and pension funds in many cases to fix the terms of their pension schemes and the retirement date according to their own perceptions.
- 34 The Court observes in the first place that the question of interpretation referred to it does not concern access to a statutory or occupational retirement scheme, that is to say the conditions for the payment of an old-age or retirement pension, but the fixing of an age limit with regard to the termination of employment. That question concerns the conditions governing dismissal and therefore falls to be considered under Directive No 76/207.
- 35 Article 5 (1) of Directive No 76/207 provides that application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women are to be guaranteed the same conditions without discrimination on grounds of sex.
- 36 In its judgment in the *Burton* case the Court has already stated that the word 'dismissal' contained in that provision must be given a wide meaning. Consequently, an age limit for the compulsory dismissal of workers pursuant to an employer's general policy concerning retirement falls within the term 'dismissal' construed in that manner, even if the dismissal involves the grant of a retirement pension.

- 37 As the Court emphasized in that judgment, Article 7 of Directive No 79/7 expressly provides that the directive does not prejudice the right of Member States to exclude from its scope the determination of retirement age for the purpose of granting old-age and retirement pensions and the possible consequences thereof for other benefits falling within the statutory social security schemes. The Court thus acknowledged that benefits linked to a national scheme which lays down a different pensionable age for men and women may lie outside the ambit of the aforementioned obligation.
- 38 However, in view of the fundamental importance of the principle of equality of treatment, which the Court has reaffirmed on numerous occasions, Article 1 (2) of Directive No 76/207, which excludes social security matters from the scope of that directive, must be interpreted strictly. Consequently, the exception to the prohibition of discrimination on grounds of sex contained in Article 7 (1)(a) of Directive No 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.
- 39 In that respect it must be emphasized that, whereas the exception contained in Article 7 of Directive No 79/7 concerns the consequences which pensionable age has for social security benefits, this case is concerned with dismissal within the meaning of Article 5 of Directive No 76/207.
- 40 Consequently, the answer to the question referred to the Court of Justice by the Hoge Raad der Nederlanden must be that Article 5 (1) of Directive No 76/207 must be interpreted as meaning that it does not allow the Member States the freedom to exempt from the application of the principle of equality of treatment an express or implied condition in a contract of employment concluded on the basis of a collective agreement, if that condition has the effect of terminating the contract of employment on the ground of the age attained by the employee and the relevant age is determined by the age — which is different for men and women — at which the employee becomes entitled to a retirement pension.

### Costs

- 41 The costs incurred by Denmark, the Netherlands, the United Kingdom and the Commission of the European Communities, which have 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 before the national court, the decision as to costs is a matter for that court.

On those grounds,

# THE COURT,

in answer to the question referred to it by the Hoge Raad der Nederlanden by an order of 2 November 1984, hereby rules:

Article 5 (1) of Directive No 76/207 must be interpreted as meaning that it does not allow the Member States the freedom to exempt from the application of the principle of equality of treatment an express or implied condition in a contract of employment concluded on the basis of a collective wage agreement, if that condition has the effect of terminating the contract of employment on the ground of the age attained by the employee and the relevant age is determined by the age — which is different for men and women — at which the employee becomes entitled to a retirement pension.

Mackenzie Stuart

Everling

Bahlmann

Bosco

Koopmans

Due

O'Higgins

Delivered in open court in Luxembourg on 26 February 1986.

P. Heim

A. J. Mackenzie Stuart

Registrar

President