# JUDGMENT OF THE COURT (Sixth Chamber)
11 December 1997 *

In Case C-246/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Office of the Industrial Tribunals and the Fair Employment Tribunal, Belfast, for a preliminary ruling in the proceedings pending before that court between

**Mary Teresa Magorrian,**

**Irene Patricia Cunningham**

and

**Eastern Health and Social Services Board,**

**Department of Health and Social Services,**

on the interpretation of Article 119 of the EC Treaty and of Protocol No 2 concerning Article 119 of that Treaty, annexed to the Treaty on European Union,

* Language of the case: English.

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, G. F. Mancini (Rapporteur), P. J. G. Kapteyn, J. L. Murray and G. Hirsch, Judges,

Advocate General: C. Cosmas,
Registrar: L. Hewlett, Administrator

after considering the written observations submitted on behalf of:

— Mrs Magorrian and Mrs Cunningham, by J. O'Hara, Barrister-at-law, and E. McCaffrey, Solicitor,

— the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, and by R. Weatherup QC, and N. Paines, Barrister,

— the Commission of the European Communities, by C. Bury, M. Wolfcarius and C. Docksey, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Magorrian and Mrs Cunningham, of the United Kingdom Government and of the Commission at the hearing on 5 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 10 July 1997,

gives the following

## Judgment

1 By order of 9 July 1996, received at the Court on 17 July 1996, the Office of the Industrial Tribunals and the Fair Employment Tribunal, Belfast, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Article 119 of the EC Treaty and of Protocol No 2, concerning that provision, annexed to the Treaty on European Union.

2 Those questions have been raised in proceedings between Mrs Magorrian and Mrs Cunningham and the Eastern Health and Social Services Board and the Department of Health and Social Services in relation to certain additional benefits under a contracted-out retirement pension scheme.

### The national provisions

3 Under Section 2(4) of the Equal Pay Act (Northern Ireland) 1970 ('the EPA'), claims concerning equal pay must be brought within six months of the end of the relevant period of employment. Section 2(5) of the EPA provides that, in proceedings brought in respect of a failure to comply with an equal pay clause, a woman is not to be entitled to be awarded any payment by way of arrears of remuneration or damages in respect of a period earlier than two years before the date on which the proceedings were instituted.

4 Section 56 of the Social Security Pensions (Northern Ireland) Order 1975 provides that, in the case of a public service pension scheme, the Minister, government department or other person or body concerned with its administration are to take such steps as are open to them for bringing the rules of the scheme into conformity with the requirement of equal access.

5 Regulation 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations (Northern Ireland) 1976 No 238 ('Occupational Pension Regulations'), amending the EPA, provides that, in proceedings concerning access to membership of occupational pension schemes, the right to be admitted to the scheme is to have effect from a date no earlier than two years before the institution of proceedings.

6 Regulation 3 of the Health and Personal Social Services (Superannuation) Regulations (Northern Ireland) 1984 ('the Superannuation Regulations') defines a mental health officer ('MHO') as a whole-time officer on the medical or nursing staff of a hospital used wholly or partly for the treatment of persons suffering from mental disorder who devotes the whole or substantially the whole of his time to the treatment of such persons.

7 Under regulation 50(2) of the Superannuation Regulations, where a person has reached or passed the age of 50 and has worked as a mental health worker for a period of 20 years and continues to work as a mental health officer, his or her subsequent service is reckoned for pension purposes at twice its length and the right to a pension is obtained at the age of 55 instead of the normal age of 60.

## The main proceedings

8 Mrs Magorrian and Mrs Cunningham were employed as qualified nurses in the mental health sector by a public-sector health board responsible for supplying medical and other services in a region of Northern Ireland.

9 They commenced their careers working full-time with MHO status. When their family responsibilities increased, they both commenced working part-time and therefore lost that status. Each of them was nevertheless in charge of a hospital ward and as such responsible for full-time nurses.

10 The difference between part-time work and full-time work was very small. In fact, as a result of a re-organization of work in 1981, the working hours for part-time nurses were set at 31 hours 5 minutes per week, whilst full-time hours were reduced from 40 hours to 37 hours and 30 minutes per week.

11 Both of the applicants in the main proceedings were affiliated to and contributed to the Health and Personal Social Services Superannuation Scheme ('the Superannuation Scheme'), a voluntary contracted-out pension scheme to which both the employer and the employee contribute. Since 1973 this scheme has been open to part-time workers working a specified number of hours and, since 1991, all part-time workers have been entitled to join the scheme regardless of the hours worked.

Under the scheme, persons affiliated receive a lump-sum payment on retirement, followed by monthly payments.

12 On 18 October 1992, Mrs Magorrian retired at the age of 59 years and 355 days, having completed 9 years and 111 days of full-time work as an MHO between 1951 and 1963, and the equivalent of 11 years and 25 days of part-time service between 1979 and 1992. She had also worked part-time between 1969 and 1979, but for hours not reckonable for pension purposes.

13 Mrs Cunningham retired in April 1994 at the age of 56 years and 80 days, having completed 15 years and 175 days of full-time service as an MHO between 1956 and 1974, and the equivalent of 11 years and 105 days of part-time service between 1980 and 1994. She had also worked part-time between 1974 and 1980 for hours not reckonable for pension purposes and had elected not to make pension contributions during that period.

14 Mrs Magorrian therefore interrupted her career between her full-time employment and her part-time work, whilst Mrs Cunningham went directly from full-time work to part-time work without interruption.

15 On their retirement, the applicants in the main proceedings received the lump sums to which they were entitled, together with their basic retirement pensions, but were not given certain additional benefits to which they would have been entitled under regulation 50(2) of the Superannuation Regulations if they had had

the status of mental health officers at the time of their retirement. It was made clear at the hearing that, if the applicants had had that status, they would have obtained the additional benefits without having to pay additional contributions.

16 By application dated 22 September 1992 the applicants in the main proceedings brought the matter before the national court, relying on Article 119 of the Treaty in support of their claim for additional benefits on the basis of their length of service calculated from 8 April 1976, the date of the judgment in *Defrenne* (Case 43/75 [1976] ECR 455) or, in the alternative, from 13 May 1986, the date of the judgment in Case 170/84 *Bilka-Kaufhaus* v *Weber von Hartz* [1986] ECR 1607). They claim that there is no justification for limiting the calculation of their length of service to the period of two years laid down in the EPA, or to 17 May 1990, the date of the judgment in Case C-262/88 *Barber* v *Royal Guardian Exchange* [1990] ECR I-1889, since to do so would deprive them of any effective legal remedy.

17 It is clear from the order for reference that all the parties agree that payment of those benefits under the applicants' occupational pension scheme constitutes 'pay' for the purposes of Article 119 of the Treaty and 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 (OJ 1975 L 45, p. 19). The national file also shows that the applicants both lodged their claims before leaving their employment.

18 In its interlocutory judgment of 12 September 1995 the national court found that the exclusion of part-time psychiatric nurses from MHO status constituted indirect discrimination based on sex, since a considerably smaller proportion of women than men working in the mental-health sector in Northern Ireland were in a position to satisfy the requirements imposed by full-time working. It further found that discrimination to be unjustified.

## The preliminary questions

19 Taking the view that the outcome of the dispute depended on the interpretation of Community law, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'In circumstances where:

(a) a worker has been employed by a Health Board which is part of the State, in employment concerned with the care of the mentally ill to which an occupational pension scheme applies;

(b) the worker has at all material times either been a member or been eligible to be a member of the pension scheme;

(c) the pension scheme contains a term according to which those who work full-time and devote all or substantially all their working hours to the care of the mentally ill (who are described as "Mental Health Officers") are entitled to additional benefits not available to those doing the same work part-time, as follows:

where a person has reached or passed the age of 50 and has worked as a Mental Health Officer for 20 years (here referred to as the "qualifying service") and continues to work as a Mental Health Officer, then

(i) their subsequent service is reckoned for pension purposes at twice its length (here referred to as the "double-time service"); and

(ii) they have the right to a pension at the age of 55 instead of the normal age of 60;

(d) the worker is deprived of the status of Mental Health Officer and the additional benefits attached thereto solely on the ground that her employment was part-time;

(e) the national tribunal has held that the provisions described at (c) and (d) constitute discrimination on grounds of sex against women working part-time in the care of the mentally ill;

(f) the pension which the worker receives and the additional benefits which they claim, are only payable to them as from their respective retirements in 1992 and 1994, after their claims have been brought before the national tribunal; and

(g) the calculation of the additional benefits from their respective retirement dates in 1992 and 1994 would involve counting their years of service prior to 1992

Question 1: From what date should the service of the workers be counted for the purpose of calculating the additional benefits to which they are entitled:

(i) 8 April 1976

(ii) 17 May 1990

(iii) some other and, if so, what date?

Question 2: Where the relevant national legislation restricts back-dating entitlement in the event of a successful claim to a period of 2 years prior to the date on which the claim was made, does this amount to the denial of an effective remedy under Community law and is the Industrial Tribunal obliged to disregard such provision in domestic law if it feels it necessary to do so?'

## The first question

20 By its first question the national court essentially seeks to ascertain the date as from which the periods of service of part-time workers who have suffered indirect discrimination based on sex must be taken into account for the purpose of calculating the additional benefits to which they are entitled.

21 It must be emphasized first of all that it is common ground that payment of additional benefits under an occupational scheme such as that under consideration in the main proceedings falls, as a matter of principle, within the concept of pay for the purposes of Article 119 of the Treaty.

22 In *Defrenne*, cited above, the Court held that the principle of equal pay under Article 119 may be relied on before national courts and that those courts have a duty to ensure the protection of the rights which that provision vests in individuals. However, the Court also stated, at paragraphs 74 and 75 of that judgment, that important considerations of legal certainty affecting all the interests involved, both public and private, meant that the direct effect of Article 119 could not be relied on in order to support claims concerning pay periods prior to the date of that judgment, 8 April 1976, except as regards workers who had already brought legal proceedings or made an equivalent claim.

23 On the other hand, in paragraphs 20 and 22 of *Bilka*, cited above, the Court found that, where an occupational pension scheme, although adopted in accordance with the provisions laid down by national legislation, was based on an agreement with workers or their representatives and the public authorities did not contribute to its financing, such a scheme did not constitute a social security scheme governed directly by statute and therefore fell outside the scope of Article 119, and that the benefits paid to employees under such a scheme constituted consideration received by the employee from the employer in respect of his employment, as referred to in the second paragraph of Article 119.

24 Although those principles were upheld in the judgment in *Barber* in relation to 'contracted-out' occupational pension schemes, the Court also stated, at paragraphs 44 and 45 of that judgment, that overriding considerations of legal certainty precluded reliance being placed on the direct effect of Article 119 of the Treaty in order to claim entitlement to a pension with effect from a date prior to delivery of the judgment in that case, except in the case of persons who had in the meantime taken steps to safeguard their rights.

25 As the Court stated in paragraphs 19 and 20 of its judgment in Case C-109/91 *Ten Oever* [1993] ECR I-4879, by virtue of the *Barber* judgment, the direct effect of Article 119 of the Treaty may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the judgment in that case, subject to the exception in favour of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

26 That limitation is also to be found in Protocol No 2 annexed to the Treaty on European Union, which provides that: 'For the purposes of Article 119 of this treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

27 However, in Case C-57/93 *Vroege* [1994] ECR I-4541, paragraphs 20 to 27, and Case C-128/93 *Fisscher* [1994] ECR I-4583, paragraphs 17 to 24, the Court took the view that the limitation of the effects in time of the *Barber* judgment concerned only those kinds of discrimination which, owing to the transitional derogations for which Community law provided and which were capable of being applied to occupational pensions, employers and pension schemes could reasonably have considered to be permissible (Case C-435/93 *Dietz* [1996] ECR I-5223, paragraph 19).

28 As far as the right to join an occupational scheme was concerned, it also stated that there was no reason to suppose that those concerned could have been mistaken as to the applicability of Article 119.

29 In fact, it has been clear since the judgment in *Bilka* that any discrimination, based on sex, in the recognition of that right infringes Article 119 (*Vroege*, cited above, paragraph 29, *Fisscher*, paragraph 26, and *Dietz*, paragraph 20).

30 Therefore, as the judgment in *Bilka* included no limitation of its effects in time, the direct effect of Article 119 may be relied on, as from 8 April 1976, the date of the judgment in *Defrenne*, in which that article was first held to have direct effect, in order retroactively to claim equal treatment in relation to the right to join an occupational pension scheme (*Dietz*, paragraph 21).

31 According to the United Kingdom Government, the main proceedings concern the amount of a retirement pension paid under an occupational social security scheme and not the right to belong to such a scheme: consequently, Article 119 applies only in order to alter the level of benefits to which a person in the situation of the applicants in the main proceedings is entitled and only periods after 17 May 1990 should be taken into account for the purposes of that calculation.

32 As regards the right to receive benefits additional to a retirement pension under an occupational scheme such as that involved in the main proceedings, the Court finds that, even if the persons concerned have always been entitled to a retirement pension under the Superannuation Scheme, nevertheless they were not fully admitted to that contributory scheme. Solely on account of the fact that they worked part-time, they were specifically excluded from MHO status which gives access to a special scheme under the Superannuation Scheme.

33 It is sufficient to recall in this regard that, at paragraph 23 of its judgment in *Dietz*, the Court has already stated that membership of a scheme would be of no interest to employees if it did not confer entitlement to the benefits provided by the scheme in question. In a situation such as that involved in that case, the Court took the view that entitlement to a retirement pension under an occupational scheme was indissolubly linked to the right to join such a scheme.

34 The same is true where the discrimination suffered by part-time workers stems from discrimination concerning access to a special scheme which confers entitlement to additional benefits.

35 In light of those considerations, the reply to be given to the first question must be that periods of service completed by part-time workers who have suffered indirect discrimination based on sex must be taken into account as from 8 April 1976, the date of the judgment in *Defrenne*, for the purposes of calculating the additional benefits to which they are entitled.

## The second question

36 By its second question the national court is asking essentially whether Community law precludes the application to a claim based on Article 119 of the Treaty of a national rule under which entitlement, in the event of a successful claim, is limited to a period which starts to run from a point in time two years prior to commencement of proceedings in connection with the claim.

37 The Court has consistently held that, in the absence of relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (see, to that effect, Case 33/76 *Rewe* [1976] ECR 1989, paragraphs 5 and 6, Case 45/76 *Comet* [1976] ECR 2043, paragraph 13, *Fisscher*, cited above, paragraph 39, and Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 21).

38 According to the applicants in the main proceedings, there is nothing in *Fisscher* to justify restricting the extent of the benefits which may be awarded to them, at least in relation to the period subsequent to 1976. In fact, there would appear to be little point in holding that persons in the applicants' situation have the right to become members of an occupational social security scheme if the benefits which they derive under it can be calculated only by reference to their employment from 1990 onwards.

39 At the hearing the Commission maintained that regulation 12 of the Occupational Pension Regulations in fact prevents the applicants in the main proceedings from vindicating their rights under Article 119 of the Treaty and that, consequently, the application of that rule runs counter to the principle of legal protection.

40 The United Kingdom Government, on the other hand, argues that a restrictive national rule of the type at issue in the main proceedings has the effect of limiting the scope of a retroactive claim relating to a period preceding commencement of the proceedings and that it is therefore comparable to the rule at issue in *Johnson*.

41 As far as this issue is concerned, it must be stated that application of a procedural rule such as regulation 12 of the Occupational Pensions Regulations whereby, in proceedings concerning access to membership of occupational pension schemes, the right to be admitted to a scheme may have effect from a date no earlier than two years before the institution of proceedings would deprive the applicants in the main proceedings of the additional benefits under the scheme to which they are entitled to be affiliated, since those benefits could be calculated only by reference to periods of service completed by them as from 1990, that is to say two years prior to commencement of proceedings by them.

42 However, it should be noted that, in such a case, the claim is not for the retroactive award of certain additional benefits but for recognition of entitlement to full membership of an occupational scheme through acquisition of MHO status which confers entitlement to the additional benefits.

43 Thus, whereas the rules at issue in Case C-338/91 *Steenhorst-Neerings* v *Bestuur van de Bedrijfsvereniging voor Detailhandel* [1993] ECR I-5475 and in *Johnson* merely limited the period, prior to commencement of proceedings, in respect of which backdated benefits could be obtained, the rule at issue in the main proceedings in this case prevents the entire record of service completed by those concerned after 8 April 1976 until 1990 from being taken into account for the purposes of calculating the additional benefits which would be payable even after the date of the claim.

44 Consequently, unlike the rules at issue in the judgments cited above, which in the interests of legal certainty merely limited the retroactive scope of a claim for certain benefits and did not therefore strike at the very essence of the rights conferred

by the Community legal order, a rule such as that before the national court in this case is such as to render any action by individuals relying on Community law impossible in practice.

45 Moreover, the effect of that national rule is to limit in time the direct effect of Article 119 of the Treaty in cases in which no such limitation has been laid down either in the Court's case-law or in Protocol No 2 annexed to the Treaty on European Union.

46 Finally, the argument put forward by the United Kingdom Government that the purpose of a temporal limitation is to contribute to legal certainty by encouraging claimants to be diligent cannot invalidate that conclusion. Suffice it to state in that regard that the national rules in question apply even to persons who, like Mrs Magorrian and Mrs Cunningham, brought proceedings before leaving their employment and being admitted to the occupational retirement pension scheme in question.

47 Accordingly, the reply to be given to the second question must be that Community law precludes the application, to a claim based on Article 119 of the EC Treaty for recognition of the claimants' entitlement to join an occupational pension scheme, of a national rule under which such entitlement, in the event of a successful claim, is limited to a period which starts to run from a point in time two years prior to commencement of proceedings in connection with the claim.

## Costs

48 The costs incurred by the United Kingdom Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Office of the Industrial Tribunals and the Fair Employment Tribunal, Belfast, by order of 9 July 1996, hereby rules:

1. **Periods of service completed by part-time workers who have suffered indirect discrimination based on sex must be taken into account as from 8 April 1976, the date of the judgment in Case C-43/75 *Defrenne*, for the purposes of calculating the additional benefits to which they are entitled.**

2. **Community law precludes the application, to a claim based on Article 119 of the EC Treaty for recognition of the claimants' entitlement to join an occupational pension scheme, of a national rule under which such entitlement, in the event of a successful claim, is limited to a period which starts to run from a point in time two years prior to commencement of proceedings in connection with the claim.**

Schintgen Mancini Kapteyn

Murray Hirsch

Delivered in open court in Luxembourg on 11 December 1997.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber