

JUDGMENT OF THE COURT

3 December 1987 *

In Case 192/85

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

George Noel Newstead

and

(1) Department of Transport,

(2) Her Majesty's Treasury,

on the interpretation of Article 119 of the EEC Treaty, Council Directive 75/117 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 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: G. Bosco, President of Chamber, acting as President, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet and F. Schockweiler, Judges,

Advocate General: M. Darmon

Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

* Language of the Case: English.

George Noel Newstead, the plaintiff in the main proceedings by A. Saxon, Solicitor, A. Lester, QC, and D. Pannick, Barrister,

the United Kingdom by R. N. Ricks, of the Treasury Solicitor's Department, acting as Agent, and P. Goldsmith, Barrister,

the Commission of the European Communities, by J. Currall, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 2 April 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 June 1987,

gives the following

Judgment

- 1 By an order of 11 June 1985, which was received at the Court Registry on 21 June 1985, the Employment Appeal Tribunal referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 119 of that Treaty, Council Directive 75/117 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 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 Those questions were raised in the course of proceedings between Mr Newstead, a civil servant employed by the Department of Transport, and the Department of Transport and the Treasury.
- 3 With regard to social security, civil servants employed by the Department of Transport are covered by the Principal civil service pension scheme 1974, an occupational scheme established by the State for civil servants. Under the applicable

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

- 4 The occupational scheme to which Mr Newstead belongs makes provision for a widows' pension fund. That fund is financed in part by the contributions of civil servants. However, although male civil servants, whatever their marital status, are obliged to contribute to the fund, a deduction of 1.5% being made from their gross salary, female civil servants are never obliged to contribute to the fund but may in certain circumstances be permitted to do so.
- 5 In the case of a civil servant who was at no time married while he was covered by the occupational scheme, it is provided that his contributions to the widows' pension fund should be returned to him, with compound interest at the rate of 4% per annum, when he leaves the Civil Service. Should he die before then, that amount is paid to his estate.
- 6 Mr Newstead, who is unmarried, argues that the obligation to contribute to the widows' pension fund has the effect of discriminating against him in comparison with a female civil servant in an equivalent post, since she is not obliged to give up 1.5% of her gross salary, albeit temporarily, as a contribution to the fund. He therefore brought proceedings before an industrial tribunal for an order that he should no longer be obliged to make the contribution in question.
- 7 The industrial tribunal dismissed his application. On appeal, however, the Employment Appeal Tribunal considered that the application raised issues concerning the interpretation of Article 119 of the EEC Treaty and of Directives 75/117 and 76/207, referred to above. It therefore stayed the proceedings and referred the following questions to the Court:

- '(a) Is it a breach of Article 119 (read on its own or together with the Equal Pay Directive 75/117) for the employer to pay men and women the same gross salary but to require an unmarried male pensionable civil servant (such as the appellant) to pay (by way of deduction from his salary) 1.5% of his gross salary as a contribution to provision of a widow's pension of the sort in the present case, and which contributions cannot be repaid until his death or he leaves the Civil Service, when a similar requirement is not imposed upon an unmarried female pensionable civil servant for the purposes of a widower's pension?

- (b) If the answer to (a) is in the affirmative, does Article 119 (read on its own or together with the Equal Pay Directive) have direct effect in Member States so as to confer enforceable rights on individuals in the circumstances of the present case?

- (c) Is it a breach of the Equal Treatment Directive 76/207/EEC for the employer to pay men and women the same gross salary but to require an unmarried male pensionable civil servant (such as the appellant) to pay (by way of deduction from his salary) 1.5% of his gross salary as a contribution to provision of a widow's pension of the sort in the present case and which contributions cannot be repaid until his death or he leaves the Civil Service, when a similar requirement is not imposed upon an unmarried female pensionable civil servant for the purposes of a widower's pension?

- (d) If the answer to (c) is in the affirmative, does the Equal Treatment Directive have direct effect in Member States so as to confer enforceable rights on individuals in the circumstances of the present case?"

8 Reference is made to the Report for the Hearing for a more extensive account of the facts of the case, the course of the procedure and the observations submitted to the Court pursuant to Article 20 of the Protocol on the Statute of the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

- 9 In its first question the Employment Appeal Tribunal asks in essence whether it is a breach of Article 119, read together with Directive 75/117, for an employer to pay men and women the same gross salary but to deduct 1.5% of the gross salary of men only as a contribution to a widows' pension fund.
- 10 In order to reply to that question it must be determined first of all whether the case before the Employment Appeal Tribunal falls within the scope of Article 119.
- 11 According to the first paragraph of Article 119 the Member States must ensure the application of the principle that men and women should receive equal pay for equal work; pursuant to the second paragraph, 'pay' is to be understood, for the purposes of that article, as 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer'.
- 12 It is not disputed that in the case under consideration by the Employment Appeal Tribunal the net pay received by men is less than that received by women doing the same work: only men have 1.5% of their gross salary deducted as a contribution to the widows' pension fund.
- 13 As the United Kingdom and the Commission rightly pointed out, however, the difference between the net pay of men and women in the case before the Employment Appeal Tribunal is the result of the fact that only men are required to belong to the widows' pension fund and thus have a deduction made from their salary as a contribution to the fund.
- 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.
- 16 In order to dispute that conclusion Mr Newstead argues that in its judgments of 11 March 1981 in Case 69/80 *Worringham and Humphreys v Lloyds Bank* [1981] ECR 767 and of 18 September 1984 Case 23/83 *Liefting v Academisch Ziekenhuis bij de Universiteit van Amsterdam* [1984] ECR 3225 it was from the point of view of Article 119 that the Court examined differences in pay between men and women related to the different conditions applied to them in respect of contributions to the pension schemes, occupational and statutory respectively, at issue in those two cases.
- 17 It must be borne in mind, however, that in those judgments the Court simply observed that Article 119 was applicable in particular where the gross pay of men was higher than that of women in order to make up for the fact that only men were required to contribute to a social security scheme. The Court emphasized that although the extra pay was subsequently deducted by the employer and paid into a pension fund on behalf of the employee, it determined the calculation of other salary-related benefits (redundancy payments, unemployment benefits, family allowances, credit facilities) and was therefore a component of the worker's 'pay' for the purposes of the second paragraph of Article 119 to which the prohibition of discrimination laid down in the first paragraph of Article 119 was applicable.
- 18 Those circumstances are not present in the case before the Employment Appeal Tribunal. The deduction in question results in a reduction in net pay because of a contribution paid to a social security scheme and in no way affects gross pay, on the basis of which the other salary-related benefits mentioned above are normally calculated. This case cannot therefore be governed by the approach taken by the Court in the judgments referred to.
- 19 It follows from what has been said that the case before the Employment Appeal Tribunal does not fall within the scope of Article 119 of the Treaty.

