JUDGMENT OF THE COURT
25 MAY 1971[1]

Gabrielle Defrenne v Belgian State (Reference for a preliminary ruling by the Belgian Conseil d'État)

'Equal Pay'

Case 80/70

Summary

Social policy of the EEC — Men and women workers — Pay — Concept — Social security benefits — Retirement pensions — Schemes established by legislation — Exclusion — Discrimination
(EEC Treaty, Article 119)

The concept of pay as defined in Article 119 of the EEC Treaty does not include social security schemes or benefits directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers or which, within the framework of such a general system established by legislation, relate to certain categories of workers in particular.
This applies especially to retirement pension schemes which give workers the benefit of a legal system, the financing of which, workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy. The part due from the employer in the financing of such schemes does not constitute a direct or indirect payment to the worker; the latter receives the benefits legally prescribed solely by reason of the fact that he fulfils the legal conditions required for their being granted.
Situations involving discrimination resulting from the application of such a scheme are not subject to the requirements of Article 119.

In Case 80/70

Reference to the Court under Article 177 of the EEC Treaty by the Belgian Conseil d'État for a preliminary ruling in the action pending before that court between

GABRIELLE DEFRENNE, former air hostess with the Belgian Airline Company, Sabena, resident in Brussels,

and

BELGIAN STATE, represented by the Minister for Social Security,

1 — Language of the Case: French.

on the interpretation of Article 119 of the EEC Treaty with regard to the Royal Decree of 3 November 1969 laying down special rules for the civil aviation air crews on the entitlement to pension and the special conditions of application of Royal Decree No 50 of 24 October 1967 concerning retirement pensions and survivor's pensions of employed persons,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore (Rapporteur) and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

Miss Gabrielle Defrenne was engaged as an air hostess by the airline company Sabena on 10 December 1951.
On 15 February 1968, the date on which she reached the age of 40 years, Miss Defrenne's contract was determined under Article 5 of the contract of employment of air crew of Sabena, which provides that women shall cease to be members of the crew on reaching the age of 40 years.
Miss Defrenne brought an action before the Conseil de prud'hommes, Brussels, for damages for breach of contract. Independently of this action, which is still pending as an appeal before the Cour du travail, Brussels, Miss Defrenne made an application on 9 February 1970 to the Belgian Conseil d'État for annulment of the Royal Decree of 3 November 1969 laying down special rules for civil aviation air crews on entitlement to pension and the special conditions of application of Royal Decree No 50 of 24 October 1967 concerning retirement pensions and survivor's pensions of employed workers (Moniteur belge of 10 December 1969, pp. 11903 to 11911).
In support of this application Miss Defrenne claimed the infringement on the one hand of Article 14 of Royal Decree No 40 of 24 October 1967 on the work of women and on the other hand of Article 119 of the EEC Treaty.
By order dated 4 December 1970 lodged at the Court Registry on 11 December, the Belgian Conseil d'État, section d'administration, IIIrd Chamber, stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:
(a) Does the retirement pension granted under the terms of the social security financed by contributions from workers, employers and by State subsidy,

constitute a consideration which the worker receives indirectly in respect of his employment from his employer?

(b) Can the rules establish a different age-limit for men and women crew members in civil aviation?

(c) Do air hostesses and stewards in civil aviation do the same work?

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 9 February 1971 by the defendant in the main action, on 26 February 1971 by the plaintiff in the main action and on 27 February 1971 by the Commission of the European Communities.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral proceedings without any preparatory enquiry.

The parties to the main action and the Commission made oral observations at the hearing on 31 March 1971.

The Advocate-General delivered his opinion at the hearing on 29 April 1971.

In the procedure before the Court the plaintiff in the main action was represented by Marie-Thérèse Cuvelliez, Advocate of the Brussels Bar, the defendant in the main action by Henri Wynants, Advocate of the Brussels Bar and the Commission by its Legal Adviser, Italo Telchini.

II — Observations submitted to the Court

The written and oral observations submitted to the Court may be summarized as follows:

A — *The jurisdiction of the Court*

The first question

Miss Defrenne, plaintiff in the main action, is of the opinion that the first question raised by the Conseil d'État needs to be defined in order to avoid the Court's being led, by means of a question of very general scope, to formulate a global definition of a pension system which is made up of different schemes and consequently requires separate and distinct definitions according to the individual scheme. In the present case an analysis is required of the retirement pension scheme of air crew as laid down by the Royal Decree of 3 November 1969.

