COMMISSION
OF THE
EUROPEAN COMMUNITIES

Brussels, 21 December 1988

JUR(88) D/7572

TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

OBSERVATIONS

submitted pursuant to article 20, second paragraph, of the Protocol on the Statute of the Court of Justice of the European Economic Community, by the Commission of the European Communities, represented by Mrs Karen BANKS and Mr Julian CURRALL, members of its Legal Service, acting as agents, having an address for service with Mr Georgios KREMLIS, also a member of its Legal Service, Centre Wagner, Kirchberg, Luxembourg

in Case 262/88

Douglas Harvey BARBER - Appellant -

and

GUARDIAN ROYAL EXCHANGE ASSURANCE GROUP - Respondents -

in which the Court of Appeal, London, has referred preliminary questions on the interpretation of article 119 of the Treaty establishing the European Economic Community.

The Commission has the honour to make the following observations :

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I. FACTS

1. The appellant, Mr Barber, was born on 29 September 1928.

   He entered the employment of the Car and General Insurance Corporation on 14 June 1948. That company was later taken over by the respondents ("The Guardian").

2. Mr Barber had been a member of Car and General's non-contributory occupational pension scheme from 11 March 1953. When the Guardian took over Car and General, he became a member of the Guardian's scheme.

   The latter is stated by the Court of Appeal to be a non-contributory private occupational pension scheme (i.e. it is financed entirely by the employer).

   Under this scheme, the normal pensionable date for those who had formally belonged to Car and General's scheme and who were in service on 1 April 1970, was the 62nd birthday, for men, and the 57th birthday for women[1].

3. The Guardian issued to all its employees a Staff Handbook setting out their terms of employment.

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1 This difference reflected the five-year age difference for the basic State pension, which is available to women at 60, to men only at 65 : at the material time this was provided by Social Security Act 1975, s. 27(1) and Schedule 20. Although the ages themselves are different from those fixed by that Act, it appears that this is a peculiarity which concerns only some categories of Guardian staff, including Mr Barber. For other categories, the Guardian scheme was identical to the state scheme, not only as to the 5 year age difference as between men and women, but also as to the actual ages : see page 14 of the Employment Appeal Tribunal's judgment. The ages of 62 and 57 applicable to former Car and General employees do not seem to have been regarded as ages for compulsory retirement, since the Severance Terms (paragraph 3 below) envisage the possibility of men still being employed up to age 65 and women to age 60. That no doubt reflects the fact that, as the law then stood, statutory protection against dismissal ceased at 65 for a man and 60 for a woman, in the absence of a "normal retirement age" : Employment Protection (Consolidation) Act 1978 s. 64(1), subsequently modified by the Sex Discrimination Act 1986, s. 3(1).

This Handbook referred to (and thus apparently incorporated into the terms of the contract[2]) a separate document called "Guardian Royal Exchange Guide to Severance Terms" ("the Severance Terms"). This document set out the special conditions applicable to severance, early retirement and redundancy.

The Severance Terms applied to all staff made compulsorily redundant, provided they were not over the age of 65 (men) or 60 (women) - see f.n. (1) above.

Paragraph 3.1 stated that in a case of compulsory redundancy members of the Guardian Pension Fund, such as Mr Barber, would receive immediate pensions from the Fund if they were within seven years of their normal retirement date - which in the case of former Car and General employees, meant the age of 55 (men) or 50 (women). Other staff would instead receive cash benefits under the Severance terms, and the right to a deferred pension payable at the normal age applicable to them. (All staff, whether or not eligible for an immediate pension, also received a sum equal to the statutory redundancy payment).

At the same time, however, the General rules of the Guardian Pension scheme provided that an employee had a right to an immediate pension "on being retired" by the employer during the 10 years preceding the normal retirement date - which in Mr Barber's case, meant from age 52[3].

4. In 1979, the Guardian decided to reorganise some of its activities. That meant closing some offices, including Mr Barber's. Mr Barber was offered other jobs with the Guardian but declined them. The Guardian therefore dismissed him, on the ground of redundancy.

5. His dismissal took effect on 31 December 1980. He was paid compensation by the Guardian, made up as follows :

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2 Order for Reference, point 6.
3 Rules 3(a)(ii) an 32; see the judgment of the Employment Appeal Tribunal, p. 14.

(1) cash benefits under the Severance Terms

(2) an amount equal to the statutory redundancy payment

(3) a deferred pension under the Guardian's scheme, payable from the day after his 62nd birthday, that is to say 30 September 1990.

The total of (1) and (2) was £ 18,597.00.

6. The Court of Appeal states[4] that if Mr Barber had been a woman aged 52, he would have received :

(1) the sum equal to the statutory redundancy payment

(2) an immediate pension from the Guardian's scheme.

The Court of Appeal has stated that the value of this latter form of compensation is greater than that of the compensation which Mr Barber actually received (f.n. 4). The Employment Appeal Tribunal stated the matter in very clear terms :

> "In our judgment, this is a case in which different compensation for severance is being offered to men and women of the same age, women between the ages of 50 and 55 receiving more compensation for severance than the comparable man ... In this case, the company by offering women between the age of 50 and 55 a retirement pension plus a cash payment and Mr Barber only a cash payment (albeit of a greater amount) has discriminated between men and women of the same age not simply in relation to retirement benefits but also in relation to severance compensation ..."[5].

It should be noted that there was in fact one woman made redundant with Mr Barber, who was aged 50 at the time, and so received an immediate pension[6]. The comparison is not simply hypothetical.

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4 Order for Reference, point 16 - it seems that the parties agreed that the aggregate value of an immediate pension was greater than that of the cash payment.
5 judgment of the Employment Appeal Tribunal, p. 18.
6 Order for reference, point 11.

7. Mr Barber complained to an Industrial Tribunal. He alleged discrimination contrary to sections 1(i)(a) and 6(2)(a) and (b) of the Sex Discrimination Act 1975, and infringement of the principle of equal pay in article 119 EEC and Council directive 75/117/EEC[7], and of the principle of equal treatment in Council directive 76/207/EEC[8].

   The Tribunal dismissed his claim. So did the Employment Appeal Tribunal, which heard the same arguments on appeal.

   Mr Barber argued that his claim arose, not because he had retired, but because he had been dismissed, and female employees of the same age had received an immediate pension as part of their compensation. He also submitted that financial compensation for redundancy was pay, for the purposes of the principle of equal pay, rather than a matter of equal treatment.

8. The Guardian argued that the claim to an immediate pension was a "provision in relation to retirement", so that Mr Barber's claim was defeated by section 6(4) of the Sex Discrimination Act 1975 ("SDA 1975") - see paragraph 22.

   As to the claim based upon equal pay, the matter was covered by Case 19/81 Burton v British Railways Board[9].

9. The Employment Appeal Tribunal held that there was discrimination, but that it was lawful in national law, being covered by the exception for "provision in relation to death or retirement" in section 6(4) SDA 1975.

   So far as equal pay was concerned, it followed from the Burton case that this was a question of access to pension benefits, which fell not under equal pay, but under equal treatment.

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7 O.J. L 45/19, 19.2.1975.
8 O.J. L 39/40, 14.2.1976.
9 [1982] ECR 555.

The Employment Appeal Tribunal further held that directive 76/207 was not directly applicable in the United Kingdom; moreover, it could not be used as a guide to the interpretation of section 6(4) SDA 1975, "because it was unclear what the combined effect of the decision in Burton and the Equal Treatment Directive was in the context of a claim concerned with a private occupational scheme"[10].

It will be seen that the Employment Appeal Tribunal noted the apparent conflict between the Severance Terms and the General Scheme, referred to in the last two sub-paragraphs of paragraph 3 above : Mr Barber would be entitled to an immediate pension under the latter, if he could be considered to have "retired"; however, if he had been made compulsorily redundant, for the purposes of the Severance Terms, an immediate pension was payable only 7 and not 10 years before normal retirement age, so that he would not be eligible[11]. The industrial tribunal had held that this was a case of compulsory redundancy, not early retirement, and the Employment Appeal Tribunal did not see fit to reopen that conclusion.

10. Mr Barber appealed to the Court of Appeal, which has referred the following questions for a preliminary ruling by the Court :

> "(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") ?
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> "(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

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10 Order for Reference, point 21.
11 Judgment of the Employment Appeal Tribunal, pp. 15-16.

(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 satified 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 sha was made redundant within seven years of her normal pension date under the pension scheme ?"

II. THE PRELIMINARY QUESTIONS

11. In Questions 1 and 3 the Court of Appeal has particularly emphasised that Mr Barber's redundancy was compulsory.

12. Question 3 is in two parts.

Part (a) concerns whether not paying an immediate occupational pension to one sex only is ipso facto unlawfully discriminatory. Part (b) is based on the hypothesis that it has been possible actually to compare the respective compensation given to a man and a woman of the same age, and to conclude that, when the former has received a lump sum and a deferred pension, he has received less than the latter who received a (smaller) lump sum and an immediate pension. It will be remembered that the Court of Appeal has found as a fact that the total compensation offered to women of 52 was of greater value than that offered to Mr Barber[12].

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12 Order for Reference, point 16.

13. Question 5 is the only question which introduces the problem of different pensionable ages for men and women. It will be remembered that the Guardian's pension scheme laid down different ages for men (62) and women (57) for normal retirement (i.e. at which a pension could be claimed - see paragraph 2 and f.n. (1) above); these differences were reflected in the Severance Terms, as explained at point 3 : all employees made compulsorily redundant within seven years of their normal pensionable age were entitled to an immediate pension : women were therefore thus entitled at 50, men only at 55.

The Court of Appeal wants to know if the application of article 119 and directive 75/117 is excluded because the difference in benefits for men and women aged 52 reflects a difference in pensionable age, carried over into the Severance Terms.

14. It will be noticed that the present case was heard by the Employment Appeal Tribunal and the Court of Appeal together with Roberts v Tate and Lyle Industries plc, which also gave rise to preliminary questions to the Court, as Case 151/84. That case was however referred to the Court separately in 1984, and the Court gave its judgment on 26 February 1986[13].

The Roberts case, it will be remembered, also concerned compensation for compulsory redundancy, the significant difference being that the alleged discrimination concerned the fixing of a single age for access to an immediate pension, namely 55. Miss Roberts complained that as a result, a man could obtain an immediate pension 10 years before his normal date of retirement under the employer's Scheme, but a woman only 5 years early; she was aged 53 at the time, and claimed that equal treatment with men meant that she too should have access to an immediate pension 10 years early.

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13 |1986| ECR 703.

III. THE RELEVANT PROVISIONS OF NATIONAL LAW AND COMMUNITY LAW

(a) Community law

15. Article 119 of the EEC Treaty certainly does not need to be set out in full, though it may be helpful to recall that the notion of "pay" defined in the second paragraph includes, as well as basic pay, "any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer".

    The case-law interpreting this provision is examined below[14].

16. Directive 75/117/EEC[15] does not appear to require consideration independently of article 119, since the problem of interpretation of that article in the present case concerns the definition of pay and not the matters on which the directive "facilitates the practical application of the principle of equal pay outlined in article 119.."[16], such as job classification systems and recourse to law.

17. Directive 76/207[17] provides in article 5(1) 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".

18. That directive does not cover questions of social security which are to be the subject of other provisions to be adopted by the Council : article 1(2).

