OPINION OF ADVOCATE GENERAL ALBER

delivered on 13 December 2001 [1]

I — Introduction

1. This reference for a preliminary ruling concerns the interpretation of the term 'old-age benefits' within the meaning of Article 3(3) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. [2] If the disputed benefits claimed by the applicant are not 'old-age benefits' but are dependent on dismissal, the question arises whether they constitute obligations of the employer within the meaning of Article 3(2), and are thus to be paid by the transferee in the event of a transfer of the undertaking, which would not be the case if they were old-age benefits. A preliminary issue is whether this directive is applicable in the case of the privatisation of public institutions.

1 — Original language: German.
2 — OJ 1977 L 61, p. 26.

II — Legal background

(1) *Provisions of Community law*

2. Directive 77/187

Article 1

'1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.'

Article 3

'1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the provision that it shall not be less than one year.

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

...'

(2) *Provisions of national law*

3. Directive 77/187 was implemented in national law in the United Kingdom by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (hereinafter 'TUPE').

4. Regulations 5, 6 and 7 of the TUPE provide on the relevant points:

'5. Effect of relevant transfer on contracts of employment etc.

(1) ... a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) above, ... on completion of a relevant transfer

— all the transferor's rights, powers, duties and liabilities under or in connection with such a contract shall be transferred by virtue of this regulation to the transferee; and

— anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee ...

6. Effect of relevant transfer on collective agreements

Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by Regulation 5(1) above, then:

(a) ... that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application as aforesaid, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee ...

7. Exclusion of occupational pension schemes

(1) Regulation 5 and 6 above shall not apply:

(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the "Social

Security Pensions Act 1975" or the "Social Security Pensions (Northern Ireland) Order 1975"; or

(b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

(2) For the purposes of paragraph (1) above any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall be treated as not being part of the scheme.'

(3) *National provisions on collective agreements*

5. The General Whitley Council conditions of service must be taken into account in addition to the statutory provisions in the present case. The contract of employment concluded between the applicant in the main proceedings and the North West Regional Health Authority (hereinafter 'NWRHA') declared the General Whitley Council Conditions of Service (hereinafter 'the GWC conditions of service') to be applicable to that contract.

6. Section 45 of the GWC conditions of service provides for 'lump sum redundancy payments'. According to Paragraph 12 of that section there is a (contractual) obligation on the employer to pay those benefits to his employees.

7. Section 46 of the GWC conditions of service sets out the terms of the Collective Agreement on Premature Payment of Superannuation and Compensation Benefits (hereinafter 'the PPSCB' agreement). In the event of early dismissal it provides for immediate payment of a retirement pension and compensation. Section 46(12) provides that the provisions of Section 46 are to be implemented by regulations of the UK Parliament. Accordingly, the PPSCB was implemented by the National Health Service Compensation for Premature Retirement Regulations 1981 (hereinafter 'CPRR').

8. At the time of Mrs Beckman's dismissal, the early retirement pension and compen-

sation payments to which eligible dismissed employees were entitled were governed by the National Health Service Pension Scheme Regulations 1995 (hereinafter 'the PSR') [3] and the CPRR cited above. Provision is made for the following specific benefits:

(a) an early retirement pension (hereinafter 'ERP') based on actual years of pensionable service, paid from the date of termination of employment (PSR E3);

(b) early payment of a lump sum on retirement being three times the yearly rate of the ERP (PSR E6(1) and (2));

(c) compensation consisting of an annual allowance at a rate equal to the rate by which his [ERP] would be increased, if a period equal to the period with which he is credited under Regulation 5 were added to his reckonable service (CPRR Regulation 4(3), CPRR Regulation 5(2) providing for the crediting of additional years in accordance with GWC conditions of service Section 46.10;

(d) a lump sum compensation payment being three times the annual allowance (CPRR Regulation 4(2)).

9. To give a coherent picture, the English names of the benefits described and the abbreviations given above will be used.

10. Under these provisions qualifying employees who receive the maximum enhancement of 10 years have no entitlement to the lump sum payment provided for by GWC Section 45. Where the enhancement is between 6 ⅔ and 10 years, there is a pro-rata reduction in the amount of the redundancy payment (GWC conditions of service Section 45.7 and 46.13).

3 — The claimant in the main proceedings describes these regulations as the Superannuation Scheme Regulations 1995 and uses the abbreviation SSR. However, according to Part A, A1, of the regulations, the official designation of the statutory instrument is 'National Health Service Pension Scheme Regulations 1995'. Hereinafter the abbreviation 'PSR', used by the referring court and the other parties to proceedings apart from Mrs Beckman, will therefore be used.

III — Facts

11. The claimant in the main proceedings, Mrs Beckman, was employed as a quantity surveyor within the National Health Service (hereinafter 'NHS') for the North West Regional Health Authority from 20 September 1982 to 31 May 1995. On 1 June 1995, the body for which Mrs Beckmann worked was transferred to Dynamco Whicheloe Macfarlane Ltd, a private company and the defendant in the main proceedings (hereinafter 'DWM'). Mrs Beckman's contract of employment was taken over by DWM until she was dismissed for redundancy as from 6 May 1997. The parties are in dispute over the benefits to be paid on her dismissal.

12. On her dismissal DWM paid Mrs Beckman the lump sum redundancy payments calculated in accordance with Section 45 of the GWC conditions of service. However, at no time did she receive any of the payments provided for in Section 46 of the GWC conditions of service. She therefore brought proceedings against DWM seeking payment of the benefits provided for in that Section. The parties are in dispute as to whether Mrs Beckman's entitlements under Section 46 of the GWC conditions of service were transferred on transfer of the undertaking in June 1995 on the basis of the provisions in Article 3(1) and (2) of Directive 77/187 and the corresponding provisions of the TUPE to the employment relationship between Mrs Beckman and DWM or whether such a transfer is precluded by the provisions of Article 3(3) of Directive 77/187 and the corresponding provisions of the TUPE.

13. In the view of the referring court, the transfer of the NWRHA to DWM constitutes a transfer of an undertaking within the meaning of the TUPE and within the meaning of Article 1(1) of Directive 77/187.

14. As regards the legal status of the entitlements under Section 46 of the GWC conditions of service the referring court points out that all the benefits provided for by that Section are paid by the Secretary of State. However the NHS is under an obligation to make contributions to the Secretary of State in respect of the costs of:

(a) making the ERP payments up to age 60 (normal retirement age) (PSR Regulation D2(3)(a)),

(b) early payment of the lump sum on retirement (i.e. before the age of 60), these costs being assessed by the Government Actuary (PSR Regulation D2(3)(f)) and

(c) the annual allowance and the lump sum compensation (PSR Regulation D2(3)(d)).

15. Further, according to the referring court, the NHS Superannuation Scheme (hereinafter 'NHS Pension Scheme') is an occupational pension scheme as defined in TUPE Regulation 7(1). The PSR, from which the ERP and the lump sum on retirement are derived, are the principal regulations governing the scheme. They were issued by the Secretary of State for Health in exercise of powers contained in Section 10 of the Superannuation Act 1972, in respect of the pensions of workers in the health service.

16. The CPRR, from which the annual allowance and the lump sum compensation are derived, were issued by the Secretary of State for Social Services pursuant to Section 24(1) of the Superannuation Act 1972. That Act allows regulations to be made for the payment of pensions, allowances or gratuities by way of compensation to workers in the NHS who suffer loss of office or employment.

17. According to the referring court, both the PSR and the CPRR are statutory regulations which lie outside the United Kingdom social security system.

18. On the transfer of the undertaking in June 1995, Mrs Beckman's membership of the health service pension scheme came to an end in that DWM could no longer make contributions to the NHS Pension Scheme in order to increase the benefits which Mrs Beckman receives from the scheme. Mrs Beckman is entitled to pension benefits from the scheme from the statutory age of retirement.

19. In its order the referring court cites the judgment of the Employment Appeal Tribunal in London of 2 September 1998 in *Frankling and Others* v *BPS Public Sector Limited*, which concerned the same problems and issues of law as the present case.[4] The Employment Appeal Tribunal (hereinafter EAT) came to the conclusion that the benefits under Section 46 of the GWC conditions of service are not transferred to the transferee on the transfer of an undertaking but that the entitlements of the employee end when she leaves the NHS on the transfer of the undertaking. In reply to a question by the Court of Justice, the parties in the case stated that this judgment is the only judgment of the English courts which deals with the legal classification of the benefits under Section 46 of the GWC conditions of service.

20. Mrs Beckman and the United Kingdom Government also cite this judgment in their observations. The following additional facts regarding the provisions of Sections

4 — ICR 1999, 347, in particular 357 et seq.

45 and 46 of the GWC conditions of service emerge from the judgment and appear to be of significance in the present proceedings: Under Section 46.12 the terms of Section 46 are to be implemented by statutory instrument and the employer does not assume any direct obligations towards employees. Rather, the relationship is a tripartite one. Employees are entitled to benefits on the basis of Section 46 and the statutory instruments implementing it. The Secretary of State bears the responsibility for paying the benefits. The employer's duty, under the regulations, is to provide the necessary funds to the pension scheme to make the relevant payment to the employees entitled under Section 46. [5] The rationale of these regulations is that employers rather than the NHS Pension Scheme should bear the cost of their own management decisions. [6] The employee thus pays no contributions towards these pension benefits.

21. It also emerges from this judgment that the benefits under Section 46 of the GWC conditions of service cover the period between dismissal and the attainment of the (normal) retirement age of 60. On reaching retirement age employees receive the usual pension payments under the NHS Pension Scheme. [7] In the event of death the benefits are payable to the employee's survivor. [8] The entitlements under Section 46 are, moreover, not acquired rights like pension rights. They are only payable if the employee is dismissed. [9]

IV — Questions referred for a preliminary ruling

22. In the course of the dispute over the legal status of the benefits payable under Section 46 of the GWC conditions of service the High Court of Justice referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is the employee's entitlement to early payment of pension and retirement lump sum and/or to the annual allowance and lump sum compensation, a right to an old-age, invalidity or survivors' benefit within the meaning of Article 3(3) of Council Directive 77/187/EEC?

2. If and to the extent that the answer to Question 1 is "no", is there an obligation of the transferor arising from the contract of employment, the employment relationship or the collective agreement within the meaning of

5 — P. 358 of the EAT judgment.

6 — P. 357, paras 5 to 7 of the EAT judgment.

7 — P. 357, para. 6 of the EAT judgment.

8 — P. 359 of the EAT judgment

9 — P. 360 of the EAT judgment.

Article 3(1) and/or 3(2) which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal?'

V — Arguments of the parties

(1) *The first question*

23. Mrs Beckman and the United Kingdom Government take the view that the ERP and the lump sum on retirement are not old-age benefits within the meaning of Article 3(3) of the Directive. They are not paid on account of old age but on dismissal. They therefore consider that the decision of the EAT in *Frankling* is wrong.

24. Mrs Beckman bases her view first on the wording of Article 3(3). It only covers old-age benefits. The benefits paid under Section 46 of the GWC conditions of service are, however, not paid on attainment of a given age but on account of dismissal. The fact that there is a minimum age requirement, that is to say 50, for entitlement to these benefits does not mean they are old-age benefits. Entitlement begins long before entitlement to old-age benefits, up to 15 years earlier where the retirement age is 65.

25. This interpretation is in line with the spirit and purpose of the benefit. It is not paid because a given age has been reached but because of a dismissal.

26. Further, Mrs Beckman points to the interplay between the provisions of Section 46 and those of Section 45 of the GWC conditions of service. The compensation payments under Section 45, which are payable on dismissal, are offset against those under Section 46 of the GWC conditions of service. This also suggests that the benefits under Section 46 should be viewed as benefits payable on dismissal rather than old-age benefits. In support of her legal argument she cites the judgment in *Barber*,[10] in which the Court of Justice held that benefits payable on dismissal, in order to allow early retirement, are to be treated like other benefits paid on dismissal.

27. Further, Mrs Beckman takes the view that the description of the reason for payment of the benefit, whether retirement or dismissal, should not determine its legal

10 — Case C-262/88 *Barber* [1990] ECR I-1889.

classification. Frequently an employee who has reached an advanced age has no option but to retire, as he will not find another job on account of his age. The heading under which a benefit is paid is equally irrelevant. What is important is the legal nature of the benefit and not the source from which it is financed. However, it is of crucial importance that the transferor, in this case the NHS, was under an obligation to pay the benefit.

28. The United Kingdom Government shares the views of Mrs Beckman. Article 3(3) of the Directive should be construed narrowly, as it is an exception to the rule. It covers only benefits which are paid on account of old age. On the other hand, benefits which are merely calculated by reference to age or years of service are not covered. The Court of Justice took that view in *Roberts* v *Tate & Lyle* in which a distinction was made between benefits paid on attainment of a given age and those paid on dismissal. Pensions which are paid on dismissal were not held by the Court to be old-age benefits. [11]

29. The United Kingdom Government, too, considers the judgment of the EAT in *Frankling* [12] to be wrong. An old-age benefit which is paid not on the ground that the relevant age has been reached but on the ground of dismissal before that age was reached is not an old-age benefit within the meaning of Article 3(3) of the Directive. The benefits under Section 46 of the GWC conditions of service fit that description.

30. DWM, however, takes the view that the benefits under Section 46 of the GWC conditions of service are covered by the exception in Article 3(3) of the Directive. They are old-age benefits within the meaning of that paragraph.

31. DWM contends that the fact that these benefits were paid early does not alter their character as old-age benefits within the meaning of Article 3(3) of Directive 77/187. The claimant in the main proceedings seeks to define the character of the benefit on the basis of the point in time at which it is payable. This is fallacious as old-age benefits could be paid before the usual time, for instance in the event of early retirement; in the present case at 50 instead of 60. Bringing forward the time at which the benefit is paid does not, however, alter the character of the benefit.

32. There is, it is argued, support for this view in the fact that the benefits under Section 46 of the GWC conditions of service are calculated according to the age and number of years of service of the employee, and the fact that in the event of his death the benefits are payable to his survivors.

11 — Case 151/84 *Roberts* v *Tate & Lyle* [1986] ECR 703, para. 30.

12 — ICR 1999, p. 347.

33. The NHS pension scheme is a supplementary company pension scheme within the meaning of Article 3(3). The benefits provided for by Section 46 were not intended to compensate for redundancy. That is the purpose of the lump sum payment under Section 45, which Mrs Beckman also received.

34. The fact, too, that an employee under 50 is not entitled to the benefits under Section 46 of the GWC conditions of service supports this argument. In such cases and in all others in which there is no entitlement to benefits under that section, employees will receive benefits under Section 45 of the GWC conditions of service. Conversely, the benefits paid under Section 46 of the GWC conditions of service are taken into account in the calculation of the benefits under Section 45 of the GWC conditions of service. In an extreme case the benefits under Section 45 of the GWC conditions of service are simply not payable if, for example, an employee meets the conditions for the maximum enhancement of his pension benefits of 10 added years under the terms of Section 46 of the GWC conditions of service. It is thus clear that the benefits under Section 46 of the GWC conditions of service are not compensation for the loss of a job like the benefits paid under Section 45 of the GWC conditions of service, but old-age benefits, payment of which is merely linked to the loss of a job.

35. The Commission takes the view that the answer to the first question cannot be found in the wording of Article 3(3) of Directive 77/187 alone. Rather, the extent to which the benefits under Section 46 of the GWC conditions of service are comparable to those described in Article 3(3) of Directive 77/187 must be examined.

36. The Commission points to the scheme of the directive, which reveals the reason for the exception in Article 3(3) of Directive 77/187. It lies in the great variety of occupational supplementary pension schemes which made it impossible to enshrine in the directive a general obligation on the transferee to assume liability for such benefits on the transfer of an undertaking.

37. As, in its view, the referring court has provided incomplete information, the Commission proposes that the first question should be answered on the basis of the following criteria: method of financing, nature and purpose of benefits, conditions for grant of benefits and method of calculation of benefits.

38. On the basis of those criteria it proposes that the ERP and the lump sum on retirement should be considered to be benefits which fall within the exception in Article 3(3) of Directive 77/187. They are based on a collective agreement, only apply to employees in a specific sector, namely the NHS, are based on NHS membership and financed by contributions from both

employer and employee. Admittedly the employer alone bears the additional costs of the early payment of the ERP and lump sum on retirement. However, the underlying purpose of the payments is clearly to provide a sufficient (additional) income when an employee is (for any reason) no longer employed.

