OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 8 July 1986 *

Mr President,
Members of the Court,

1. It is a rather unusual case of sex discrimination which has led the Employment Appeal Tribunal to refer four questions to the Court for a preliminary ruling.

In this case the appellant in the main proceedings, who alleges that he has been discriminated against by his employer on grounds of sex, is a man, George N. Newstead, 58 years old, who has been a civil servant since 1970 and is now employed as Information Officer in the Department of Transport.

The dispute has its origin in the 1974 reform of the national civil service pensions scheme (Principal Civil Service Pension Scheme 1974, hereinafter referred to as 'the Principal Scheme'), with particular regard to the scheme of widows' pensions. It is an occupational pension scheme established in accordance with the Superannuation Act 1972 and, in its amended form, is in conformity with the Social Security Pensions Act 1975.

In his Opinion in Case 69/80 (judgment of 11 March 1981 *Worringham and Humphreys* v *Lloyds Bank* [1981] ECR 767, in particular at pp. 798 and 799) Advocate General Warner described in detail the functioning of such a scheme. In the British system a distinction must be drawn between two elements of retirement pensions: the basic component, financed by the State, which is the same for everyone, and a variable component based on earnings, in which the amount of employer and employee contributions and the amount of the benefit paid on retirement vary in accordance with earnings. Subject to certain statutory requirements regarding their substance (in particular the rules governing widows' benefits) and their form (approval by an official body) independent retirement schemes may be established for the administration of the second component, which then ceases to belong to the State scheme. Such schemes are therefore called 'contracted-out' schemes, in the sense that members have 'contracted out' of the statutory scheme with regard to the earnings-related component of retirement pensions. An independent scheme thus partially replaces the statutory scheme. Employers and employees then pay reduced rates of contribution to the State scheme for the basic pension, and the sums paid into the independent scheme are the latter's sole source of finance. Under the Social Security Pensions Act 1975, in order to be qualified as a 'contracted-out' scheme an independent scheme must provide for a widow's pension; there is no such requirement with regard to a widower's pension.

Civil servants were formerly free to contribute to the scheme or not, as they wished, and Mr Newstead had preferred

* Translated from the French.

not to become a member. Under the Principal Scheme, however, since 1 June 1973 his salary, like that of all male civil servants, married or not, has been subject to a compulsory deduction of 1.5% of his gross salary by way of contribution to a fund for widows' pensions.

Female civil servants, on the other hand, leaving aside certain specific cases in which they may but are not required to contribute to the scheme, are not obliged or even permitted to make such contributions for a widower's pension.

The amounts thus deducted from the salaries of male civil servants who are unmarried when they leave the Civil Service are refunded, with compound interest at the rate of 4% per annum with yearly rises, to the persons concerned in the case of retirement and to their estates in the case of their death. However, Mr Newstead, who says that he is a 'confirmed bachelor' and has no intention of marrying, considers that he is denied immediate access to part of his salary, whereas his female colleagues in like circumstances are not put to that inconvenience; he considers that he is therefore a victim of discrimination on grounds of sex.

The tribunal which heard the matter at first instance agreed, on the basis of the relevant national legal provisions, the Equal Pay Act 1970 and the Sex Discrimination Act 1975. The industrial tribunal considered that Mr Newstead received less favourable remuneration, for the purposes of the Equal Pay Act 1970, and that there was detriment on the ground of sex, for the purposes of the Sex Discrimination Act 1975. The tribunal held, however, that the matter was covered by the exemptions made in those Acts for provisions relating to death or retirement (Section 6 (1A) of the Equal Pay Act 1970 and Section 6 (4) of the Sex Discrimination Act 1975).

Before the Employment Appeal Tribunal Mr Newstead, the appellant in the main proceedings, argued that the obligation imposed on him was contrary to Article 119 of the Treaty and to one or more Community directives.

The questions referred by the Employment Appeal Tribunal, which were drawn up in agreement with the parties, may be summarized as follows:

'Does a deduction from gross salary such as that at issue here which is applied only for men constitute a breach

> of Article 119 on its own or in conjunction with Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (Official Journal 1975, L 45, p. 19), adopted in implementation of that article,
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> or 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 (Official Journal 1976, L 39, p. 40)?

If the answer to that question is in the affirmative, under what conditions does primary or secondary Community law have direct effect?'

It should be observed that in its third question the Employment Appeal Tribunal referred only to Directive 76/207, but that, as may be seen from the judgment attached to the request for a preliminary ruling, it

was obviously concerned with the scope of Article 119 and of the directives intended to implement the principle of equal treatment, including Council Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979, L 6, p. 24), and with the rules applicable in sectors where that principle has not been implemented, such as that of occupational social security schemes, in respect of which there exists only a proposal for a directive submitted by the Commission to the Council on 5 May 1983 (Official Journal 1983, C 134, p. 7).

2. Let me deal first of all with the observations of the parties regarding the Community rules which may be applicable. According to Mr Newstead, the respondents in the main proceedings, the Department of Transport and the Treasury, do not dispute that by reason of his sex he is treated less favourably than a woman in a comparable situation.

Analysing the terms used in Article 119 and in the Court's case-law, he argues that there is a breach of Article 119, read together with Directive 75/117, because the English version of Article 119 speaks of the amount which a worker 'receives'; the pay he receives differs from that paid to a comparable female employee. There is thus discrimination on grounds of sex in relation to an aspect and condition of remuneration.

In his view Article 119 would be deprived of much of its substance if the Court were to follow the interpretation of the *Worringham* judgment (Case 69/80, referred to above) put forward by the industrial tribunal, according to which the question of difference in pay should be assessed in the light of gross pay. That would permit all manner of deductions before pay was actually 'received'.

The fact that the case concerns contributions to an occupational pension scheme does not, he says, prevent the application of Article 119 or of Directive 75/117. As in *Worringham* and in *Liefting* v *Academisch Ziekenhuis bij de Universiteit van Amsterdam* (judgment of 18 September 1984 in Case 23/83 [1984] ECR 3225), the issue is not the payment of benefits from an occupational pension scheme. Article 119 makes no exception for deductions made for the purpose of payments to an occupational pension scheme.

In the alternative, the appellant in the main proceedings argues that there is a breach of Articles 1 (1), 2 (1) and 5 (1) of Directive 76/207 inasmuch as male employees are subject to a discriminatory working condition: unlike comparable female employees, they are denied immediate payment of 1.5% of their pay.

Since the case does not concern the payment of benefits from an occupational pension fund or of social security benefits the question of how Directive 76/207 applies to such benefits need not be considered. The fact that the sum withheld is placed in a pension fund is not relevant; to take that fact into account would partly frustrate the objects of the directive.

3. Neither the United Kingdom nor the Commission shares that point of view.

According to the *United Kingdom*, there is no inequality of pay. Salaries can be compared only on the basis of gross pay, before deductions of any kind — tax, social

security, pensions, etc. — since those deductions may vary considerably according to the personal circumstances of the worker, including his sex.

Workers must receive equal pay for the same work: according to the *Worringham* judgment (paragraphs 12 to 15) there is no such equality where net pay is equal although gross pay is not. Equality both of gross and of net pay may often be impossible.

The claim concerns the payment of contributions, a condition of access to a pension scheme. It follows from the distinction drawn in the judgment of 16 February 1982 in Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555, at paragraph 8, between benefits received under a pension scheme and the conditions of access to such a scheme that the latter are covered not by Article 119 of the Treaty and Directive 75/117 but by Directive 76/207.

If that assertion is wrong, however, it is necessary to establish, as the Court has not yet done in a comprehensive manner, whether benefits under an occupational pension constitute 'pay' for the purposes of Article 119 of the Treaty. The United Kingdom submits that occupational pension schemes, both because they ensure financial provision and because they may cover other risks (death, illness, accident, etc.), are matters of social security, in respect to which Articles 117 and 118, and not Article 119, provide for close cooperation between the Member States. In his Opinion in the *Worringham* case, Advocate General Warner considered that a pension scheme such as that at issue here, linked to the national social security system and replacing all or part of the statutory scheme, lay outside Article 119 and the concept of pay. That was made clear, he said, by secondary legislation, in particular Article 3 (3) of Directive 79/7 on social security, according to which:

'With a view to ensuring implementation of the principle of equal treatment in occupational schemes, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application',

and the proposal for a directive on equal treatment in occupational social security schemes, submitted on 5 March 1983, which, according to the United Kingdom, has not yet been adopted *inter alia* because the first two paragraphs in the preamble refer incorrectly to Article 119.

Emphasizing the particularities of pension funds, which are strongly influenced by life expectancies, different for men and for women, the United Kingdom argues that the financial rules hitherto adopted in that area cannot be put in question by a simple application of Article 119.

Occupational pension schemes must by their nature come under Articles 117 and 118; that is confirmed by the judgments of the Court, which has excluded statutory social security schemes from the scope of Article 119. As Advocate General Warner put it in

the *Worringham* case, the scheme in question, which replaces the statutory scheme, falls 'to be dealt with under the broader headings in Article 118' ([1981] ECR 806).

In connection with the third question the United Kingdom goes on to examine Directives 76/207 and 79/7 and the proposal for a directive submitted on 5 March 1983; it considers that the fourth recital in the preamble to Directive 76/207 and Article 1 (2) of that directive leave the implementation of the principle of equal treatment in matters of social security to be dealt with in subsequent instruments. Article 5 (1) of that directive cannot cover the terms of a pension scheme. Article 3 (2) and (3) of Directive 79/7, adopted in application of Article 1 (2) of Directive 76/207, excludes from its scope both occupational schemes and provisions regarding survivors' benefits. The proposal for a directive submitted on 5 March 1983, provided for in Article 3 (3) of Directive 79/7, is concerned precisely with occupational schemes in which benefits are 'intended to supplement the benefits provided by statutory social security schemes or to replace them, whether affiliation to such schemes is compulsory or optional'. The scheme in question corresponds to that definition.

Furthermore, Article 9 (1) of the draft directive provides that the Member States may defer application of the principle of equal treatment with regard to pensions for surviving spouses. The discrimination complained of by Mr Newstead is therefore not prohibited by Community law.

4. In the *Commission's* view, it must be determined whether the problem is one of pay or of working conditions. The deduction of the contributions in question can never benefit the employer; for him, the cost of employing a man is the same as that of employing a woman for the same job. The economic objective of Article 119, which is to prevent distortion of competition between Member States according to whether or not the principle of equal pay is observed, is therefore not frustrated.

The Commission emphasizes that the amounts deducted from his salary are not lost to a male worker or to his estate; that reinforces the point that the employer can in no way benefit and that there is no discrimination between male and female employees with regard to pay.

The Commission adds that it is not entirely clear that there is in fact any discrimination between men and women. If there is discrimination it is between married and single men, and even then it cannot be excluded that a single man may in the end marry, despite what he has declared to be his fixed intentions.

In order to determine whether the principle of equal pay is observed it is not sufficient to compare gross pay without considering net pay, since certain deductions, as in this case, stem at least in part from a decision on the part of the employer. However, the issue in this case is one not of inequality with regard to a financial benefit provided by the employer but of a difference in a condition of employment which has financial consequences. In the *Defrenne III* judgment of 15 June 1978 in Case 149/77 [1978] ECR 1365, at paragraph 21), the Court stated that the fact that certain conditions of employment may have

financial consequences is not sufficient to bring them within the field of application of Article 119.

The Commission therefore considers that the issue falls under Article 5 (1) of Directive 76/207 on the implementation of the principle of equal treatment as regards working conditions. The Commission accepts that from that point of view discrimination between male and female civil servants may be held to exist, even though it may be said that the real inequality of treatment is between unmarried male civil servants and their married colleagues; an unmarried male civil servant does not dispose of his salary under the same conditions as an unmarried female civil servant.

The fact that a deduction is made cannot be viewed in isolation from the reason for which it is made: the compulsory contribution is justified by the provision of a benefit under a social security scheme, and the one cannot be dissociated from the other. It is therefore necessary to determine what provisions of Community law are applicable to survivors' pensions. The Commission's analysis of Article 1 (2) of Directive 76/207, Article 3 (2) and (3) of Directive 79/7 and Article 9 of the proposal for a directive submitted on 5 March 1983 leads it to conclude, with the United Kingdom, that no instrument of Community law yet provides for equal treatment in relation to occupational social security schemes and that even if the proposal for a directive were adopted in its present form there would not necessarily be any obligation on Member States to ensure equality in the case of survivors"pensions.

5. The main issue in this case is once more the definition of the scope of Article 119. The applicant considers that the measure in dispute in the main proceedings may be regarded as an aspect of pay which differs according to sex, the United Kingdom considers that the claim concerns a condition of access to an occupational scheme and the Commission argues that it deals with a working condition which has financial consequences, associated with a question of social security. It is therefore necessary to define clearly the problem of interpretation with which the Court is faced.

Mr Newstead complains that he is not able to dispose of part of his net salary under the same conditions as his female colleagues. His claim therefore seeks the removal of that difference in treatment. There are two ways in which that could be achieved:

Women could be obliged to contribute on the same basis as men, for the purpose of a widower's pension;

The obligation for single male civil servants to contribute could be discontinued, a solution which Mr Newstead appears to prefer.

The problem of interpretation before the Court concerns an obligation to contribute to an occupational scheme for the purposes of a survivor's pension, an obligation which, with certain exceptions, falls only on men, whether or not they are married. It is that obligation that lies behind the measure which Mr Newstead regards as discriminatory, and the latter is merely a consequence.

In Case 19/81 (*Burton*, referred to above), the plaintiff argued that he was treated less favourably than a female worker inasmuch as at the age of 58 he was not eligible for a voluntary redundancy benefit, whereas a woman of the same age was. Going beyond the effect, the Court addressed itself to the cause, and held that the questions referred did not concern a benefit as such but in fact raised the issue whether the age conditions, which differed according to the sex of the worker and determined eligibility for the

benefit, constituted discrimination prohibited by Community law. The cause of the difference in treatment lay in the conditions relating to age, and the fact that men were not eligible for a benefit under the same conditions as women was merely an effect.

In this case, the cause is the obligation to contribute which is imposed only on male civil servants, and the effect is a difference in comparison with their female colleagues with regard to the immediate availability of part of their salary.

If our examination were to be restricted to the effect alone, as suggested by the applicant, the question would arise whether there was in fact any discrimination on grounds of sex. Could it not be said, as the Commission has suggested, that the discrimination lies rather in the unjust imposition of the same obligation on all men, whether or not they are married? Since in general, with rare exceptions, widowers' pensions do not exist, it is difficult to argue that there is discrimination in pay between men and women, since men have the benefit of a future advantage, financial provision for their spouses, whereas women have not. From the point of view of social progress, it could even be argued that it is women who are in fact thus discriminated against in their employment. At the hearing, moreover, Counsel for Mr Newstead admitted that the applicant would no doubt have considered the situation less unjust if he were married, precisely because his wife would then have a right to a survivor's pension. It appears from the remarks of Counsel that Mr Newstead wishes to be placed in the same situation as unmarried women, that is to say he thinks that, like them, unmarried men should be exempt from the obligation to contribute. Negotiations between the Government and the civil service unions are currently in progress with a view to extending the same pay deduction to all civil servants, whatever their sex and marital status. That is not what Mr Newstead would like to see, since in fact he does not wish to contribute for a spouse which he says he will never have; if I have correctly understood the matter, however, he will nevertheless be less dissatisfied, since single women who, like him, intend to remain single will be treated as unfavourably as he is.

This kind of claim is not supported by Articles 117 to 119 of the Treaty, and if the question were to be restricted to that aspect the answer would be that none of the provisions referred to applies.

This case nevertheless raises a real issue which is, as I have already stated, the question to what extent the principle of equal treatment applies to an obligation to make contributions for the purpose of a survivor's pension, and that amounts to asking what the nature is of such an obligation to make contributions.

6. In my view the answer may be found quite simply in Directive 79/7, which applies to statutory schemes providing insurance in case of sickness, invalidity, old-age, accidents at work and occupational diseases, and unemployment. Article 4 of that directive prohibits discrimination on grounds of sex by reference in particular to marital status, especially as concerns '*the obligation to contribute* and the calculation of contributions' (my emphasis).

According to Article 3 (2), however, the directive does not apply 'to the provisions

concerning survivors' benefits', and Article 3 (3) leaves the implementation of the principle of equal treatment in occupational schemes to subsequent provisions to be adopted by the Council on a proposal from the Commission. As I said, a proposal on the subject was submitted by the Commission to the Council on 5 May 1983. We have been told that its adoption may be delayed for a considerable period.

According to Article 2 (1) of the proposal for a directive,

' "Occupational schemes" means schemes whose purpose it is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings or an occupational sector or group of such sectors, with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether affiliation to such schemes is compulsory or optional'.

The scheme of survivors' pensions to which Mr Newstead has been obliged to contribute falls under those criteria since it partly replaces the statutory scheme, in so far as its earnings-related component is concerned.

Article 5 of the draft directive, like Article 4 of Directive 79/7, prohibits discrimination on grounds of sex by reference in particular to marital status, especially as regards 'the obligation to contribute'.

One conclusion is inescapable: according to Council Directive 79/7 and the proposal of 5 March 1983 the obligation to contribute to a social security scheme, which the applicant says affects his conditions of pay and therefore falls within the scope of Article 1 (1) of Directive 75/117, in fact lies outside the field governed by Article 119 and the directive adopted in implementation of it, and falls instead within that governed byArticles 117 and 118, the second of which expressly governs matters of social security.

In his Opinion in Case 149/77 (*Defrenne III*, referred to above, [1978] ECR 1365 at p. 1382), Advocate General Capotorti has already pointed out that working conditions, governed generally by Articles 117 and 118, certainly include pay. Those articles may thus, through their effect on working conditions, have an influence on rules regarding pay. That is true in particular of matters relating to social security, and it is scarcely necessary to point out the close links between them and national policies of social protection.

It follows that pay deductions made pursuant to an obligation to contribute to a social security scheme fall within the ambit of working conditions to which the principle of equal treatment for men and women applies only in so far as it has been implemented by a Council directive. Although Directive 76/207 concerns 'working conditions, including pay' (first recital in the preamble), it excluded from its scope, by referring to a directive to be adopted by the Council, those concerning matters of social security (Article 1 (2)), which have since been partly covered by Directive 79/7.

Consequently, a situation such as that at issue in this case does not fall within the scope of Article 119, which 'in contrast to the provisions of Articles 117 and 118, which are essentially in the nature of a programme', is 'limited to the question of pay discrimination between men and women workers[and]constitutes a special rule

whose application is linked to precise factors' (*Defrenne III*, referred to above, at paragraph 19).

Article 119 is 'based on the close connection which exists between the nature of the services provided and *the amount* of remuneration' (paragraph 21 of the same judgment; my emphasis). Having held that Article 119 was directly applicable in its own field, the Court stated that the terms of the article must not be so widely interpreted as to risk 'intervening in an area reserved by Articles 117 and 118 to the discretion of the authorities referred to therein' (paragraph 23).

The close cooperation between the Community institutions and the Member States of which Article 118 speaks is perhaps even more necessary in matters of social security than in other matters. The financial difficulties with which the Member States of the Community are faced (see in this regard Dr Leo Crijns, 'Les pensions de vieillesse et les problèmes y afférents dans les dix États membres de la Communauté européenne, *Droit Social* No 9-10, September/October 1984, p. 573) are certainly far from conducive to action on the part of the Council to hasten the abolition of discrimination on grounds of sex in occupational pension schemes. The Commission has officially expressed its deep regret with regard to that state of affairs (see Official Journal 1984, C 314, p. 22, reply given on 11 October 1984 by Mr Richard, on behalf of the Commission, to a question put by a member of the European Parliament). However, although I think the delay is indeed very regrettable, I am forced to conclude that the scheme in question has the characteristics of occupational schemes with regard to which the principle of equal treatment has not yet been implemented. Moreover, since we are concerned with an obligation to make contributions for the purpose of a survivor's pension, if the text proposed by the Commission in 1983 came into force in its present state it would still include an exception applicable to a case of the kind now before the Court. Although Article 4 (b) expressly states that it is to apply to 'occupational schemes which provide . . . in particular survivors' benefits . . . , 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', Member States would still be entitled to defer application of the principle of equal treatment with regard to such pensions (Article 9 (1) (b) of the draft directive) unless equal treatment had already been achieved in statutory social security schemes.

Under Community law as it now stands, there is thus no obligation on a Member State to apply the principle of equal treatment for men and women to an obligation to make contributions for the purpose of creating survivors' pensions.

7. It remains to be seen, however, whether such a conclusion is compatible with the judgments of the Court according to which a contribution owed by a worker to a social security scheme, including a statutory one, may be regarded as pay for the purposes of Article 119.

The Court has held that:

'. . . the amounts which the public authorities are obliged to pay in respect of contributions owed to the social security scheme by persons working for the State and which are included in the calculation of the gross salary payable to civil servants must be regarded as pay within the meaning

of Article 119 since they directly determine the calculation of other advantages linked to the salary' (judgment of 18 September 1984 in Case 23/83 *Liefting* v *Academisch Ziekenhuis bij de Universiteit van Amsterdam* [1984] ECR 3225, at paragraph 13, p. 3239).

Those remarks reflect the contents of the decision in Case 69/80 *Worringham*, referred to above, at paragraphs 14 to 17 [1981] ECR 790.

In reality, the problem becomes clear when one refers, as the Court did in *Defrenne III*, following the Opinion of Advocate General Capotorti, to the distinction which must be drawn between the scope of Articles 117 and 118 of the Treaty on the one hand, and that of Article 119 on the other.

Articles 117 and 118 are general in scope; they emphasize 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained' (first paragraph of Article 117) and give the Commission 'the task of promoting close cooperation between Member States in the social field', particularly in matters relating to social security (first paragraph of Article 118).

I have already pointed out that those provisions are in the nature of a programme and require, for their implementation, the adoption of secondary Community legislation. It is in that context that the Council adopted Directives 76/207 and 79/7. The adoption of those directives does not exhaust the sphere of application of the two articles.

Article 119 of the Treaty is specific in scope and concerns the 'application of the principle that men and women should receive equal pay for equal work' (first paragraph). Its relatively restricted sphere of application is included in the more general scope of Articles 117 and 118. The fundamental nature of the principle laid down in Article 119 has led the Court to hold that it is directly applicable with regard to 'all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application' (judgment of 9 February 1982 in Case 12/81 *Garland* v *British Rail Engineering* [1982] ECR 359, at paragraph 14, p. 370).

That is the general framework in which the decisions cited above, referred to by the Employment Appeal Tribunal, the parties to the main proceedings and those who have submitted observations to the Court, must be understood.

The judgments of the Court reflect a desire to strike a balance between:

on the one hand, the fundamental nature of the principle laid down in Article 119, which demands Community support for its effective application, and

on the other, due regard for the jurisdiction reserved by Articles 117 and 118 to the Community institutions and the Member States; the latter must retain the power to control their own social policy and, of course, its financial consequences (see L. Imbrechts, 'L'égalité de rémunération entre hommes et femmes', *Revue trimestrielle de droit européen*, Vol. 2, April-June 1986, p. 231, at pp. 236-237).

As I have already pointed out, social security, under which heading survivors' pensions fall, is one of the matters expressly referred to in Article 118.

That is why there is no contradiction between the solution which I propose in this case and that arrived at by the Court in *Worringham* and *Liefting*, where the issue was not the *obligation* to contribute, a working condition, but sums paid pursuant thereto — that is to say the *amount* of the contribution — included in the gross salary and used to determine the calculation of other advantages linked to the salary. In plain language the obligation itself should not be confused with the contribution which is merely the financial consequence thereof.

It is clear that an unmarried male worker whose *total* pay, including the amount of the social security contribution, was less than that paid to female workers in like circumstances would be entitled to rely on both Article 119 and its implementing directive, Directive 75/117. However, where the amount of pay is *equal* whatever the sex of the worker, and the legislation applicable to the person concerned merely requires the deduction of a social security contribution imposed only on men, the measure under which the deduction is made comes under Articles 117 and 118 of the Treaty and Directives 76/207 and 79/7. As we have seen, under Community law as it now stands those provisions do not prohibit different treatment on grounds of sex in that respect.

It is understandable that the persons affected should find that a deplorable state of affairs, and one can only hope that Community legislation settling the matter will be adopted as soon as possible. However that may be, so long as the proposal for a directive currently before the Council is not in force a measure such as that at issue in the main proceedings cannot, I think, be regarded as incompatible with primary or secondary Community law.

Let me add, for the sake of completeness, that this analysis must not be interpreted as permitting any pay deduction whatsoever which might be made in a manner discriminatory on grounds of sex. Any deduction of that kind which did not fall within the scope of an express exemption would be contrary to Article 5 of Directive 76/207, which the Court has held to have direct effect (judgment of 26 February 1986 in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723).

In view of the foregoing observations, I propose that the following reply should be given to the questions referred by the Employment Appeal Tribunal:

Having regard to Article 1 (2) of Council Directive 76/207 of 9 February 1976 (Official Journal 1976, L 39 of 14 February 1976) and Article 3 (2) and (3) of Council Directive 79/7 of 19 December 1978 (Official Journal, L 6 of 10 January 1979) a deduction made from the gross pay of men only in order to provide for a survivor's pension under an occupational pension scheme is compatible with Community law as it now stands.