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14 paragraphs 31 ff.
15 f.n. 7 above.
16 Case 96/80 Jenkins v Kingsgate |1981| ECR 911, 927, ground 22
17 f.n. 8 above.

19. Those other provisions are contained in two further directives.

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[18] applies to statutory social security, and refers questions of occupational social security to future provisions - article 3(3).

Those future provisions are contained in 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[19].

Directive 79/7 was to be implemented by 22 December 1984 - article 8(1). The date for implementing directive 86/378 has not yet arrived : 30 July 1989 - article 12(1).

Both these directives contain exceptions allowing the maintenance of different pensionable ages for men and women.

Directive 79/7 states in article 7(1) :

> "This directive shall 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"

Directive 86/378 contains a corresponding provision in article 9(1) :

> "Member States may defer compulsory application of the principle of equal treatment with regard to :
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> a) determination of pensionable age for the purposes of granting old-age or retirement pensions and the possible implications for other benefits :
> - either until the date on which such equality is achieved in statutory schemes,
> - or, at the latest until such equality is required by a directive."

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18 O.J. L 6/24, 10.1.1979.
19 O.J. L 225/40, 12.8.1986; corrigendum to article 2(2), O.J. L 283/27, 4.10.1986.

It is also necessary to cite certain other provisions of directive 86/378; its scope rationae materiae is defined in article 4. Among the occupational schemes covered are those which provide protection against the risk of "old age, including early retirement".

Article 5 is the general prohibition on discrimination (cp. article 4(1) of directive 79/7). It applies in particular to :

> "- the scope of the schemes and the conditions of access to them;
> "- the obligation to contribute and the calculation of contributions;
> "- the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants and the conditions governing the duration and retention of entitlement to benefits."

Article 6(1) identifies a number of particularly common forms of discrimination in occupational social security schemes, which are to be prohibited, without prejudice to the generality of article 5. Among these specific instances are conditions

> "(a) determining the persons who may participate in an occupational scheme ...
> "(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes
> "(f) fixing different retirement ages", subject to the special exception in article 9(1).

20. Finally, on 27 October 1987, the Commission presented to the Council a proposal for a futher directive completing the implementation of the principle of equal treatment for men and women in statutory and occupational social security schemes[20]. The object is to remove the exceptions to directives 79/7 and 86/378, including those which allow different pensionable ages for men and women.

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20 COM(87) 494 final, 23.10.1987, O.J. C 309/10, 19.11.1987.

(b) national law

21. The Order for Reference refers only to the Sex Discrimination Act 1975 ("SDA 1975") and not to the Equal Pay Act 1970, although the latter is still in force, as modified.

22. The relevant provisions of the "SDA 1975" were as follows at the material time[21] :

"Discrimination employers

6.Discrimination against applicants and employees

(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman
(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
(b) in the terms on which he offers her that employment, or
(c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her
(a) in the way he affords her access to opportunities for promotion, tranfer of training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
(b) by dismissing her, or subjecting her to any other detriment.

(4) Subsections (1)(b) and (2) do not apply to provision in relation to death of retirement"

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21 The Act has since been amended, to take account of the Court's judgments in Cases 165/82 Commission v United Kingdom [1983] ECR 3431 and 152/84 Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) [1986] ECR 723 - Sex Discrimination Act 1986, esp. s.2. It appears that the provisions in the Equal Pay Act 1970 which correspond to s. 6(4) SDA 1975 have not been amended. This does not cause a problem in the present case, but may need to be looked into in the light of the Court's recent case-law.

It will be noted that both the Employment Appeal Tribunal and the Court of Appeal itself were bound by earlier Court of Appeal decisions[22] on the interpretation of section 6(4) SDA 1975. That section had to be interpreted widely so as to cover "any provision about death or retirement" and therefore covered different ages of dismissal for men and women, and different ages for men and women for access to severance benefits[23].

IV. ANALYSIS

23. In order to answer the questions referred, the following issues must be considered :

(a) is the age difference lawful in a case of compensation for compulsory redundancy ?

(b) if not, is it because the matter is covered by article 119, or by article 5(1) of directive 76/207 ?

The Guardian is a private employer. It will be bound by article 119 EEC in national proceedings[24] but not by directive 76/207[25]. Issue (b) is therefore crucial for the decision in the Court of Appeal.

24. The Commission proposes to take as a starting-point the judgment in Case 19/81 Burton[26] on which the Employment Appeal Tribunal relied, when it gave judgment in the present case, on 30 March 1983.

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22 The Court of Appeal remains bound by its own previous decisions : Young v Bristol Aeroplane Co |1944| 1 KB 718,729 - recently affirmed in another case about s. 6(4) of the SDA 1975, Duke v Reliance Systems |1987| 2 WLR 52.

23 In this case, the previous decisions were in Roberts v Cleveland Health Authority (dismissal) and MacGregor Ltd v Turton (severance), both |1979| ICR 559 (see the Employment Appeal Tribunal's judgment at p. 8).

24 Case 43/75 Defrenne v Sabena (n° 2) |1976| ECR 445.

25 Case 152/84 Marshall, f.n. 21 above, ground 48.

26 f.n. 13 above.

The factual situation in Burton was similar to that in the present case, save that in Burton, the problem was access to voluntary redundancy arrangements, whereas here the redundancy was a fait accompli and the issue is the amount and nature of compensation for compulsory redundancy.

It is necessary to see whether what has happened in Community law since 30 March 1983, implies that a different approach must be taken in this case to that in Burton.

25. The events which appear relevant are the following :

(1) on 26 February 1986, the Court gave judgment in Case 151/84 Roberts[27]; the judgment suggests that in cases of compulsory redundancy, article 5(1) of directive 76/207 applies, but not the exception concerning different retirement ages, in article 7(1)(a) of directive 79/7 (or its counterpart in directive 86/378).

(2) the same day, the Court ruled on the preliminary questions referred in Case 152/84 Marshall[28]. It held that a woman could rely on article 5(1) of directive 76/207 before national Courts, as against a State employer, to contest being dismissed at an earlier age than a man, by reason of having reached female pensionable age. Directives do not of themselves, however, impose obligations on private employers before national courts.

(3) on 13 May 1986, the Court gave judgment in Case 170/84 Bilka-Kaufhaus v Weber[29]. It held that discrimination through exclusion from occupational benefits (including pensions) financed exclusively by the employer, was covered by article 119 EEC.

(4) on 24 July 1986, the Council adopted directive 86/378 (see paragraph 19).

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27 f.n. 13 above.
28 f.n. 21 above.
29 [1986] ECR 1607.

(5) on 3 December 1987, the Court gave judgment in Case 192/85 Newstead v Department of Transport[30] in which it held that an obligation upon an employee to contribute to a survivors' benefit under an occupational scheme did not fall within article 119 EEC, but instead was a matter for the directives, falling at present within the exceptions in those directives concerning survivor's pensions.

(a) Can the difference in retirement age lawfully be taken into account in a case of compulsory redundancy ?

26. In Burton, the age difference was held to be lawful in relation to voluntary redundancy.

However, in the Commission's view Case 151/84 Roberts suggests that Burton should no longer be followed; alternatively it can be distinguished, as relating only to access to voluntary redundancy with compensation.

The facts of Roberts are summarised at paragraph 14 above. Like the present case, it concerned compensation upon compulsory redundancy. Unlike the present case, there was a single age-limit for men and women for access to the compensation.

Ground 30 of the judgment is as follows :

> "The Court observes in the first place that the question of interpretation which has been referred to it does not concern the conditions for the grant of the normal old-age or retirement pension but the termination of employment in connection with a mass redundancy caused by the closure of part of an undertaking's plant. The question therefore concerns the conditions governing dismissal and falls to be considered under Directive n° 76/207."

At grounds 35 and 36, the Court said :

> 35 "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 n° 76/207, which excludes social security matters from the scope of that directive,

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30 not yet reported.

> must be interpreted strictly. Consequently, the exception to the prohibition of discrimination on grounds of sex provided for in article 7(1)(a) of Directive n° 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.
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> 36 "In that respect it must be emphasized that, whereas the exception contained in Article 7 of Directive n° 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 n° 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"

27. The interest of this formulation, as the Commission understands it, is this : it would have been possible to say, in Roberts, simply that there was no discrimination on the facts, since a single age had been fixed for the payment of an immediate occupational pension. However, grounds 35 and 36 suggest instead a statement of principle, namely that article 7(1)(a) of directive 79/7 is limited to normal retirement and does not apply in a case of compulsory redundancy, which falls under article 5(1) of directive 76/207 (dismissal)[31].

28. If the Commission has correctly understood the judgment in Roberts, directive 76/207 requires the Member States to ensure that, in a case of redundancy before normal pensionable age (at least in a case of compulsory redundancy) there is no discrimination on ground of sex between employees of the same age, in the terms on which they are offered compensation, even if the compensation consists of or includes immediate payment of a pension from a pension scheme in which normal retirement is at different ages for men and women.

29. The same conclusion would follow if the matter were covered by article 119, to which no exceptions are possible except in cases of indirect discrimination[32] which is not in issue here, since

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31 paragraph 17 above.
32 Case 170/84 Bilka (objective justification), f.n. 29.

the national court has found that there is discrimination and is only concerned as to its lawfulness[33]; as has been pointed out, however, the consequences for the present case before the Court of Appeal are very different, according as the matter falls under directive 76/207 or article 119.

It is now necessary to turn to that issue.

(b) is the compensation in question covered by article 119 or directive 76/207 ?

30. Whether social security benefits, in particular pensions, are "pay", is the oldest question in the Court's case-law on sex equality[34].

It is also perhaps the most difficult.

It is noteworthy that of 10 requests for preliminary rulings from the United Kingdom, no fewer than 4 (including the present case) are the direct result of the existence of different retirement ages for men and women.

31. Over the years, the Court has had to consider various benefits payable to the employee by reason of his or her employment. The present state of the case law can in the Commission's view, be summarised as follows :

(1) social security schemes or benefits, in particular retirement pensions, are covered by article 119, unless they are the result of a legislative obligation "without any element of agreement within the undertaking" - Case 80/70 Defrenne n° 1, ground 7.

(2) "future consideration" is covered by article 119, provided that the employee receives it, albeit indirectly, in respect of his employment, from his employer - ibid. ground 6

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33 see paragraph 9 above.
34 Case 70/80 Defrenne (n° 1) [1971] ECR 445.

(3) the fact that a condition of employment - such as an age-limit - has financial consequences, does not of itself bring it within article 119 "which is based on the close connexion which exists between the nature of the services provided and the amount of remuneration" - Case 149/77 Defrenne n° 3, ground 21[35]

(4) employers' contributions to occupational pension schemes on behalf of the employee, are pay - Case 69/80 Worringham and Humphreys v Lloyds Bank, ground 17[36]

(5) redundancy payments themselves are covered by article 119 : this follows from the conclusion that employer's contributions are "pay" when they directly determine other benefits, including redundancy payments[37]

(6) other severance benefits, such as refunds of contributions, are pay[38]

(7) one must look to the benefits as a whole to see whether there is inequality on grounds of sex. It is not enough to look at, for example, net pay. Any inequality, thus detected, is covered by article 119[39]

(8) even voluntary benefits fall within article 119 if they are granted by the employer to the employee by reason of his or her employment - Case 12/81 Garland v British Rail Engineering, ground 10[40]

(9) access to pension benefits financed by the employer under voluntary redundancy schemes may nevertheless be made subject to different conditions of age for each sex, if that