39. However, the Commission leaves the question of the annual allowance and the lump sum compensation open. It is not even clear whether those benefits are also paid out of the NHS supplementary Pension Scheme. Nor is the purpose of the payments clear. They could be benefits intended to guarantee a sufficient income or compensation for dismissal. Moreover these benefits have to be offset against the benefits under Section 45 of the GWC conditions of service. Similarly, it is not made clear, whether, in the event of the death of the person entitled to these benefits, they are to be paid to his survivor. As regards their financing, the Commission points out that it appears that the employee does not have to make any contribution but that they are calculated on the basis of the number of years of service.

(2) *The second question*

40. On the second question Mrs Beckman, the United Kingdom Government and the Commission are of the view that the benefits at issue derive from the contract of employment or employment relationship between Mrs Beckman and the NHS. The contract of employment expressly provided that Mrs Beckman was entitled to the benefits under Section 46 of the GWC conditions of service. The corresponding obligations were therefore transferred to the transferee under Article 3(1) of the Directive.

41. Moreover, they derived from a collective agreement, the PPSCB, so that the obligation to pay benefits was also transferred to the transferee under Article 3(2) of Directive 77/187. The fact that various statutory instruments were enacted to implement those rights is as irrelevant as the fact that they are paid by the Secretary of State and reimbursed by the NHS.

42. In that connection Mrs Beckman points out that, under English law, there must be statutory authority for obligations to make payments to workers in the public sector. That is why the PPSCB, a collective agreement between the NHS and the unions, had to be implemented by statutory instrument.

43. DWM bases its opposing view on the latter two factors. The benefits under Section 46 of the GWC conditions of service are based, as required by Section 46.12, on statutory instruments. However, Section 45.12 of the GWC conditions of service provides that the benefits are paid

by the employer. The rights under Section 46 of the GWC conditions of service thus have no basis in an employment contract, which is required for Article 3(1) and (2) of Directive 77/187 to apply. The NWRHA simply had no obligations towards employees such as the claimant, but only an obligation to reimburse the Secretary of State, who was liable to pay the benefits under the statutory instrument. That obligation was not transferred to DWM on the transfer of the undertaking.

VI — Legal assessment

44. The dispute concerns the legal classification of the benefits provided for by Section 46. The parties to the main proceedings are in dispute over the extent to which the benefits contained in it can be viewed as 'old-age benefits' within the meaning of Article 3(3) of Directive 77/187 and a transfer to the transferee of the undertaking of the obligation to pay the benefits can be ruled out. In the event that the conditions of Article 3(3) are not met, they are in dispute over the legal basis for these benefits, that is to say, whether they are derived from a contract of employment or employment relationship or a collective agreement and are thus transferred to the transferee on transfer of the undertaking pursuant to Article 3(1) or (2) of Directive 77/187, or whether they have a statutory basis and a transfer is therefore ruled out.

(1) *The first question*

45. To answer the first question, that is to say whether the disputed benefits under Section 46 of the GWC conditions of service constitute employees' rights to old-age benefits, it must first be established whether Mrs Beckman is an employee within the meaning of Directive 77/187. The extent to which Directive 77/187 is applicable to the facts of the present case must therefore first be established.

(a) Applicability of Directive 77/187

46. The referring court has assumed that the transfer of the NWRHA, in which Mrs Beckman was employed, to DWM was a transfer of an undertaking within the meaning of Directive 77/187. It has therefore assumed that the Directive is applicable. No further reasons are given for this assumption in the order for reference.

47. The parties to the proceedings did not go into this preliminary issue in their written observations. At the request of the Court they explained at the hearing that there were no specific employment law regulations for employees in the public sector. Employees in the NHS were therefore protected by national employment law

and should thus be regarded as employees within the meaning of Directive 77/187. The judgment of the Court in *Collino and Chiappero* [13] did not preclude the application of Directive 77/187.

48. However, the applicability of Directive 77/187 to the present case is not uncontroversial. The NHS, of which the NWRHA is part, is under the supervision of the United Kingdom Government. It is part of the Department of Health and financed out of the United Kingdom budget. The various reforms, such as the establishment of NHS Trusts and the division of the NHS into regional authorities, do not seem to have changed the essential status of the NHS as a body which is part of the public administration.

49. In its judgment in *Collino and Chiappero* the Court of Justice held that Directive 77/187 is generally applicable to a transfer of public bodies to a private purchaser. However, only those employees who originally enjoyed protection as employees under national employment law can take advantage of the Directive. According to this judgment, public employees are, as a rule, not employees within the meaning of Directive 77/187. [14]

50. According to settled case-law, the term 'employee' within the meaning of Directive No 77/187 must be interpreted as covering any person who, in the Member State concerned, is protected as an employee under national employment law. It is for the national court to establish whether that is the case in a given instance. [15] This is consistent with the legal definition in Article 2 of Directive 77/187 in the amended version in Council Directive 98/50/EC of 29 June 1998. [16]

51. As in the present case, the judgment in *Collino and Chiappero*, cited above, concerns the privatisation of a State-owned undertaking or part of an undertaking. It is based on the Directive's objective of ensuring, as far as possible, that the contract of employment or the employment relationship continues unchanged with the transferee, so that the employees affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer. It is not, however, intended to establish a uniform level of protection throughout the Community on the basis of common criteria. [17]

52. It should be noted that Mrs Beckman was employed at NWRHA under a contract of employment. This suggests that

13 — Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659.

14 — *Collino and Chiappero*, cited above at footnote 13, paras 40 and 41.

15 — Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, para. 28; Joined cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, para. 24; *Collino and Chiappero*, cited at footnote 13, para. 36.

16 — Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1998 L 201, p. 88).

17 — *Collino and Chiappero*, cited at footnote 13, para. 37.

her employment relationship is not based on an instrument of public law such as a Civil Service code or regulations, as was apparently the case in *Collino and Chiappero*. [18]

53. Further, under her contract of employment her terms of employment were based on the GWC conditions of service. The GWC conditions of service are, as explained above, a collective agreement. In that respect, too, they differ fundamentally from the statutory regulations clearly at issue in *Collino and Chiappero*.

54. However, the rights granted by Section 46 of the GWC conditions of service were implemented by statutory instrument. In that respect a parallel can be drawn with the *Collino and Chiappero* case.

55. In its judgment in *Henke*, which also concerned the applicability of Directive 77/187 to public sector employees, the Court of Justice expressly focused on the notion of the exercise of public authority. [19] This functional approach, on the basis of the activities actually carried out, seems more appropriate than an approach based on the way the transferred entity is organised or the legal nature of the instrument which established the employment relationship (contract or appointment).

56. That interpretation of the Directive also finds support in the wording of Directive 77/187. Article 3(1) mentions not only a contract of employment but also an employment relationship.

57. The present case concerns the national health service. However, the activities exercised here probably do not constitute the activities in the exercise of public authority on which the Court's decision in *Henke* turned, even if they are governed by public law; that is a question which falls to be examined and decided by the national court.

58. Nor is it necessary to limit the scope of the Directive in order to fulfil its objective of protection. The Directive achieves only partial harmonisation of the rules for the protection of employees in the event of a change of employer. [20] By means of such harmonisation the Community legislature intended both to ensure comparable protection for employees' rights in the different Member States and to harmonise the costs which those protective rules entail for Community undertakings. [21]

18 — See para. 40 of the judgment in *Collino and Chiappero* (cited at footnote 13). The German translation of this judgment is less clear than the Italian original. The German version reads: 'Status von öffentlich-rechtlich Bediensteten und nicht von Arbeitnehmern', while the Italian version reads: 'soggetti ad uno statuto di diritto pubblico e non al diritto di lavoro'. [The English version reads: 'subject to a public-law status, not to employment law'].

19 — Case C-298/94 *Henke* [1996] ECR I-4989, para. 17.

20 — Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, para. 28, and subsequent references.

21 — *Commission* v *United Kingdom*, cited at footnote 20, para. 15.

59. One factor to be considered is that application of Directive 77/187 might make the privatisation of public bodies more difficult. An investor could be faced with economic burdens which might affect his readiness to invest. However, it is precisely in the context of privatisation that the protection of employees of public undertakings must be guaranteed. It would be contrary to the principal purpose of the Directive described above to exclude certain employees from that protection simply because their employment relationship is rooted in public law. Moreover, it should be borne in mind that the employment relationship governed by public law ends on privatisation, as the present case demonstrates. As explained above at point 14, DWM could not pay any contributions to the NHS pension scheme in order to increase the benefits which Mrs Beckman receives from the system. DWM had to arrange pension insurance elsewhere.

60. The current trend for privatisation has brought about a situation in which many areas of activity which were previously considered to belong in the public sector, such as postal services and telecommunications, or the water supply, are now viewed as economic activities. When these activities are privatised and the relevant bodies are transferred, along with their staff, to a new owner, the employees concerned are in a comparable situation to employees affected by a transfer of undertakings in the private sector. It is thus hard to see why employees in that position should be considered not to be 'employees' within the meaning of Directive 77/187.

61. When Directive 77/187 was adopted the trend for privatisation was not yet apparent. The silence of Directive 77/187 on the problem outlined here cannot be taken to indicate the legislature's intention that cases such as the present one should be excluded from the protection afforded by Directive 77/187. The question simply did not arise in 1977. Cases such as the present one arise now because of the changed politico-economic situation. The case-law on the interpretation of Directive 77/187 should take account of that. The Directive has of course been amended several times. However, the problem exercising us in this case has not yet been addressed by the legislature.

62. Accordingly it must be assumed that Directive 77/187 applies to the present case, even if the employment relationship between Mrs Beckman and the NHS is to be classified as an employment relationship governed by public law. As a result Mrs Beckman must be considered to be an employee within the meaning of Article 3(3) of Directive 77/187.

(b) Interpretation of the term 'old-age benefits' within the meaning of Article 3(3) of Directive 77/187

63. If Article 3 of Directive 77/187 and the legislation enacted in English law to implement it are applicable in this case, the

question arises as to how the entitlements provided for by Section 46 of the GWC conditions of service are to be classified. In particular, it must be determined whether they are 'old-age benefits' within the meaning of Article 3(3) of Directive 77/187 and whether or not they are therefore transferred from the NWRHA to DWM on the transfer of the undertaking.

64. It must be noted from the start that the United Kingdom Government comes out in favour of the transfer of the entitlements in issue here, not only in its observations in the present case but also on the internet site of the Department of Trade and Industry (dti), where it mentions the case of *Frankling*, cited above, and the present dispute in *Beckman*. On that internet site the United Kingdom states its intention to amend national legislation so that entitlements such as those in Section 46 of the GWC conditions of service pass across in a transfer, whatever ruling the Court makes in the present case. [22]

65. An amendment to the legislation of that sort would render the present proceedings null and void if it was made retroactive. However, it cannot be said that this has yet happened or will happen. A position therefore has to be taken on the question raised. For the sake of clarity, the classification of the ERP must first be discussed.

22 — See the argument at paras 18 and 19 on the Internet site www.dti.gov.uk/er/tupe/consult.htm.

(aa) Classification of the Early Retirement Pension

66. It must first be observed that Directive 77/187 does not define 'old-age benefits' further, either in Article 3 or elsewhere. Nor has there been any further interpretation of the term in the case-law on the legislation to date.

67. In support of their submission that the benefits in question are not old-age benefits, Mrs Beckman and the United Kingdom Government cite the judgments in *Barber* [23] and *Roberts* v *Tate & Lyle*. [24] In those judgments, the Court held early retirement pensions payable on dismissal to be 'conditions governing dismissal' and therefore 'working conditions' within the meaning of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [25] or 'pay' within the meaning of Article 141 EC. In the view of both parties this precludes the ERP, which is also an early retirement arrangement, from being seen as an old-age benefit.

23 — *Barber*, cited at footnote 10.

24 — *Roberts* v *Tate & Lyle*, cited at footnote 11.

25 — OJ 1976 L 39, p. 40.

68. In that connection it must be noted that it does not necessarily follow from the classification of benefits comparable to the ERP as pay within the meaning of Article 141 EC,[26] that the ERP is an old-age benefit. *Barber* clearly dealt with an old-age benefit, namely a pension. However, that pension derived from an occupational scheme and thus was not one of the statutory social security schemes to which Article 141 EC did not apply.[27]

69. On the other hand, the classification of benefits comparable to the ERP as working conditions and conditions governing dismissal as in *Roberts* v *Tate & Lyle*, is at least an indication that occupational old-age pensions, which are paid early, in other words before retirement age, on mass dismissal, are not necessarily to be seen as old-age benefits simply on account of their designation as 'early retirement pensions'.

70. However, it must be pointed out that the judgment in *Roberts* v *Tate & Lyle* concerned a question of equal treatment of men and women. The proceedings did not concern the difference between old-age benefits and unemployment benefits within the meaning of Article 3(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security,[28] which was adopted pursuant to Article 1(2) of Directive 76/207 in order to define the substance, scope and arrangements for the application of the principle of equal treatment. In those proceedings it was simply a matter of whether the benefit at issue fell within the scope of the Directive. It was therefore irrelevant whether it was an old-age benefit or an unemployment benefit. In that respect this judgment, too, sheds only limited light on the present case.

71. However, reference should be made to the judgment in *Buchner*.[29] That case concerned a benefit described as an 'early old-age pension on account of incapacity for work'. The referring court raised the question whether this benefit was an old-age or retirement pension within the meaning of Article 7(1)(a) of Directive 79/7. This case, too, concerned equal treatment. Under the amended legislation men were no longer entitled as hitherto to the benefit on completion of their 55th year but only on completion of their 57th year whereas women were entitled to the benefit on completion of their 55th year. However, in that connection, the Court had to distinguish between an old-age pension and an invalidity pension. In that respect the case is comparable to the present one, which concerns the distinction between an old-age benefit and a benefit payable on dismissal. Both cases turn on the question of what constitutes an old-age benefit.

26 — *Barber*, cited at footnote 10, para. 28.

27 — *Barber*, cited above at footnote 10, para. 28.

28 — OJ 1979 L 6, p. 24.

29 — Case C-104/98 *Buchner and Others* [2000] ECR I-3625.

72. In *Buchner* the Court of Justice held that the 'early old-age pension on account of incapacity for work' was not an old-age pension but an invalidity pension. It based its judgment on the argument that, although the grant of the contested benefit depended on the attainment of a certain age it was only granted to persons who were incapable, following an illness or other infirmity or weakness of their physical or mental powers, of continuing to work. Such a benefit cannot constitute an old-age pension within the meaning of Article 7(1)(a) of Directive 79/7, which is a derogating provision, since, according to settled case-law, in view of the fundamental importance of the principle of equal treatment, any such provision must be interpreted strictly. [30]

73. In my Opinion in that case I also started from the premiss that the distinction between an 'old-age benefit' and an 'unemployment benefit' should be made on the basis of objective criteria. In the case of an 'old-age benefit' the attainment of a given age is a necessary and sufficient condition. In contrast, it is characteristic of an 'unemployment benefit' that the recipient of the benefit is not in an active employment relationship. [31] As regards the minimum age condition, I took the view in that case that it could not be taken as a constituent element in the classification of the benefit, as it merely served to limit the class of persons potentially entitled. [32]

74. The ERP provided for by Section 46 of the GWC conditions of service is dependent on the attainment of a minimum age, namely 50. It is also linked to a minimum period of pensionable service with the NWRHA, namely five years. However, as in the *Buchner* case, entitlement to the ERP is triggered not by the attainment of a given age but by another event, namely unemployment. Even if the ERP is only paid to those who have reached a given minimum age, it is not the attainment of that age which triggers the benefit. Not everyone who has completed his 50th year has a right to the ERP, but only those who, having reached that minimum age, are dismissed on certain grounds specified in Section 46 of the GWC conditions of service. In that respect, the view of DWM that dismissal merely causes the ERP to fall due must be rejected. Rather, the view of the claimant and the UK Government, that dismissal is the ground on which the benefit is paid at all, should be upheld.

75. Even if the name of the ERP might, on the face of it, suggest that it is an 'old-age benefit' and that its calculation is linked to the attainment of a specific minimum age and to the length of pensionable service in

30 — *Buchner and Others*, cited at footnote 29, paras 20 and 21.

31 — Opinion of 16 September 1999 in Case C-104/98 *Buchner and Others* [2000] ECR I-3625, point 22.

32 — Opinion in *Buchner and Others*, cited at footnote 31, point 25.

the NHS, it can, none the less, hardly be considered to be an 'old-age benefit' within the meaning of Article 3(3) of Directive 77/187.