- 20 Council Directive 75/117, which was also mentioned by the Employment Appeal Tribunal in its question, does not affect the conclusion arrived at with regard to Article 119. As the Court stated in its judgment of 31 March 1981 in Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911, that directive is principally designed to facilitate the practical application of the principle of equal pay laid down in Article 119 and in no way alters its content or scope as defined in that article.
- 21 The answer to the first question of the Employment Appeal Tribunal must therefore be that Article 119 of the EEC Treaty, read together with Council Directive 75/117 of 10 February 1975, does not prevent an employer from paying men and women the same gross salary but making a deduction of 1.5% of the gross salary of men only, even those who are unmarried, as a contribution to a widows' pension fund provided for under an occupational scheme which is a substitute for a statutory social security scheme.

The second question

- 22 Since this question was submitted only in the event that the Court should reply to the first question in the affirmative, there is no need to reply to it.

The third question

- 23 In its third question the Employment Appeal Tribunal asks whether, in circumstances such as those at issue in the main proceedings, there is a breach of Council Directive 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).
- 24 As the United Kingdom and the Commission correctly observed, Directive 76/207 is not intended to apply in social security matters. That is clear from Article 1 (2), according to which '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'.

- 25 None of the directives adopted by the Council pursuant to that provision applies to survivors' pensions, whether provided for under a statutory social security scheme or under an occupational scheme.
- 26 Article 3 (2) of Council Directive 79/7 of 19 December 1978 (Official Journal 1979, L 6, p. 24), which is designed to extend the application of the principle of equal treatment to statutory schemes providing protection in the case of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and to social assistance in so far as it is intended to supplement or replace such schemes (Article 3 (1)), states that the directive 'shall not apply to the provisions concerning survivors' benefits'. As for occupational social security schemes, Article 3 (3) made application to them of the principle of equal treatment subject to the adoption of further provisions by the Council, acting on a proposal from the Commission.
- 27 While these proceedings were in progress, the Council, acting pursuant to Article 3 (3), adopted Directive 86/372 of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (Official Journal 1986, L 225, p. 40). However, Article 9 of that directive — the period for whose implementation by the Member States, laid down in Article 12, has not yet expired — provides that 'Member States may defer compulsory application of the principle of equal treatment with regard to . . . (b) survivors' pensions until a directive requires the principle of equal treatment in statutory social security schemes in that regard'.
- 28 In the absence of more specific directives extending the application of the principle of equal treatment to benefits for surviving spouses, whether these are provided

under a statutory social security scheme or under an occupational scheme, and having regard to the fact that the difference in treatment affecting Mr Newstead as regards the immediate enjoyment of all his net pay is the direct consequence of a difference in treatment in the occupational scheme in question with regard to this type of benefit, it must be concluded that the case before the Employment Appeal Tribunal falls within the exception to the application of the principle of equal treatment provided for in Article 1 (2) of Directive 76/207.

- 29 The answer to the third question of the Employment Appeal Tribunal must therefore be that Council Directive 76/207 of 9 February 1986 does not prevent an employer from paying men and women the same gross salary but making a deduction of 1.5% of the gross salary of men only, even those who are unmarried, as a contribution to a widows' pension fund provided for under an occupational scheme which is a substitute for a statutory social security scheme.

The fourth question

- 30 Since this question was submitted only in the event that the Court should reply to the third question in the affirmative, it is not necessary to reply to it.

Costs

- 31 The costs incurred by the United Kingdom and by the Commission, 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 proceedings pending before the Employment Appeal Tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Employment Appeal Tribunal by an order of 11 June 1985, hereby rules:

- (1) Article 119 of the EEC Treaty, read together with Council Directive 75/117 of 10 February 1975, does not prevent an employer from paying men and women the same gross salary but making a deduction of 1.5% of the gross salary of men only, even those who are unmarried, as a contribution to a widows' pension fund provided for under an occupational scheme which is a substitute for a statutory social security scheme.
- (2) Council Directive 76/207 of 9 February 1976 does not prevent an employer from paying men and women the same gross salary but making a deduction of 1.5% of the gross salary of men only, even those who are unmarried, as a contribution to a widows' pension fund provided for under an occupational scheme which is a substitute for a statutory social security scheme.

Bosco Due Moitinho de Almeida Rodríguez Iglesias Koopmans

Everling Bahlmann Galmot Kakouris Joliet Schockweiler

Delivered in open court in Luxembourg on 3 December 1987.

For the President A. J. Mackenzie Stuart

P. Heim

G. Bosco

Registrar

Acting as President