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35 |1978| ECR 1365.
36 |1981| ECR 767; confirmed in Case 23/83 Liefting |1984| ECR 3225, albeit in respect of special statutory schemes, and in Case 192/85 Newstead (f.n. 30), ground 14.
37 Worringham, grounds 15 and 26.
38 ibid, grounds 25 and 26.
39 ibid, ground 25.
40 |1982| ECR 359, Garland also appears to confirm proposition (2), since the benefits in that case were conferred after the end of the employment relationship, as well as during it.

condition is linked to a difference in statutory pensionable age. Such a case does not concern the amount of benefit, but access to it, therefore falls not under article 119, but the directives - Case 19/81 Burton, ground 8[41]

(10) total exclusion from occupational benefits, including pensions is covered by article 119, at least where they are financed entirely by the employer - Case 170/84 Bilka[42]

(11) however, a requirement upon an employee to contribute to an occupational pension scheme, is not covered by article 119 - Case 192/85 Newstead[43]

32. So far as the directives are concerned, the Commission has already pointed out[44] that the decision in Roberts has either cast doubt upon the earlier ruling in Burton, or has introduced a distinction between voluntary and compulsory redundancy, different age conditions for compensation only being permissible in the former case.

However, in Roberts, the questions referred made no mention of article 119, and the judgment interprets only directives 76/207 and 79/7. The Advocate General expressly left aside the question "whether under article 119 of the Treaty a private pension is to be treated as deferred pay", and examined the directives on the assumption that it was lawful under them to have different pensionable ages in occupational schemes[45].

Taken on its own, Roberts might suggest that a case of compulsory redundancy such as the present was to be dealt with under directive 76/207. However, since the question of article 119 was left open, it is necessary to see whether the two subsequent cases, Bilka and Newstead are of assistance.

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41 f.n. 9
42 f.n. 29
43 f.n. 30
44 paragraphs 26-28;
45 |1986| ECR 703, 709

33. First of all, the Commission submits that Newstead does not govern the present case : it is authority for the proposition[46] that conditions requiring the employee to use his money in a certain way, namely to contribute to a survivor's pension, are not a matter of pay[47] - at least where, as in Newstead, the obligation to contribute does not represent any saving to the employer or any permanent loss to the employee (unlike this case).

However, the present case concerns severance benefits, including immediate pensions, financed entirely by the employer. There is no issue at all about contributions. The Commission submits that Newstead is not relevant to such a case.

34. In the Commission's view, one can already say that, on the basis of propositions (5) and (6) in paragraph 31, the compensation paid to Mr Barber and his colleagues, other than the immediate pension, is covered by article 119[48].

There remains the question of the immediate occupational pension. The Court of Appeal, in question 3(a) wants to know if not paying such a pension amounts to prohibited discrimination under article 119. In question 3(b) it is concerned to know if article 119 covers the case where one employee receives a higher lump sum, but a deferred pension, and another, a smaller lump sum but an immediate pension, and the former's compensation is of lower total value than the latter's.

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46 a proposition supported by the Commission in its observations.

47 it will be remembered that the facts available to the Court were that, if the male official remained unmarried, he always received his contributions back on leaving the service (or his personal representatives if he were to die, with compound interest in either case : accordingly, the employer never gained from the system nor was there a permanent loss to the employee, unlike the present case.

48 there is in fact United Kingdom authority that article 119 applies directly to redundancy payments, so that payments to a woman dismissed for redundancy cannot be reduced by reason of her working beyond her pensionable age, if no similar reduction is made in the redundancy pay offered to a man of the same age as her : Hammersmith etc. Health Authority v Cato |1987| IRLR 483, Employment Appeal Tribunal.

It is now necessary to look at the Bilka case.

The complaint in that case was exclusion from an occupational social security scheme financed entirely by the employer. The particular occasion of complaint was the employer's refusal to pay an occupational pension under that scheme.

It is true that the complaint did not concern different age limits for pensions since there was no such difference either in Bilka's scheme or in the statutory scheme applied in the Federal Republic of Germany. However, the United Kingdom intervened in the case - it was in fact the only Member State which did. It is likely that its motive was essentially to defend the existence of different age-limits in occupational pension schemes, which would be called into question if article 119 governed benefits under such schemes, and access to them : in any event the two authorities it relied upon, Cases 149/77, Defrenne (n° 3)[49] and 19/81 Burton[50], arose out of age differences. The United Kingdom urged upon the Court that the exclusion of part-time workers from the pension scheme was a question of access to benefits, Burton showing that article 119 did not apply.

The Court based itself instead[51] on the criteria set out in its judgment in Case 70/80 Defrenne (n° 1)[52]; application of those criteria showed that benefits under the scheme were covered by article 119[53]. The argument that the case concerned access to benefits, thus not article 119, is explicitly rejected in ground 31 and point (1) of the ruling :

> "... article 119 ... is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless ...".

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49 f.n. 35.
50 f.n. 9.
51 grounds 16 to 21.
52 f.n. 34.
53 ground 22.

35. This ruling appears to cast doubt on the continued validity of the distinction made in Burton between amount of benefit and access to benefit which determines (or determined ?) whether a question fell under article 119 or the directives. At that point it must also be doubtful whether the exceptions in directive 86/378[54] concerning benefits under occupational schemes (at least those financed entirely by the employer) are indeed valid, vis-à-vis article 119[55]. If Bilka indeed means that the distinction is no longer to the applied, the first question can be answered "yes", it is clear that article 119, would then cover the present case even if it were to be regarded as a problem of access to benefits. For here, just as in Bilka, none of the reasons given in Defrenne (n° 1) for excluding article 119 applies.