76. That conclusion is confirmed by the following considerations. Article 3(3) of Directive 77/187 is, like Article 7(1) of Directive 79/7, a derogating provision. As such it must, as the Court has consistently held, be interpreted narrowly. [33]

77. It is consistent with the protective purpose of Directive 77/187 — to ensure, as far as possible, that the contract of employment or the employment relationship continues unchanged with the transferee, so that the employees affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer [34] — to interpret the scope of the derogating provision in Article 3(3) narrowly. Benefits which, by their nature, are not unequivocally old -age benefits should fall within the general rules in Article 3(1) and (2) of the Directive.

33 — *Buchner and Others*, cited at footnote 29, para. 21, and subsequent references.

34 — *Collino and Chiappero*, cited at footnote 13, para. 37.

78. The type and manner of financing and the period for which the ERP is paid also confirm the view expressed here. As explained at points 14 and 20 above, the necessary monies for the financing of the ERP benefits are to be provided by the authority of the NHS responsible. They are paid by the Secretary of State to those entitled to the benefit. However, the NWRHA is under an obligation to compensate the Secretary of State. In that way it is the employer, who is responsible for the dismissal, who in the end bears the cost of its rationalisation measures alone. In that respect there is a clear separation between the financing of the ERP and the financing of the general occupational old-age pension under the NHS Pension Scheme.

79. The ERP is also clearly distinct from typical old-age benefits in terms of the period for which it is paid. Once retirement age is reached, pension payments replace the ERP. Thus, the ERP is only paid from the time of dismissal until retirement age is reached. For that reason DWM's view that it is merely a case of early payment of 'old-age benefits' must be rejected. Rather it is a benefit which is distinct from an 'old-age benefit'.

80. The relationship between Section 45 and Section 46 of the GWC conditions of service also confirms the classification of benefits under Section 46 of the GWC conditions of service argued for here. It is

hard to see why the rule that the benefits under Section 46 of the GWC conditions of service are to be offset against benefits under Section 45, to the point where benefits under Section 45 of the GWC conditions of service may not be payable at all, should necessarily mean that only benefits under Section 45 of the GWC conditions of service are benefits payable on dismissal, as DWM argues. Rather, the rule prohibiting cumulation of benefits emphasises the equivalent status of the benefits under the two provisions. Thus, if benefits under Section 45 of the GWC conditions of service are 'benefits payable on dismissal', which is not disputed between the parties, then the same should apply to benefits under Section 46 of the GWC conditions of service. Otherwise, the justifiability of offsetting these benefits against one another is called into question. Normally, only benefits of the same type are offset against each other. Benefits of different types can as a rule be paid in tandem.

81. The fact that the ERP is paid on the basis of a statutory instrument, the NHS Pension Scheme Regulations 1995, does not appear apt to undermine this analysis. It is true that Section 46.12 of the GWC conditions of service provides that the PPSCB is to be implemented by regulations, as stated in point 6 of this Opinion. However, that is merely an arrangement concerning its implementation. As Mrs Beckman pertinently observes, the NHS falls within the United Kingdom's public sector and regulations on the payment of its employees must therefore be made by statutory instrument. As the referring court explains in its order for reference, Section 46 of the GWC conditions of service is, in terms of its content, a collective agreement drawn up by the employers in the health service and recognised by the unions. The Court of Justice has repeatedly stressed in its case-law that a collective agreement does not lose its status as a contractual arrangement by being embodied in or confirmed by statute. [35]

82. In the light of the foregoing considerations, it must be concluded that the ERP is not an 'old-age benefit' within the meaning of Article 3(3) of Directive 77/187.

(bb) Other benefits

83. The above arguments apply *mutatis mutandis* to the lump sum on retirement, the Annual Allowance and the lump sum compensation. All these benefits are characterised by the fact that they are only paid in the event of unemployment under particular circumstances specified in detail. The requirements of attainment of a minimum age of 50 and a minimum period of pensionable service with the NRWHA of five years merely serve to limit the class of persons potentially entitled. The benefits are paid, not on account of attainment of a given age or employment in the undertaking but on account of unemployment under particular circumstances which are specific to the undertaking. In line with the arguments on the ERP these benefits are thus

35 — See, for example, Case C-35/97 *Commission* v *France* [1998] ECR I-5325, para. 34.

not old-age benefits within the meaning of Article 3(3) of Directive 77/187 either.

(cc) Proposal for a decision

84. In the light of the above arguments, I therefore suggest the following answer to the first question referred for a preliminary ruling: the entitlement of an employee to payment of the Early retirement pension and Lump sum on retirement and/or the Annual Allowance and Lump sum compensation is not a right to an old-age, invalidity or survivor's benefit within the meaning of Article 3(3) of Directive 77/187.

(2) *The second question*

85. By its second question the referring court wishes to know whether the entitlements to benefits under Section 46 of the GWC conditions of service are obligations of the transferor, in other words the NWRHA, arising from a contract of employment or employment relationship which are transferred to DWM pursuant to Article 3(1) of Directive 77/187 on the transfer of the undertaking with the result that it is under an obligation to pay benefits to Mrs Beckman on her dismissal. In the alternative, it asks whether the benefits transfer under Article 3(2) of Directive 77/187 on the ground that the right is agreed in a collective agreement.

86. The second question raises the problem that the rights under Section 46 of the GWC conditions of service might not come within the scope of Article 3 of the Directive because Section 46.12 of the GWC conditions of service provides that the collective agreement is to be implemented by statute. This reference for a preliminary ruling was probably prompted by the findings of the EAT in its judgment in *Frankling*, cited above. The EAT decided that the entitlements under Section 46 of the GWC conditions of service were not contractual entitlements and thus did not transfer to the transferee because Section 46.12 provided that the provisions of that section were to be implemented by statutory instrument. The EAT based its view on the triangular relationship described in point 18 of this Opinion. In contrast to Section 45 of the GWC conditions of service the employer does not undertake in the collective agreement to pay the benefits provided for in Section 46 of the GWC conditions of service. Rather, the employee has a statutory entitlement to benefits, which corresponds to an obligation incumbent on the NHS Pension Scheme to pay benefits. The employer is under an obligation to the NHS Pension Scheme to make the necessary resources available. This is an enforceable claim under the satutory provisions. There may, possibly, be a contractual obligation owed by employer to employee in that the

employer is obliged to make payments to the NHS Pension Scheme, which make it possible for the employee to receive the benefits under Section 46 of the GWC conditions of service. However, there is no contractual obligation of the employer towards the employee. Nor is this necessary as the employee has a statutory claim against the NHS Pension Scheme. [36]

87. In answering the question whether the rights of employees under Section 46 of the GWC conditions of service are obligations of the transferor under an employment contract in existence at the time of the transfer within the meaning of Article 3(1) of Directive 77/187, it will be necessary to take account of the following factors, as well as the question of who pays whom, on which the decision of the EAT turned. The rights in Section 46 of the GWC conditions of service derive, according to the findings of the referring court, which coincide with those of the EAT in that respect, from a collective agreement concluded between NHS employers and the unions in which the NHS employees are organised. Thus, Article 3(1) and (2) may be inapplicable as a result of the legal effect of the requirement of statutory implementation of Section 46 of the GWC conditions of service.

88. In the course of the discussion of the first question referred for a preliminary ruling it has already been established that the entitlements under Section 46 of the GWC conditions of service were negotiated, in terms of their content, in the collective agreement. However, the implementation of the collective agreement is governed by statute. As has already been established, a collective agreement does not lose its status as a contract because it is incorporated in or confirmed by statute. [37] There is no sign that the legislature influenced the content of the entitlements under Section 46 of the GWC conditions of service. In that respect the role of the legislature is really a formality which arises because the NHS belongs to the public sector.

89. Further, it must be observed that the employment contract concluded between Mrs Beckman and the NWRHA expressly declared the GWC conditions of service to be applicable to the contract. In that respect there are good reasons for speaking of a contractual basis for the entitlements under Section 46 of the GWC conditions of service and — conversely — the obligations of the transferor, contrary to the decision of the EAT in *Frankling*.

90. As explained above, the fact that the regulations in Section 46 of the GWC conditions of service have to be implemented by statute, in the end merely reflects the fact that the NHS is part of the public administration and the expenditure of the public administration requires a legal basis. If, as I propose, we take Directive 77/187 to be applicable generally to employment relationships in the NHS, it

36 — ICR 1999, p. 358.

37 — *Commission* v *France*, cited at footnote 35, para. 34.

would be inconsistent to disallow the application of Article 3(1) and (2) on the ground that the entitlements enshrined in the collective agreement must be confirmed or implemented by statute. On the basis of these observations on the first question we must conclude that the entitlements under Section 46 of the GWC conditions of service are obligations of the transferor under a contract of employment existing at the time of the transfer within the meaning of Article 3(1) of Directive 77/187 or under a collective agreement within the meaning of Article 3(2) of Directive 77/187.

91. The solution proposed here is comparable to the case-law on the definition of the term 'pay' in Article 141 EC. In defining the term the Court of Justice excluded from the definition of pay only social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are compulsorily applicable to general categories of workers. [38] On the other hand it recognised benefits under schemes which are not compulsorily applicable to general categories of workers but apply only to workers employed by certain undertakings — with the result that affiliation to those schemes derives of necessity from the employment relationship with a given employer — as pay within the meaning of Article 141 EC. [39]

38 — *Barber*, cited at footnote 10, para. 22.

39 — *Barber*, cited at footnote 10, para. 26.

92. Accordingly, in this case, too, it will be necessary to take account of the fact that the benefits under Section 46 of the GWC conditions of service derive from a collective agreement. They were negotiated between the NHS employers and the representatives of the major unions and subsequently adopted by the General Whitley Council. Moreover, it must be borne in mind that it is expressly agreed in the contract of employment, as it is in Mrs Beckman's, that they apply to the employment relationship in each case. It must therefore be assumed that the application of the provisions in Section 46 of the GWC conditions of service is based both on the contract of employment and employment relationship within the meaning of Article 3(1) of Directive 77/187 and on a collective agreement within the meaning of Article 3(2) of Directive 77/187. Even if the contested benefits in the PSR and the CPRR are governed by statute, the rights and obligations do not derive from the statutory instrument but from the collective agreement and its incorporation in the contract of employment in each case.

93. I therefore propose that the second question referred for a preliminary ruling should be answered as follows:

there is an obligation of the transferor of an undertaking arising from the contract of employment, the employment relationship and the collective agreement within the meaning of Article 3(1) and (2) to pay benefits to an employee in the event of dismissal which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal.

VII — Conclusion

94. In the light of the foregoing considerations, I propose that the questions referred for a ruling should be answered as follows:

(1) The entitlement of an employee to payment of the Early retirement pension and Lump sum on retirement and/or the Annual Allowance and Lump sum compensation is not a right to an old-age, invalidity or survivor's benefit within the meaning of Article 3(3) of Directive 77/187/EEC.

(2) There is an obligation of the transferor of an undertaking arising from the contract of employment, the employment relationship and the collective agreement within the meaning of Article 3(1) and (2) to pay benefits to an employee in the event of dismissal which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal.