2. The principle of equal pay enshrined in Article 119 applies to the case where it is established that, having regard to the nature of her services, a woman has received less pay than a man who was employed prior to the woman's period of employment and who did equal work for the employer.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 28 FEBRUARY 1980 [1]

Mr President,
Members of the Court,

1. This case gives the Court the opportunity of returning to the important issue of equal pay for men and women, as laid down in Article 119 of the Treaty of Rome, which has already been considered in the well-known judgment of 8 April 1976 in the case of *Gabrielle Defrenne* v *Sabena* [1976] ECR 456.

The facts are straightforward. The English company Macarthys Ltd., who are wholesale dealers in pharmaceutical products, paid in 1974 and 1975 a weekly wage of £60 to a Mr McCullough, who was the manager of one of their warehouses. On 1 March 1976, after that post of warehouse manager had been vacant for more than four months, Mrs Wendy Smith was employed to fill it at a weekly wage of £50. Thereafter, relying upon the English legislation on equal pay (the Equal Pay Act 1970), Mrs Smith applied to the Industrial Tribunal in London for an order that, in virtue of that Act, she was entitled to the same salary as that which had been received by her predecessor.

By decision of 27 June the Tribunal, although finding that the applicant's

1 — Translated from the Italian.

duties were not identical to those of her predecessor (in particular, in contrast to the latter, she was not responsible for the maintenance of vehicles), held that Mrs Smith's work was "broadly similar", within the meaning of Section 1 (4) of the Equal Pay Act, to that previously performed by Mr McCullough. It accordingly decided that Mrs Smith's remuneration should have been calculated on the same basis as that adopted for calculating Mr McCullough's salary, particularly as the applicant did not have available the assistance of the two assistant warehouse managers which her predecessor had had.

That decision was upheld by the appellate tribunal in employment disputes, the Employment Appeal Tribunal, although it recognized that to do so it was necessary to go beyond a strict construction of the Equal Pay Act, which restricts the right of equality of treatment to the case of contemporaneous employment with the same firm of men and women whose actual duties (and not the abstract title of the post held) are to be compared. According to the Employment Appeal Tribunal, it appeared necessary to go beyond a strict construction of the British Statute in order to avoid the unjust results which would otherwise arise and to avoid, moreover, incompatibility with the Community principle of equal pay for workers of both sexes for "equal work", laid down in Article 119 of the Treaty of Rome.

On further appeal to the Court of Appeal, Macarthys prayed in aid the literal wording of the Equal Pay Act while counsel for Mrs Smith advanced the need to interpret the national law in accordance with Community law and referred not only to the said Article 119 of the Treaty but also to Article 1 of Council Directive No 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. According to the latter provision "The principle of equal pay for men and women outlined in Article 119 of the Treaty... means, for the same work *or for work to which equal value is attributed*, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration".

By order of 25 July 1979, the Court of Appeal in London referred to this Court four questions on the interpretation of the Community legislation with a view to establishing whether the principle of equal pay must apply in a situation of the kind in which Mrs Smith found herself.

2. The Court of Appeal asks, first, whether the principle of equal pay for men and women for "equal work", referred to in Article 199 of the EEC Treaty and Article 1 of the Council directive cited above, is confined to cases in which the men and women concerned are contemporaneously engaged on equal work within the same undertaking.

A restriction on the application of the said principle of Article 119 in the sense indicated by that question is not warranted by the wording of that provision which confines itself to laying down, as a condition for its application, similarity in the services rendered,

without in fact mentioning any criterion of contemporaneity. In addition, the above-cited judgment of 8 April 1976 in the *Defrenne* case, in holding Article 119 to be directly applicable, refers to the case "where men and women receive unequal pay for equal work carried out in the same establishment" (paragraph 22 of the Decision) without requiring contemporaneity in the work in question.

Nor is the restriction mentioned justified by the objectives of Article 119. As is clearly stated in the aforementioned *Defrenne* judgment (paragraphs 8 to 10 of the Decision), "Article 119 pursues a double aim. First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principal of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty."

The Commission has correctly pointed out that if an undertaking could, by replacing its male employees with female employees, by that fact alone pay lower wages, that would result in its having an unfair competitive advantage over undertakings which contemporaneously employ men and women to carry out the work in question. Further, if the only reason for a difference in the level of remuneration for the same work performed for the same undertaking at different times was the difference in sex, female workers would be unjustly discriminated against and placed at a disadvantage in comparison with male workers, which would be manifestly contrary to the social objectives of the legislation in question.

The British Government submitted in the course of these proceedings that, in order to apply the said principle contained in Article 119 to equal work performed at different times, it would be necessary to adopt legislation defining the limitative criteria in terms of time and the appropriate reference period for the comparison. In the absence of such details Article 119 could not apply to work carried out at different times. In support of that proposition the British Government referred to the distinction drawn by the Court, once again in the above-mentioned *Defrenne* judgment, between "first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question, and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character" (paragraph 18 of the Decision). However, what led the Court to make that distinction and to hold that Article 119 had no direct effect in regard to the

second type of discrimination was, above all, the existence of cases in which it is impossible to compare the work of men and women, as occurs, for example, when discrimination takes place not simply within the same establishment but in relation to whole sectors of industry which are characterized by exclusively or predominantly female employment, not to speak of the disguised discrimination which arises by virtue of restrictions on access by women to certain posts or levels of employment. Direct comparability between the functions performed by employees of both sexes for the same undertaking is not, on the other hand, prevented by the fact that the services are rendered at different times; and detailed legislation is surely not necessary to enable a court to establish whether work is "equal" within the meaning of the first paragraph of Article 119.

In order to make such an assessment it is necessary only that there be ascertained, in each individual case, certain matters of fact, namely as to whether the tasks performed by workers of both sexes are comparable. That manifestly comes within the field of the direct application of Article 119, as is made clear by the *Defrenne* judgment (paragraphs 16 to 18 of the Decision).

Difficulties may arise in a case where the period of time which has elapsed between the two periods of employment in question is such as to render a comparison between the two remunerations not reasonably possible, given the change in general economic conditions and, especially, the particular conditions of the employer. The adoption of a more restrictive incomes policy may also affect earnings from one day to the next. But in cases of that kind the difference in treatment would have an objective justification in the changing general or particular economic conditions just mentioned: there would thus be no longer any ground for speaking of unjustified and arbitrary discrimination in pay between men and women employees. All depends, even in this regard, upon the ascertainment of the facts, which is the task of the national tribunal. It is permissible to suppose, for example, that an undertaking wishing to show that it was constrained by economic circumstances to pay a woman employee less than the man who preceded her in the same post will rely upon facts relating to the general level of wages inside, and possibly outside, the undertaking. I would note incidentally that, in the present case, the court making the reference held that no facts other than the lower remuneration paid to Mrs Smith in comparison with her predecessor and the almost total identity of the tasks entrusted to both of them were to be taken into account.

These considerations lead me to hold that the principle of equal pay without discrimination on grounds of sex for equal work for the same undertaking (contained in Article 119 of the EEC Treaty) may not be restricted to cases in which the work is contemporaneously carried out by male and female workers.

3. In the second question, which is dependent upon a negative answer to the first, the Court of Appeal asks whether the principle of equal pay may be relied upon by a worker who shows that she receives less pay than would have been received by a man doing equal work for the same undertaking, assuming a man

were appointed to her post, or than had actually been received by a male worker who had been employed previously and who had been doing equal work for the same undertaking.

In my opinion, an affirmative answer is the logical and necessary consequence to the reply given to the preceding question. The method of making a hypothetical comparison between the wage paid to a female worker and that which *would have been* paid to a male worker, had he held her position, gave rise to debate in the course of the proceedings. However, such a comparison is undoubtedly possible when there is a means of referring to wages normally paid or offered to male workers for equal work within the same undertaking.

I have already observed that there are grounds for reliance upon Article 119 where the reason for the difference in treatment lies in the difference in sex. That means that a mere finding of a difference in treatment, to the detriment of a female worker, with respect to the remuneration which a man has already received, or could have received, for the same work within the same undertaking can represent at the most a mere presumption of unlawful discrimination.

