OPINION OF ADVOCATE GENERAL JACOBS
delivered on 2 December 1992 *

My Lords,

1. In this case, the Commission seeks a ruling under Article 169 of the EEC Treaty that, by maintaining in force legislation which renders female workers aged over 60 who are made redundant ineligible for a supplementary allowance, Belgium has failed to fulfil its obligations under Article 119 of the Treaty or, in the alternative, under Directive 76/207 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 (OJ 1976 L 39, p. 40).

Background to the dispute

2. The origin of the proceedings lies in a complaint received by the Commission in 1987. That complaint had two elements. First, it alleged that the provisions of Belgian law permitting female workers aged between 60 and 65 to be dismissed at shorter notice than was normally required was incompatible with Community law. Secondly, it suggested that the Belgian legislation relating to supplementary allowances for workers who are made redundant discriminated against female workers and was also contrary to Community law.

3. The complaint led to the opening of proceedings against Belgium under Article 169. In the course of the pre-litigation procedure, the Belgian legislation on the circumstances in which workers could be dismissed at short notice was amended in a manner which in the Commission's view satisfied the requirements of Community law. Belgium denied, however, that its legislation relating to supplementary allowances was unlawful. The Commission therefore decided to bring the matter before the Court.

4. A system of supplementary allowances for workers who are made redundant after they have reached a certain age was established by Collective Labour Agreement No 17 of 19 December 1974, which was drawn up by the National Labour Council. That Agreement was given the force of law by a Royal Decree of 16 January 1975 (*Moniteur belge*, 31 January 1975, p. 1055). According to Articles 3 and 4 of the Royal Decree, workers aged over 60 who are made redundant have the right to a supplementary allowance paid on a monthly basis by their last employer on condition that they are entitled to unemployment benefit. The age limits for receipt of unemployment benefit are governed by Royal Decree of 20 December 1963, Article 144, as amended by Royal Decree of 7 August 1984. According to

* Original language: English.

Article 144, men cease to be eligible for unemployment benefit when they reach the age of 65 whereas women cease to be so eligible when they reach the age of 60. It follows that the system of supplementary allowances established by the Collective Agreement benefits male workers only.

5. It is common ground that the difference in treatment between men and women as regards the age limits for receipt of unemployment benefit is linked to the difference in treatment as regards retirement age which existed at one time in Belgian law. However, by a law of 20 July 1990, Belgium introduced a flexible retirement age from 60 to 65 applicable to both sexes, replacing the previous system whereby women retired at 60 and men at 65. The Law of 20 July 1990 also authorized the enactment of secondary legislation with a view to bringing the previous law into conformity with its provisions. However, no amendment has been made to Article 144 of the Royal Decree of 20 December 1963. It therefore remains the case that a female worker over the age of 60 who is made redundant cannot take advantage of the supplementary allowance as she is ineligible for unemployment benefit. By Article 5 of the Royal Decree of 16 January 1975, the supplementary allowance is equal to half of the difference between a reference salary and the unemployment benefit, and the Belgian Government concedes that in the majority of cases the combined amount of the supplementary allowance and the unemployment benefit is higher than the amount of pension. It is not therefore contested that women over the age of 60 are likely to receive less money than a man of the same age dismissed under the same circumstances, since they are excluded from the supplementary allowance.

6. The Commission considers that the system established by the Collective Agreement is incompatible with Article 119 of the EEC Treaty which provides that 'men and women should receive equal pay for equal work'. The Commission adds that, if the Court finds that Article 119 is not applicable in these circumstances, then the contested legislation is incompatible with Article 5(1) of Directive 76/207. I will examine these submissions in turn.

Article 119

7. The Commission takes the view that the supplementary allowance constitutes 'pay' for the purposes of Article 119 and relies on the decisions of the Court in Case 12/81 *Garland* v *British Rail Engineering* [1982] ECR 359 and, especially, in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889. The Commission points out that the supplementary allowance has the following characteristics: it results from a collective convention concluded between employers and employees; it is payable by the last employer of the worker who becomes redundant; and it is paid in respect of the employment relationship. The Commission concludes that the supplementary allowance satisfies all the conditions which according to the decision of the Court in *Barber* must be fulfilled in order for a benefit to fall within the meaning of 'pay'.