36. It is however possible, in the Commission's view, to treat the present case as being covered by article 119, but on a narrower basis, limited to cases of compensation for compulsory redundancy. Such an approach would take into account the following considerations :

(1) if the problem of "access" to benefit is still alive after Bilka, it should be confined to voluntary redundancy and retirement. Roberts shows that the exception allowing different pensionable ages cannot be invoked in a case of dismissal rather than normal retirement, where the directives apply, but in Roberts the Court was no asked about the possible application of article 119. "Access" to benefits is not in question when the employer has already taken the initiative of dismissing the employee for redundancy in which case some compensation must inevitably be paid; the only remaining question is "how much" - a question of benefit,

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54 paragraph

55 some commentators have already suggested this : see "Equality in Pension Schemes : the Redundant Directive ?", G. Keane, Law Society's Gazette, 25.2.1987, p. 565; D. Curtin : "Occupational Pension Schemes and Article 119 : Beyond the Fringe ?" |1987| CML Rev. 215, esp. at pp. 254-7; C. Nyssens, "Le principe d'égalité de traitement entre hommes et femmes dans les régimes professionnels de sécurité sociale" Chroniques de droit social 1988, n° 1, p. 1, esp. at pp. 4(point (i)), and 7-8.

which, according to Burton itself, ground 8 (let alone the other authorities cited in paragraph 31) is covered by article 119.

(2) the national court has already found it possible to determine that the compensation offered to Mr Barber is of less value than that offered to a woman of the same age who could obtain an immediate pension[56]. Such a question clearly comes under article 119[57].

(3) as the matters in (2) above show, the issue here is the form and amount of compensation for dismissal, not the circumstances in which it was decided to dismiss Mr Barber. The dismissal itself was not decided upon by reference to Mr Barber's age, or that of any of his colleagues[58]; that is an important distinction between the present case and Defrenne (n° 3)[59] and Marshall[60], in which the issue turned on different ages of dismissal, a matter held in the latter case to fall under article 5(1) of directive 76/207. Indeed, in Burton, the issue was in substance, the age at which Mr Burton could choose to have himself dismissed.

37. In his opinion in the Bilka case, the Advocate General[61] seems to suggest a distinction for the purposes of applying article 119, between when one can claim a benefit and whether one can claim it, the former question being covered by Burton, but not the latter.

The Commission does not understand the Court's judgment as reflecting any such distinction - in which case age-limits for occupational pensions are indeed covered by article 119. However, if this question were thought to have been left open by the judgment, it can be said that the "when/whether" approach would give the same results here as consideration n° 1 under paragraph

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56 paragraph 6
57 see paragraph 31, proposition (7), and Case 69/80 Worringham
58 some were under 26 when dismissed - see paragraph 11 of the Order for Reference. The United Kingdom case referred to in f.n. 48 seems to support this argument.
59 f.n. 35.
60 f.n. 21.
61 |1986| ECR 1603, 1613, point 7.

36 : in Burton, the problem was when the employee could apply for voluntary redundancy (it being for him to choose when). Here, the employer has already decided the "when" - Mr Barber was dismissed. All that remains is "whether" he can have compensation worth globally the same (in proportion to time served in the employment) as a woman also dismissed at the same age.

38. To summarise, in the Commission's submission, two approaches are possible in order to arrive at the answer to the Court of Appeal's questions :

(1) a broad approach of considering that Bilka has brought access to occupational social security, as well as occupational social security benefits themselves, within article 119.

(2) a narrower approach which leads to a ruling that amounts of compensation for compulsory redundancy are covered by article 119, so that the same compensation must be paid to men and women in the same situation, even if the compensation includes immediate payments from an occupational scheme in which normal retirement ages are different for men and women.

The Court of Appeal's questions are expressly linked to the particular facts of the case. The Commission's suggested replies (below) keep closely to the wording of the questions. This does not mean that the Commission is expressing a preference for the narrower approach. Indeed, it would respectfully suggest that, if the Court accepts that article 119 does indeed apply to allow Mr Barber to claim benefit equal in value to an immediate pension payable as from his dismissal, it would be better to formulate the grounds of the judgment in terms of the wide approach (see paragraphs 40 and 44).

39. Whichever approach is preferred, the Commission submits that there are important reasons for treating the present case as one covered by article 119 :

(1) it seems to the Commission that there can be little doubt that severance pay (or indeed statutory redundancy pay, the amount of which depends on contractual conditions such as length of

service and level of pay[62]) is covered by article 119. To hold that other elements of compensation were covered not by article 119 but by the directives (the effect of which in national courts is of course much more restricted), would introduce considerable confusion and uncertainty.

(2) such a view could also lead to arbitrary results, if there were any doubt about the effectiveness of the national rules implementing the directives : an employer could unilaterally alter or exclude the effect of Community law by modifying the type of compensation offered.

(3) likewise, article 119 should not be limited in such a way that employers would be encouraged to dismiss men of a certain age rather than women, on the grounds that it was cheaper to do so.

40. Of the two approaches, the Commission submits that the wider is now to be preferred. This is for the following reasons :

(a) the wide approach already appears to be a part of the case-law : the Court has now specifically held, in Bilka, what has been implicit ever since Defrenne (n° 1), namely that occupational social security benefits (and access to them, as the Commission understands it) are covered by article 119. To take the narrower approach in the present case even if it does not of itself case doubt on Bilka; however, a judgment which did not expressly confirm Bilka might be understood in this difficult and contentious area of the law, as a "retreat" from that judgment. Even if such a view were misconceived, it might only be possible to make that clear after yet further cases.

(b) not continuing with the wide approach taken in Bilka could be understood as meaning that directive 86/378, which was adopted 2 1/2 months after that judgment, had in some way modified article 119. This is clearly an impossibility[63] quite apart from not being the objective expressed in the motivation of the directive.

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62 see f.n. 50 above.

63 the problem is familiar in this area of the law : in Case 43/75 Defrenne (n° 2) |1976| ECR 455, it was suggested that the existence of directive 75/117 demonstrated that article 119 was not directly effective - see the United Kingdom's arguments at |1976| ECR 455, 459(a), 460(c) and 463 and those of Ireland, ibid, 461(c) and 463 : the Court rejected this approach - see especially grounds 60-64 of the judgment.

(c) Considerations of Legal Certainty

41. It should not be thought that there is anything revolutionary in such an approach : the Commission itself has for years consistently argued that occupational pension benefits are covered by article 119[64].

The Commission recognises that such an approach might be thought to cast doubt upon directive 86/378, as to its usefulness in relation to benefits under occupational schemes, and as to the validity of certain exceptions. However, that problem has existed, at least potentially, since 1971, because of the judgment in Defrenne (n° 1), twelve years before the Commission made the proposal which finally became directive 86/378[65] (and five years before the original proposal for a directive on all forms of social security, both occupational and statutory[66]). In 1983, the Commission considered that it was committed to make the proposal, which was expressly envisaged by article 3(3) of directive 79/7; moreover, as matters stood in 1983, there were strong reasons of law for making the proposal, since :

(a) there were some problems for which the criteria in article 119 might not suffice to provide an answer (e.g. actuarial calculations, mentioned in articles 6(1)(h) and (i) and 10(1) of the 1983 proposal) - see the second "considérant" of the proposal[67]

(b) some matters of occupational social security appeared to be outside the notion of "pay" - this was particularly the case for employees' contributions to occupational schemes and the conditions under which they are able or obliged to contribute[68]

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64 e.g. in Case 69/80 Worringham, in Case 170/84 Bilka and in its oral submissions at the resumed hearing of 2 April 1987 in Case 192/85 Newstead.

65 COM(83) 217 final, 29.4.1983, O.J. C 134/7, 21.5.1983.

66 COM(76) 650 final, 10.1.1977, O.J. C 34/3, 11.2.1977.

67 see article by C. Nyssens, referred to in f.n. (55) and further in this paragraph.

68 the correctness of doubts on this point was confirmed by Case 192/85 Newstead, at least in relation to cases in which the employee's contribution did not in fact represent a saving for

(c) at the time when the Commission made the 1983 proposal the most recent relevant judgment of the Court was that in Burton, which excluded article 119 in questions of access to benefits, at which point virtually all the provisions in article 6(1) of the 1983 proposal were clearly needed.

But in truth, there is no reason to see the existence of the directive - or of the proposal which became the directive - as being inconsistent with a wide application of article 119 in this field. The second "considérant" of the 1983 proposal - which survived into the final version, with modifications - is not so much the expression of a doubt as to the application of article 119 to occupational social security, or as to its effect in such matters before national courts, as the recognition that it might be necessary, for a question of technical complexity, in which there are wide variations of practice between individual schemes, and between Member States, to "facilitate the practical application" of article 119 in an area to which it was considered already to apply. Such an approach had already been taken by the Court, in relation to directive 75/117, in Cases 43/75 Defrenne (n° 2)[69] and 96/80 Jenkins v Kingsgate[70], to explain the need for a directive which nevertheless by definition could not affect a provision of the Treaty.

This is confirmed by two important elements in the directive :

- the use of article 100 as one of the legal bases
- the scope and terms of article 4(b)[71].

Concerning the legal basis, the presence of article 235 is due, it would seem, to the fact that the self-employed are also covered : see article 2(1). The remainder of the directive can be considered to be based on article 100. The use of this basis must be taken to mean that the Council accepted that, at least in

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the employer, or a permanent loss to the employee.

69 f.n. 63.

70 [1981] ECR 911.

71 see Curtin, op. cit. f.n. (55), at p. 255.

relation to benefits, the new directive had the same scope as article 119 (it will be remembered that article 100 is the sole basis of directive 75/117).

Article 4(b) is in turn the confirmation of this deduction from the legal basis. This provision extends the scope of the directive beyond protection against the risks mentioned in 4(a) (which are those covered by directive 79/7, as to statutory social security), to include

> "occupational schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits are accorded to employed persons and thus constitute a consideration paid by the employer to the worker by reason of the latter's employment."

This provision suggests that these matters were thought to fall within article 119 already, but that further details were necessary to ensure the practical application of that article to them - such as recourse to law, and non-victimisation (art. 10 and 11, which reproduce the corresponding provisions of directives 75/117 and 76/207).

42. The negotiations continued on the basis set out above until 13 May 1986, 2 1/2 months before the directive was formally adopted (though only 2 1/2 weeks before consensus was reached in the Council on 5 June). The Commission services did indeed consider whether as a result of the judgment in Bilka, given on that date, the proposal should not be withdrawn or modified. In the event, the Commission preferred not to reopen the issue at such a late stage in the negotiation, on the basis of what would have to have been a very hasty and possibly incorrect interpretation of the judgment in Bilka. Instead, it maintained the proposal, but specifically warned the Member States' delegations in the Council, firstly that it continued to doubt the validity of the exception in articles 6(1)(i) and 9(c) (in favour of different actuarial calculation factors affecting contributions) and secondly, that the judgment in Bilka had implications for the directive, since

the case law on article 119 had apparently overtaken the legislator[72], so far as occupational social security benefits were concerned.

43. Clearly, the true interpretation of article 119 is a matter for the Court alone, under the Treaties. The fact that the Commission had proposed a directive, and that the Council has since adopted it, cannot determine the interpretation of the Treaty : indeed, the Court did not find it necessary to consider that argument at all, when the United Kingdom raised it in Bilka. It presented no obstacle to the ruling in that case[73]. For the reasons explained in paragraph 41, the Commission does not think that there is in truth any contradiction between a wide application of article 119 and the existence of the directive. However, if (quood non) expectations have reasonably arisen concerning the scope of article 119, because of the legislative history, the Commission respectfully suggests that the solution is not to interpret that article in conformity with these expectations, but to consider the possibility of limiting the effect of the judgment to existing claims and claims in respect of facts arising after the judgment.