The *Belgian State,* represented by the Minister for Social Security, defendant in the main action, considers that the question whether the retirement pension granted under the social security financed by contributions from workers, employers and by State subsidy constitutes consideration which the worker receives indirectly in respect of his employment from his employer, requires the interpretation of Article 119 of the EEC Treaty.

The *Commission of the European Communities* observes that if the wording of the questions is strictly adhered to it might be asked whether the reference by the Conseil d'État under Article 177 of the EEC Treaty has been correctly formulated in so far as the questions do not refer expressly either to the interpretation or the validity of a particular piece of Community legislation. It is proper however not to yield to formalism incompatible with the true nature of the procedure laid down by Article 177; it is clear that the Conseil d'État intended to ask the Court of Justice to interpret Article 119 of the EEC Treaty.

In the present case, moreover, the plaintiff in the main action in asking for the annulment of the Royal Decree relies on Article 14 of Royal Decree No 40 of 24 October 1967 under which any woman worker may, in accordance with Article 119 of the EEC Treaty, bring an action in the competent court for the application of the principle of equal pay for men and women. It is right to ensure the uniform interpretation of Article 119 in the Community and to this end to reserve its interpretation to the Court of Justice.

The second question

Miss Defrenne considers that to come within the jurisdiction of the Court the second question must be interpreted as meaning: Does equal pay, as laid down by Article 119 of the EEC Treaty, imply or presuppose equal treatment, that is to say, equality in the working conditions between men and women doing equal work?

The Belgian State maintains that the question whether a rule may lay down a different age-limit for men and women air crew is not relevant and conclusive in the present case.

The *Commission* is of the opinion that the question whether a rule may lay down a different age-limit for men and women required to do the same work does not come within the scope of Article 119 which refers only to pay.

The third question

Miss Defrenne is of the opinion that the third question raised by the Conseil d'État does not come within the jurisdiction of the Court; it does not relate to a question of interpretation of the EEC Treaty, but to a question of fact which is not capable of forming the subject of a reference for a preliminary ruling. It is moreover not disputed that Sabena regards air hostesses as doing the same work as stewards.

The *Belgian State* likewise considers the third question is more a question of fact than a question of law unless its object is to have confirmed by the Court the interpretation that the EEC Treaty did not intend to lay down the principle of equal pay for work of equal value but rather for the same type of work. In any case it is for the national court to decide whether as a matter of fact two activities must be regarded as being the same work.

The *Commission* shares the opinion that the question whether air hostesses and stewards in civil aviation do the same work depends on an assessment of a fact or situation which it is not for the Court of Justice to decide, but one which ought to be left to the jurisdiction of the court trying the main action.

B — *Substance*

The first question

Miss Defrenne observes that in a general way in modern law the concept of 'salary' has been considerably widened. It is right to treat as salary any sums paid as a result of the contract binding the parties even if they do not strictly have their *raison d'être* in the work done. The 'direct salary', the salary for the work done, that is to say the salary directly associated with the participation by the worker in the production process, constitutes only part of the salary of the worker. A part is likewise made up of 'indirect salary' or 'social salary' (family allowances, paid holidays, retirement pensions, for example). The principle of equal pay enshrined in Article 119 of the EEC Treaty likewise applies to the components of the salary which depend on its social character. In the wide sense of the definition of salary a retirement pension constitutes a salary for inactivity, that is to say, a social salary.

More particularly it follows from an analysis of the Royal Decree of 3 November 1969 that there is a direct and necessary link between the retirement pension under the special scheme reserved exclusively for employees of Sabena and their contract of employment since the existence of a contract of employment determines the payment of pension and the latter has its origin in the employment, certain conditions of which directly influence the amount of pension. The fact that a pension scheme is established by a law or regulation, in particular in the form of a collective agreement standardized by Royal Decree, does not change in any way the fact that the contributions and the pension have their origin in the employment.

Moreover the Belgian State is not involved in any way in the financing of the pension scheme. The pension is

funded solely from the contributions deducted from the salary paid by the employer to the air crew and from contributions from the employers own resources, the sum of these contributions being paid at the appointed time to the crew in the form of a monthly pension.

Actually, from the economic point of view, this pension thus constitutes, within the meaning of Article 119 of the EEC Treaty, 'salary' in the form of deferred pay or at least a benefit paid 'in cash' which the worker receives in respect of his employment from his employer and 'indirectly' in view of the fact that it is received by the air crew member at a deferred date and is paid by an institution having the duty of administering the funds received from and on behalf of the crew member and his employer.

In other countries of the Community air hostesses are not excluded from the pension scheme for air crew. The Royal Decree of 3 November 1969 creates an inequality in burdens and involves distortion in the conditions of competition.

For all these reasons it is right to give an affirmative reply to the first question.

The *Belgian State,* represented by the Minister for Social Security, states that Article 119 of the Treaty has only an economic objective, since its aim is to avoid discrepancies in cost prices due to the employment of female labour less well paid for the same work than male labour.

Moreover national laws establish a clear distinction between the contract of employment sector and the social security sector. The latter involves legal obligations both on the employer and the worker which arise not out of the contract of employment but by reason of its existence.

In these circumstances within the meaning of Article 119 salary is the certain and periodical contractual counterpart paid by the employer to the worker by reason of the work done. For there to be a salary it is necessary that the 'payment by the employer' and the 'payment to the worker' both have their origin in the employment. The essential point is the legal link between the payment and its receipt.

The right to a pension on the other hand is an uncertain and fortuitous right. It is an extra-contractual right. The employer is not the debtor. The payment of the contributions by the employer and the payment of the social benefits to those entitled have their origin in the law, the decree, the order or the regulation, but not in the employment. The latter is only the occasion, that is to say, the event giving rise to the application of the law. Contributions to social insurance, even those paid by the employer, calculated like tax, on the actual salary and increased by subsidies from the State, are akin to taxes.

Whether the concept of 'salary' is interpreted in accordance with Community law or internal Belgian law and whether the legal or economic viewpoint is taken, it is not possible to say that social security constitutes consideration which the worker receives in respect of his employment from his employer: the employer does not finance the system alone; the contributions and benefits paid have their origin in the laws and regulations; the employment is only the reason for the payment.

The first question therefore calls for an answer in the negative.

The *Commission of the European Communities* observes that the first question raised by the Conseil d'État relates basically to the interpretation of the concept of 'consideration . . . which the worker receives, . . . indirectly, in respect of his employment from his employer' in the second paragraph of Article 119 of the EEC Treaty.

After having outlined the recent development of the concept of salary and its 'welfare characteristic' which leads to a distinction between the salary in active employment and the salary for the non-active status, which is indeed a reallocated salary, the Commission observes, however, that with regard to their legal

nature neither the social security contributions from the employer nor the benefit paid by the social security institutions should be regarded as salaries.

As regards the concept of 'consideration . . . which the worker receives . . . indirectly, in respect of his employment from his employer', the Commission refers to Convention No 100 of 1951 of the International Labour Office from which it clearly appears that social security benefits are completely excluded from salary. The same conclusion arises from a recommendation by the Commission of 22 July 1960 to the Member States concerning Article 119 of the Treaty and the reply by the Commission of 6 October 1966 to a written question from a Member of the European Parliament.

An interpretation of Article 119 from the point of view of its intention would lead to identical conclusions.

The basic objective of Article 119 is to ensure to men and women in each Member State the same pay whether direct or indirect for the same work. It does not establish a general principle of equality between men and women extending to all matters governed by contract and regulation bearing some relation to the work. The strict nature of the principle laid down in Article 119 is linked to its limited scope. Social security benefits in general and pensions in particular must be excluded from the scope of Article 119.

The second question

Miss Defrenne is of the opinion that the principle of equality laid down by Article 119 likewise includes the equality in the conditions of employment in the exercise of the right to employment. This equality is infringed by the Royal Decree in question.

The *Belgian State* maintains that to the extent that the conditions of employment, including the age-limit, reflect in respect of air hostesses objective factors other than that of sex, they cannot contravene either the spirit or the actual provisions of the EEC Treaty.

The present case is concerned with a contract of employment for a fixed term; the question of the duration of the contract does not come within the terms of Article 119.

Grounds of judgment

1 By order of 4 December 1970, received at the Court Registry on 11 December, the Belgian Conseil d'État referred under Article 177 of the Treaty establishing the European Economic Community three questions relating to the interpretation of Article 119 of the EEC Treaty on the application of the principle of equal pay for men and women for the same work.

The first question

2 The Court is asked in the first place to say 'whether the retirement pension granted under the terms of the social security financed by contributions from workers, employers and by State subsidy, constitutes a consideration which the worker receives indirectly in respect of his employment from his employer'.

3 It appears from the judgment making the reference that this question has been raised in the course of proceedings on the validity of the Belgian Royal

Decree of 3 November 1969 concerning retirement pensions to civil aviation air crews—a decree issued within the framework of the general scheme for retirement pensions and survivor's pensions of workers—and more particularly on a provision of this decree excluding air hostesses from the scheme in question.

4 According to the plaintiff in the main action this exclusion is contrary to the principle of equality laid down by Article 119, since the benefit of the pension forms part of the 'pay' as defined in the second paragraph of Article 119 as consideration which the worker receives indirectly from his employer.

5 Accordnig to the first paragraph of Article 119 of the EEC Treaty Member States are required to ensure the application of the principle that men and women should receive equal pay for equal work.

6 The provision in the second paragraph of the article extends the concept of pay to any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.

7 Although consideration in the nature of social security benefits is not therefore in principle alien to the concept of pay, there cannot be brought within this concept, as defined in Article 119, 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 obligatorily applicable to general categories of workers.

8 These schemes assure for the workers the benefit of a legal scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy.

9 Accordingly, the part due from the employers in the financing of such schemes does not constitute a direct or indirect payment to the worker.

10 Moreover the worker will normally receive the benefits legally prescribed not by reason of the employer's contribution but solely because the worker fulfils the legal conditions for the grant of benefits.

11 These are likewise characteristics of special schemes which, within the framework of the general system of social security established by legislation, relate in partciular to certain categories of workers.

[12] It must therefore be found that situations involving discrimination resulting from the application of such a system are not subject to the requirements of Article 119 of the Treaty.

[13] It follows from the above that a retirement pension established within the framework of a social security scheme laid down by legislation does not constitute consideration which the worker receives indirectly in respect of his employment from his employer within the meaning of the second paragraph of Article 119.

The second and the third questions

[14] The second question asks whether the rules applicable to the worker can 'establish a different age-limit for men and women crew members in civil aviation'.

[15] The third question asks in addition whether air hostesses and stewards in civil aviation do 'the same work'.

[16] In view of the answer given to the first question the other questions do not call for a reply.

Costs

[17/18] The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Belgian Conseil d'État, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the parties to the main action and of the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 119 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the European Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Belgian Conseil d'État (section d'administration, IIIrd Chamber) by order of that court of 4 December 1970, hereby rules:

1. **A retirement pension established within the framework of a social security scheme laid down by legislation does not constitute consideration which the worker receives indirectly in respect of his employment from his employer within the meaning of the second paragraph of Article 119 of the EEC Treaty;**

2. **The other questions do not call for a reply.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 25 May 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 29 APRIL 1971[1]

Mr President,
Members of the Court,

Royal Decree No 50 of 24 October 1967, issued under special delegated powers, is a basic act which in Belgium lays down the retirement pension scheme for employed persons and the survivor's pension, called sometimes reversion, from which those entitled under him may benefit.

Article 3 (6) provides that the special conditions implementing this general act shall be laid down by royal decree for certain employed persons, in particular civil aviation air crews, and the text sets out in a non-exhaustive manner certain of these implementing conditions (special rules giving rise to the entitlement to the pension, retirement age, pay to be taken into account in calculating the pension etc.).

It was in implementation of this provision that an act having the character solely of a regulation, the Royal Decree of 3 November 1969, laid down the special conditions implementing Royal Decree No 50 in respect of air crews of aviation companies.

Article 1 of this decree, which determines the persons to whom it is applicable, provides (I quote) 'any member of the air crew *except air hostesses*' may benefit.

1 — Translated from the French.