8. The Belgian Government disputes the view of the Commission. It relies on the decision of the Court in Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445 and claims that the supplementary allowance is a social security benefit which falls beyond the scope of Article 119. The

Belgian Government argues that although the supplementary allowance is paid in cases of redundancy, it is not, as such, a redundancy payment. In support of this argument, it points out that according to Article 9 of the Collective Agreement the supplementary allowance cannot be accumulated with other allowances payable upon redundancy. In addition, contrary to a redundancy payment, the amount of which is calculated exclusively on the basis of the salary and the number of years in employment of the worker, the supplementary allowance depends on the amount of the salary and the amount of the unemployment benefit. Further, the Belgian Government argues that the existence of a link between the allowance and the employment relationship does not necessarily mean that the allowance comes within the scope of Article 119. This is because under Belgian legislation a link with the employment contract exists in relation to all social security benefits. It argues that the material factor for the characterization of a benefit is not its connection with the employment relationship but the nature of the regime which governs the benefit. According to the Belgian Government, the supplementary allowance is an integral part of a *sui generis* scheme, that is, the early retirement pension ('prépension conventionnelle') provided for by collective labour agreements. The early retirement pension consists of two elements: the unemployment benefit and the supplementary allowance. The latter is provided for by Collective Agreement No 17 and other labour conventions concluded in relation to specific professional sectors. The Belgian Government claims that the conditions for granting the early retirement pension are prescribed by various regulations and labour conventions in such a way that the two elements of the benefit cannot be separated. To the extent that such separation is possible, the supplementary allowance should be considered as a social security benefit provided for by an occupational social security scheme. In support of its claim that the contested allowance is a social security benefit, the defendant Government points out that the workers who benefit from the supplementary allowance are subject to restrictions regarding the exercise of other professional activities and also regarding the accumulation of the allowance with other social security benefits, such as invalidity pensions. In addition, as far as the other branches of social security are concerned (e. g. sickness and family allowances), the beneficiaries are considered as unemployed. Finally, the Belgian Government states that the supplementary allowance pursues certain social objectives by giving advantages to older workers in the event of redundancy.

9. It must first be noted that according to Article 119 of the Treaty 'pay' is defined as 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer'. In Case 43/75 *Defrenne* v *SABENA* [1976] ECR 455 the Court stated that Article 119 is a fundamental provision of the Treaty which pursues both economic and social objectives. In particular, it seeks to ensure equal conditions of competition among Community undertakings and to promote social progress. In the light of these objectives, the Court has taken an extensive view of the concept of pay in its case-law.

10. From the text of Article 119 read in the different language versions, it follows that a

benefit constitutes 'pay' provided that two conditions are fulfilled: the benefit is directly or indirectly paid by the employer; and the worker receives the benefit by reason of his employment. Fulfilment of those conditions is sufficient to bring a benefit within the scope of Article 119: see *Defrenne* v *Belgium*, paragraph 6 of the judgment, *Garland*, paragraph 5 of the judgment, and *Barber*, paragraph 12.

11. According to the *Barber* judgment, benefits paid by an employer to a worker in connection with the latter's redundancy fall within the scope of Article 119. The Court stated, at paragraphs 12 to 14 of the judgment:

'... the concept of pay, within the meaning of the second paragraph of Article 119, comprises 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 ... Accordingly, the fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being in the nature of pay, within the meaning of Article 119 of the Treaty.

As regards, in particular, the compensation granted to a worker in connection with his redundancy, it must be stated that such compensation constitutes a form of pay to which the worker is entitled in respect of his employment, which is paid to him upon termination of the employment relationship, which makes it possible to facilitate his adjustment to the new circumstances resulting from the loss of his employment and which provides him with a source of income during the period in which he is seeking new employment.

It follows that compensation granted to a worker in connection with his redundancy falls in principle within the concept of pay for the purposes of Article 119 of the Treaty.'

In *Barber* the Government of the United Kingdom argued that a statutory redundancy payment fell outside the scope of Article 119 on the ground that it constituted a social security benefit. The Court stated at paragraphs 16 to 18 of the judgment:

'... a redundancy payment made by the employer ... cannot cease to constitute a form of pay on the sole ground that, rather than deriving from the contract of employment, it is a statutory or *ex gratia* payment.

In the case of statutory redundancy payments it must be borne in mind that, as the Court held ... in Case 43/75 *Defrenne* v *SABENA* [1976] ECR 455, paragraph 40, Article 119 of the Treaty also applies to discrimination arising directly from legislative provisions. This means that benefits provided for by law may come within the concept of pay for the purposes of that provision.

Although it is true that many advantages granted by an employer also reflect

considerations of social policy, the fact that a benefit is in the nature of pay cannot be called in question where the worker is entitled to receive the benefit in question from his employer by reason of the existence of the employment relationship.'

The decision of the Court in *Barber* was confirmed in Case C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591. In that case, the Court held that Article 119 applies also to redundancy payments provided for by collective labour agreements. It appears to follow from the above decisions that the supplementary allowance in question which is paid in cases of redundancy falls in principle within the concept of 'pay'.

12. The Belgian Government claims, however, that the supplementary allowance is in substance part of an early retirement pension scheme which falls outside the scope of Article 119. It refers to Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445 where the Court stated at paragraphs 7 and 8 of the judgment:

'Although consideration in the nature of social security benefits is not ... 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.

These schemes assure for the workers the benefit of a legal scheme, [to] 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.'

On the basis of that reasoning, the Court held that a retirement pension established within the framework of a social security scheme laid down by national legislation did not constitute 'pay' under Article 119. That reasoning has been confirmed in subsequent cases. In Case 170/84 *Bilka-Kaufhaus* v *Weber von Hartz* [1986] ECR 1607 the Court examined whether the supplementary occupational pension scheme in issue in that case fell outside the scope of Article 119. The Court concluded that the scheme, although adopted in accordance with the provisions laid down by German legislation, was based on an agreement between the company and its employees. It was, therefore, of a contractual rather than a statutory nature. The effect of the scheme was to supplement the social benefits paid under national legislation of general application with benefits financed entirely by the employer. The Court concluded, at paragraph 22 of the judgment, that the scheme was not a social security scheme governed directly by statute and that benefits paid under the scheme therefore constituted pay within the meaning of Article 119.

13. In *Barber*, the Court held that a pension paid under a contracted-out private occupational scheme fell within the scope of Article

119. The reasoning of the Court appears at paragraphs 25 to 28 of the judgement:

'... it must be pointed out first of all that the schemes in question are the result either of an agreement between workers and employers or of a unilateral decision taken by the employer. They are wholly financed by the employer or by both the employer and the workers without any contribution being made by the public authorities in any circumstances. Accordingly, such schemes form part of the consideration offered to workers by the employer.

Secondly, such schemes are not compulsorily applicable to general categories of workers. On the contrary, they apply only to workers employed by certain undertakings, with the result that affiliation to those schemes derives of necessity from the employment relationship with a given employer. Furthermore, even if the schemes in question are established in conformity with national legislation ... they are governed by their own rules.

Thirdly, ... occupational schemes such as that referred to in this case may grant to their members benefits greater than those which would be paid by the statutory scheme, with the result that their economic function is similar to that of the supplementary schemes which exist in certain Member States...

It must therefore be concluded that, unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of Article 119 of the Treaty.'

14. Most of those considerations apply in my view to the supplementary allowance in issue in the present case, even though that allowance is of more general application. The supplementary allowance is paid directly by the last employer of the worker who becomes redundant and its amount is based on a reference salary. Even if it is regarded as a 'pre-pension', as the Belgian Government suggests, it can properly be regarded as consideration paid by the employer to the worker in respect of his employment in the same way as the benefit paid under the pension scheme in issue in *Barber*.

15. That conclusion is confirmed if one takes account of the factors referred to by the Court in *Defrenne* v *Belgium* as taking benefits outside the concept of pay. Those factors, it will be recalled, were, first, that the benefit is governed directly by legislation without any element of agreement; and secondly, that employers' financial contributions are determined by social policy considerations rather than by the employment relationship. In my view, the contested supplementary allowance meets neither of those criteria.

16. As far as the first criterion is concerned, it is clear that the payment of the supplementary allowance is not without any element of agreement. It is true that Collective

Agreement No 17 has been given the force of law, but in my view this does not detract from the fact that the introduction of the allowance was based on an agreement between employers and employees. In the present case, as appears from the submissions of the Belgian Government, the supplementary allowance is provided for by Collective Agreement No 17 and other collective labour agreements. There is, therefore, an element of agreement, unlike the case of the state pension.

17. As far as the second criterion is concerned, I am not persuaded that the supplementary benefit is paid primarily as a result of social policy considerations in a way similar to a state pension. In *Defrenne* v *Belgium* the Court stated (at paragraph 10) that an employee receives benefits under a state pension scheme not by reason of the employer's contributions but solely because the worker fulfils the conditions prescribed by law for the grant of the benefits. The absence of a close relationship between the contributions paid by the employer and the benefits received by the employee prevented a state retirement pension from being consideration which the worker received in respect of his employment from his employer. In contrast, the supplementary allowance is quite different from the usual type of social security benefit payable under a general social security scheme, even from a benefit financed in part by the employers' contributions. It is paid directly by the last employer of the worker who becomes redundant. In addition, it is a benefit payable in connection with redundancy. As the Court stated in *Barber*, such benefits constitute a form of pay to which the worker is entitled in respect of the employment relationship and do not cease to fall within the scope of Article 119 because their payment may reflect considerations of social policy.

18. The Belgian Government emphasizes the close link between the supplementary allowance and the unemployment benefit. In my view, the fact that the amount of the allowance is calculated not only on the basis of the salary but also by reference to the unemployment benefit does not mean that the allowance is not consideration received by the employee from the employer in respect of his employment. Furthermore, the fact that the contested allowance supplements a social security benefit is not decisive. The two payments are linked by the early retirement scheme but it is clear that the supplementary allowance is not a necessary consequence of the unemployment benefit. In fact, it appears from the Royal Decree of 16 January 1975 incorporating the terms of Collective Agreement No 17 that the supplementary allowance is independent of the general social security scheme both as regards management and funding. Like the supplementary occupational scheme in *Bilka*, the benefit provided for by the Agreement supplements social benefits of general application with benefits financed entirely by the employer. In my view, therefore, the supplementary allowance does not satisfy the criteria taken into account by the Court in *Defrenne* v *Belgium* in holding a benefit to be outside the scope of Article 119.

19. In conclusion, I take the view that the supplementary allowance provided for by the Royal Decree of 16 January 1975 constitutes 'pay' for the purposes of Article 119 of

the EEC Treaty. In effect, Belgian legislation renders female workers over the age of 60 who are made redundant ineligible for the allowance in circumstances where a male worker would be eligible to receive it. It is not contested that such difference of treatment is not justified on the basis of objective criteria. It follows that Belgium has failed to fulfil its obligations under Article 119 of the Treaty.

20. As a subsidiary argument the Belgian Government adds in its rejoinder that, if the supplementary allowance fell within the scope of Article 119, the Protocol concerning Article 119 annexed to the Treaty on European Union, signed at Maastricht on 7 February 1992 (OJ 1992 C 191, p. 1), should be applied. That Protocol states:

'For the purposes of Article 119 ..., 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.'

Since, however, the Treaty on European Union has not entered into force, this argument cannot be accepted. Even after the Treaty's entry into force, it seems to me that the argument could be relevant only in the context of particular claims for payment of the benefit. The question might then arise whether and to what extent the benefit claimed was attributable to a specific period of employment. But the argument cannot in my view be relevant to the declaration sought by the Commission in these proceedings.

Directive 76/207

21. As an alternative ground of its application the Commission submits that the contested legislation is incompatible with Article 5(1) of Directive 76/207. In this context, it should first be noted that if, as I think is the case, the supplementary allowance constitutes 'pay' for the purposes of Article 119, then Belgium has failed to comply with its obligations under that provision and there is no need to discuss the compatibility of the Belgian legislation with Directive 76/207. I will nevertheless examine the Commission's alternative submission.

22. Article 5(1) of Directive 76/207 provides as follows:

'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

The Commission refers to the decision of the Court in Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555. In that case, the Court held that by virtue of that

provision the principle of equal treatment applied to the conditions of access to a voluntary redundancy benefit paid by an employer to an employee. The Commission argues that the principle must also apply to the conditions which must be fulfilled by a worker to be eligible for a supplementary allowance upon redundancy, such as that in issue in this case. Under Belgian law, one of those conditions is entitlement to unemployment benefit. The Commission argues that since women over the age of 60 are not entitled to unemployment benefit, that condition is discriminatory. It follows, according to the Commission, that the scheme laid down by the Royal Decree of 16 January 1975 is contrary to Article 5(1).

23. The Belgian Government does not dispute that the conditions of access to the supplementary allowance are conditions governing dismissal within the meaning of Article 5(1), nor does it dispute the existence of discrimination. It argues, however, that the supplementary allowance falls outside the scope of Directive 76/207. It refers to Article 1(2) of the directive which empowers the Council to adopt the necessary provisions with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security. Such provisions have been adopted. They are contained in Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) and Directive 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40). The Belgian Government relies upon the exceptions to the principle of equal treatment provided for by Article 7(1)(a) of Directive 79/7 and Article 9(a) of Directive 86/378. Article 7(1) of Directive 79/7 provides as follows:

'This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits ...'

Article 9 of Directive 86/378 permits Member States to:

'defer compulsory application of the principle of equal treatment with regard to:

(a) determination of pensionable age for the purposes of granting old-age or retirement pensions, and the possible implications for other benefits:

— either until the date on which such equality is achieved in statutory schemes,

— or, at the latest, until such equality is required by a directive'.

24. The Belgian Government points out that, according to the Royal Decree of 17 July 1975, the supplementary allowance is linked to the unemployment benefit. The reason, therefore, why a female worker does not benefit from the supplementary allowance is that female workers cease to be eligible for unemployment benefit when they attain the age of 60 whereas male workers are entitled to receive it until they attain the age of 65. The difference as regards the age limit for receipt of unemployment benefit is a consequence of the difference in the determination of pensionable age which existed in Belgian law as it stood before the Law of 20 July 1990 came into force. The Belgian Government adds that although the Law of 20 July 1990 introduced a flexible retirement system applicable to both men and women who have attained the age of 60, it provides for an important exception. According to Article 2(2), male employees who are entitled to benefits under collective labour conventions are not eligible for a retirement pension until the age of 65. It follows, the Belgian Government maintains, that Belgian law has deferred the application of the principle of equal treatment for the purposes of determining pensionable age within the meaning of Article 7(1) of Directive 79/7 and Article 9(a) of Directive 86/378. The Belgian Government claims that the difference in treatment between men and women as regards unemployment benefit and the supplementary allowance can be considered as 'consequences' of the difference in the determination of pensionable age within the meaning of those articles. [1]

25. According to the case-law of the Court the exception provided for in Article 7(1)(a) of Directive 79/7 must be interpreted strictly; it must be assumed that the same applies to Article 9(a) of Directive 86/378. In Case 262/84 *Beets-Proper* v *Van Lanschot Bankiers* [1986] ECR 773 the Court stated at paragraph 38 of the judgment:

'... in view of the fundamental importance of the principle of equality of treatment, which the Court has reaffirmed on numerous occasions, Article 1(2) of Directive No 76/207, which excludes social security matters from the scope of that directive, must be interpreted strictly. Consequently, the exception to the prohibition of discrimination on grounds of sex contained in Article 7(1)(a) of Directive No 79/7 applies only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and to the consequences thereof for other social security benefits.'

Similar statements were made in Case 151/84 *Roberts* v *Tate & Lyle Industries* [1986] ECR 703, at paragraph 35 of the judgment and in Case 152/84 *Marshall* v *Southampton and South West Hampshire Area Health Authority* [1986] ECR 723 at paragraph 36 of the judgment; see also Joined Cases C-63/91 and C-64/91, *Jackson and Cresswell* v *Chief Adjudication Officer* [1992] ECR I-4737, paragraphs 26 and 27.

1 — It should be noted that although the English text of Article 7(1)(a) refers to 'the possible consequences thereof for other benefits' and Article 9(a) refers to 'the possible implications for other benefits', the French text is the same in both articles: 'les conséquences pouvant en découler pour d'autres prestations'.

26. In my view the discrimination with regard to the supplementary allowance does not fall within the exception of Article 7(1)(a). The Belgian Government argues in effect that the discrimination between men and women as regards eligibility for the supplementary allowance is a consequence of the difference in the age limit for receipt of unemployment benefit which, in turn, is a consequence of the difference in the determination of pensionable age provided for by Belgian law. It is clear therefore that the discrimination in relation to the supplementary allowance is not a direct consequence of the difference in pensionable age. As the Commission pointed out at the hearing, the argument of the Belgian Government implies recognition of a chain effect which would not be compatible with the principle of strict interpretation to which derogations from the fundamental principle of sex equality are subject.

27. Article 7(1)(a) was examined by the Court in Case C-9/91 *The Queen* v *Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I-4297. In that case, the Court decided that Article 7(1)(a) is to be interpreted as authorizing the determination of a statutory pensionable age which differs according to sex for the purposes of granting old-age and retirement pensions and also as authorizing other forms of discrimination which are 'necessarily linked to that difference' (paragraph 20 of the judgment). The Court remarked at paragraph 13 of the judgment:

'Since the text of the derogation refers to "the determination of pensionable age for the purpose of granting old-age and retirement pensions", it is clear that it concerns the moment from which pensions become payable. The text does not, however, refer expressly to discrimination in respect of the extent of the obligation to contribute for the purposes of the pension or the amount thereof. Such forms of discrimination therefore fall within the scope of the derogation *only if they are found to be necessary in order to achieve the objectives which the Directive is intended to pursue by allowing Member States to retain a different pensionable age for men and women*' (emphasis added).

28. Although that statement was made in a different context, the same condition must in my view also be fulfilled in relation to discrimination with regard to other benefits. In other words, a Member State may maintain discrimination with regard to a benefit only if such discrimination is necessary in order to achieve the objectives which the directive is intended to pursue by allowing Member States to retain a different pensionable age for men and women. This follows from the consequential character of the exception provided for in the second part of Article 7(1)(a) ('the possible consequences thereof for other benefits'). Any discrimination with regard to a benefit must therefore be a necessary consequence of the difference in the determination of pensionable age for the purposes of granting old-age and retirement pensions. I am not satisfied that that relationship of necessity is present in this case. As the Commission points out, the objectives and the character of the allowance show that it is in fact different from the unemployment benefit and independent of the social security system. The supplementary allowance is a benefit payable upon redundancy which has been linked to the unemployment benefit only by Collective Agreement No 17 and the

Royal Decree of 16 January 1975. This link does not appear to me to be necessary for the maintenance of a difference in the determination of pensionable age for the purposes of granting retirement pensions. In my view, to consider the discrimination with regard to the supplementary allowance as a necessary consequence of the difference in the determination of pensionable age would not accord with the principle of strict interpretation of Article 7(1)(a).

29. I conclude that the discrimination with regard to the supplementary allowance is not covered by the exception provided for in Article 7(1)(a) of Directive 79/7. The same conclusion must follow for Article 9(a) of Directive 86/378. It is also clear that, if the supplementary allowance is not considered as 'pay' within the meaning of Article 119 of the Treaty, then according to the decision of the Court in *Burton*, the conditions of access to the supplementary allowance should be considered as conditions governing dismissal within the meaning of Article 5(1) of Directive 76/207. It is not disputed that one of those conditions, i. e. entitlement to unemployment benefit, is discriminatory. It follows that by maintaining discriminatory conditions of dismissal, the Royal Decree of 16 January 1975 is contrary to Article 5(1) of Directive 76/207.

Conclusion

30. Accordingly, I am of the opinion that the Court should:

(1) declare that, by maintaining in force legislation which renders female workers who have attained the age of 60 ineligible for a supplementary allowance payable upon redundancy in circumstances where a male worker in the same position would be entitled to that allowance, the Kingdom of Belgium has failed to fulfil its obligations under Article 119 of the EEC Treaty;

(2) order the Kingdom of Belgium to pay the costs.