Apart from the possibility already mentioned where the difference in treatment arises from changes in the general or particular economic conditions, there is also the specific case where the difference in wage levels as regards a woman who has actually taken the position of a man may be caused by the personal circumstances of the workers in question, as may arise when the man taken as a basis of comparison has a greater length of service than the woman in question. In truth, such a situation would justify differing wages even in a case of contemporaneous employment.

Another specific case is that in which the management of the undertaking considers it proper to classify differently certain tasks previously carried out by a male worker which, from the point of view of their grading, had been overrated. Here, too, the factual problem is that of ascertaining whether the alleged overgrading existed; and the tribunal charged with investigating the facts must resolve the issue by resorting to objective terms of reference (such as the position in other undertakings in the same line of business or the level of grading provided for in collective agreements). What is important is that the lower wage should be due to circumstances other than the sex of the workers. It is for the undertaking accused of discrimination in pay to raise the defence that that state of affairs is brought about by circumstances of that nature; and of course, the most persuasive proof will be provided by showing that the reduction in salary would also have affected a man if he had been employed instead of a woman in succession to another male employee.

4. In the third question — which, in its turn, presupposes an affirmative answer to that just considered — the national court inquires whether that answer is "dependent" upon the provisions of Article 1 of the said Council Directive No 75/117.

I had occasion earlier to refer to the content of that article. It is clear that it is closely linked to Article 119 of the Treaty of Rome; but more precisely, its purpose is to implement Article 119 and also to supplement it by going beyond the case of "equal work", to which the concept of "work to which equal value is attributed" is related (thereby taking up

the provisions of Article 2 of Convention No 100 concluded by the International Labour Organization). Thus it is only in relation to that innovative aspect of Article 1 of the directive that there can be any point in inquiring whether the answer to the issue raised by the second question is dependent upon that article rather than upon Article 119 alone. And it appears to me to be clear that the answer must be in the negative; indeed, it was on the basis of Article 119 alone that I concluded that the principle of equal pay must not be confined to contemporaneous work performed by a man and a woman working within the same undertaking. In other words, that view is not influenced in the least by the fact that today, as a result of the above-mentioned directive, the principle in question extends to two jobs to which equal value is attributed; irrespective of that extension, and even if the extension had not occurred, the view which I have adopted would be tenable (and, in my opinion, well-founded).

In the present case, the English tribunal of first instance — and, at least by implication, that of the second instance also — considered that Mrs Smith's work was "broadly similar" — and that her services were "broadly comparable" — to that of the previous warehouse manager. That led those tribunals to hold that Section 1 (4) of the Equal Pay Act applied — thereby surmounting, as I stated at the outset, the restriction in the legislation whereby only two jobs performed contemporaneously could be regarded as comparable. The wording of the first question put by the Court of Appeal, to which the second is linked, also reflects this. It is well settled that the assessment of whether the two jobs to be compared are identical or similar is a matter for the tribunal having jurisdiction as to the substance of the case. I think that all that may be added, in general terms, is that the approach adopted in Council Directive No 75/117, in the sense of interpreting and implementing Article 119 of the Treaty of Rome in a broad manner, warrants a liberal construction of the expression "equal work" used in that provision. Accordingly, in my opinion, that phrase is to be construed in such a manner as to include two jobs which display a high degree of similarity the one to the other, even if there is no total identity between them.

The negative reply which I thus propose to give to the third question deprives of content the fourth and final question framed by the English court to cover the sole eventuality of an affirmative answer to Question 3.

5. In conclusion, I would suggest that the Court, in answering the questions referred to it for a preliminary ruling by the Court of Appeal in London by order of 25 July 1979, should rule that:

1. The application of the principle of equal pay for equal work without discrimination on grounds of sex contained in Article 119 of the EEC Treaty is not confined solely to cases where men and women employed by the same undertaking are contemporaneously engaged on that employment.

2. The above-mentioned principle is equally valid in cases where a female worker can show that she received from her employer a lesser remuneration than that which a male worker had previously received or that which he would have received if he had been contemporaneously engaged in the same undertaking and on the same work, provided always that there is no objective justification for the difference in treatment on grounds other than the difference in sex.

3. In the case of "equal work" — which includes two jobs having a high degree of similarity — the affirmative answers to the preceding questions are based upon Article 119 of the Treaty of Rome and are not dependent upon the provisions of Article 1 of Council Directive No 75/117.