Indeed, when an apparent conflict arose between the correct interpretation of article 119, and the previous behaviour of the legislative institutions, in Case 43/75 Defrenne (n° 2)[74], the Court solved it by limiting the effect in time of its judgment . In view of the matters set out in paragraph 41, the Commission does not consider that such a limitation is justified in the present case. Nevertheless, such an approach is preferable to a limitation of the scope which article 119 was interpreted as having, more than 17 years ago, by reason of legislative activity by the institutions which subsequently proves to have been in part either unnecessary or misconceived.

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72 the relevant declarations are recorded in the minutes of the Council and can be made available upon request.

73 as to the similar problem in Case 43/75 Defrenne (n° 2), see f.n. 63.

74 A more recent example is to be found in Case 309/85 Barra, concerning the effect for the past of the Court's interpretation of articles 7 and 128 EEC as applied to discriminatory fees for university courses (judgment 2.2.1988, not yet published).

Consequences

44. Choosing the narrow approach in this case by reasoning in terms of its particular facts (see paragraph 40) would at least put the following propositions beyond doubt :

(a) severance pay is covered by article 119; this would necessarily extend to statutory redundancy compensation for the reasons given in paragraph 39(1).

(b) the exception in favour of different pensionable ages only concerns normal retirement so that compensation for redundancy is covered by article 119, even if the question is whether an immediate occupational pension is payable (unless, as in Newstead, it were shown that not paying such a pension immediately did not in fact cause any permanent loss to the employee - which is not the case here - see f.n. 2).

Such an approach would not of itself cast doubt on the judgment in Bilka - or so it seems to the Commission. However, it would in a sense amount to a missed opportunity, since this is the first case after the adoption of directive 86/378 which actually does concern the scope of article 119 in relation to occupational benefits[75].

45. In the Commission's view, the wider approach is essentially a matter of expressly confirming the line of authority extending from Case 80/70 Defrenne (n° 1) via Case 69/80 Worringham to Bilka. The following consequences appear to follow already from that line of authority, if the Commission has correctly understood it :

(a) benefits under occupational social security schemes are directly governed by article 119 (alternatively, that is true only of occupational benefits financed exclusively by the employer; those were the facts on which Bilka was based).

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75 for the reasons given at paragraph 33 above, Newstead, although indeed subsequent to the directive, is of no assistance, since the issue did not concern pay at all.

(b) access to such benefits likewise falls under that article.

(c) directive 86/378 appears to have an independent role in questions of employees' contributions (at least where - as in Newstead - they do not represent a saving to the employer) and possibly also in relation to any technical issues not readily solvable by the criteria of equal work and equal pay. (It might be, given what is said at the end of (a) above, that all questions concerning contributory schemes, come under the directives, if Bilka is only an authority in relation to benefits wholly financed by the employer).

There is doubt as to the exceptions in the directive, in fields (a) and (b).

46. This latter point is, obviously, of great importance. The Commission would emphasise that this doubt seems to exist already. Choosing the narrow approach in the present case would not add to the doubt, but it would continue to exist. In the Commission's view, it is therefore important to know :

(a) whether Bilka is confined to benefits financed by the employer alone, or whether it applies to all benefits under all occupational schemes.

(b) whether Bilka is a rule only about total exclusion from benefits, as opposed to a rule about when they can be paid (see paragraph 37).

Effect of Article 119 in the present case

47. In the Commission's view, there is no need to consider whether directive 75/117 has any independent role to play in this case.[76] Article 119 itself applies.

The national courts have already found themselves able to compare Mr Barber's situation with that of a woman of the same age. It is admitted that his compensation is of lower value, amounting to a

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76 see paragraph 16.

permanent loss to him. In such a case it is clear that the criteria of equal work and equal pay have been sufficient to allow the national courts to make the comparison necessary to apply article 119. There is therefore no obstacle in the present case to the direct effect of that article as against the present respondent, at least on the hypothesis referred to in Question 3(b).

Conclusions

48. The Commission therefore respectfully suggests that the questions referred by the Court of Appeal be answered as follows :

(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, all those benefits are "pay" within the meaning of article 119 of the EEC Treaty.

(2) It is not 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) The principle of equal pay referred to in Article 119 and the Equal Pay Directive is infringed in the circumstances of the present case if either :

(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 (unless it can be shown that this arrangement involves no permanent loss to the employee); 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) Article 119 is of direct effect in the circumstances of this case.

(5) It is not 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. Differences in normal pension age cannot be taken into account in the circumstances of the present case.

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CORRIGENDUM

to the Commission's Written Observations of 21.12.1988

In the English version only, the following corrections should be noted :

1. Paragraph 22
   In the quotation from the Sex Discrimination Act 1975, the heading should read : "discrimination by employers".

2. Paragraph 35
   The third sentence should read : "If Bilka indeed means that the distinction in no longer to be applied, the first question can be answered "yes"; it is clear that article 119 would then cover ..."

   Footnote 54, attached to that paragraph, should refer to paragraph 19.

3. Footnote 61 : for "1603" read "1607".

4. Footnote 62 : for "50" read "48".

5. Paragraph 40(a)
   In the sixth line, the words "even if it" should be deleted.

6. Footnote 75 : the reference is to Case 24/86 Blaizot.

7. Paragraph 44(b)
   The first two lines should read "the exception ... only concerns normal retirement (and possibly voluntary redundancy) so that compensation for redundancy (at least, for compulsory redundancy) is covered by article 119, ..."

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