JUDGMENT OF THE COURT (First Chamber)

9 December 2004 *

In Case C-19/02,

REFERENCE for a preliminary ruling under Article 234 EC, from the Oberster Gerichtshof (Austria), made by decision of 20 December 2001, received at the Court on 29 January 2002, in the proceedings

Viktor Hlozek

v

Roche Austria Gesellschaft mbH,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas (Rapporteur), R. Silva de Lapuerta, K. Lenaerts and S. von Bahr, Judges,

* Language of the case: German.

Advocate General: J. Kokott,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 February 2004,

after considering the observations submitted on behalf of:

— Mr Hlozek, by G. Teicht and G. Jöchl, Rechtsanwälte,

— Roche Austria Gesellschaft mbH, by R. Schuster, Rechtsanwalt,

— the Republic of Austria, by C. Pesendorfer and G. Hesse, acting as Agents,

— the Commission of the European Communities, by J. Sack and N. Yerrel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 April 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 141 EC 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), and the interpretation 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 (OJ 1976 L 39, p. 40) and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40), as amended by Council Directive 96/97/EC of 20 December 1996 (OJ 1997 L 46, p. 20).

2 The reference was made in the course of proceedings between Mr Hlozek and Roche Austria Gesellschaft mbH ('Roche') concerning the latter's refusal to grant him a bridging allowance which, according to the agreement concluded as part of an operation to restructure the undertaking, was to be paid to workers having reached a certain age at the time of their dismissal.

Legal framework

Community rules

3 Article 141 EC lays down the principle of equal pay for male and female workers for equal work or work of equal value.

4 Since 1 May 1999, the date on which the Treaty of Amsterdam entered into force, Articles 136 EC to 143 EC have replaced Articles 117 to 120 of the EC Treaty. Article 141(1) and the first subparagraph of Article 141(2) EC are essentially identical to the first and second paragraphs of Article 119 of the EC Treaty.

5 Article 1 of Directive 75/117 reads as follows:

'The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", 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.

...'

6 Directive 76/207 is intended to implement in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training, working conditions, including the conditions governing dismissal, and, in the conditions laid down in Article 1(2), social security.

7 Council Directive 79/7/EEC of 19 December 1978 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) was adopted pursuant to Article 1(2) of Directive 76/207. Article 3(1)(a) thereof provides that that directive is to apply to statutory schemes which provide protection against inter alia old age and unemployment.

8 Directive 86/378 provides for the implementation of the principle of equal treatment for men and women in occupational social security schemes which provide protection against the risks specified in Article 3(1) of Directive 79/7 as well as those which provide employees with any other consideration, in cash or in kind within the meaning of the Treaty.

9 Article 2 of Directive 86/378, as amended by Directive 96/97, provides that the term 'occupational social security schemes' means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or 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 membership of such schemes is compulsory or optional.

National rules

10 According to the simplified account contained in the order for reference, it is necessary to take into consideration inter alia the following national provisions.

11 Paragraph 253 of the Allgemeines Sozialversicherungsgesetz (General law on social security, BGBl. No 189/1955, in the version thereof published in BGBl. No 33/2001) ('ASVG') confers entitlement to a retirement pension to men at the age of 65 and women at the age of 60. At the time of the facts giving rise to the main proceedings, Paragraphs 253a, 253b and 253c of the ASVG also conferred entitlement to early retirement, particularly in the event of unemployment, to men aged 60 and over and to women aged 55 and over. Those lower age limits have, in the meantime, been raised and were, at the time the reference was made, set at 61.5 years for men and 56.5 years for women.

12 Paragraph 2(1) of the Bundesgesetz über die Gleichbehandlung von Frau und Mann im Arbeitsleben (Law on equal treatment of men and women at work, BGBl. No 108/1979, in the version thereof published in BGBl. No 833/1992) ('the Gleichbehandlungsgesetz') prohibits all discrimination, whether direct or indirect, based on sex. That prohibition applies, inter alia, to discrimination as regards the establishment of the employment relationship (line 1), as regards remuneration (line 2), as regards the grant of social benefits other than remuneration (line 3), as regards career path, particularly promotions (line 5) and as regards the termination of the employment relationship (line 7).

13 Under Paragraph 97(1)(4) of the Arbeitsverfassungsgesetz (Law on labour relations, BGBl. No 22/1974, in the version thereof published in BGBl. No 833/1992 and in BGBl. No 502/1993) ('ArbVG'), the elected body of the workforce in an undertaking

may compel the owner of that undertaking to conclude a works agreement on measures to prevent, remove or alleviate the effects of a change in the undertaking within the meaning of Paragraph 109(1)(1) to (6) of the ArbVG, if it seriously affects all workers or substantial sections of the workforce. That works agreement, known as 'the social plan' ('Sozialplan'), can include all the rules intended to compensate for the adverse effects of the change in the undertaking, such as enhanced settlements in the event of dismissal following operational cutbacks or support measures for dismissed workers, as well as 'bridging allowances' ('Überbrückungsgelder'). According to the national court, the law does not prescribe any specific content for such a social plan.

14 Under Paragraph 31 of the ArbVG, a works agreement is, within its scope, directly binding; it thus has legislative effect in relation to the workers.

The social plan of 26 February 1998

15 According to the order for reference, the social plan of 26 February 1998, which is at issue in the main proceedings, is a works agreement within the meaning of the relevant provisions of the ArbVG.

16 Point 7 of that social plan concerns the voluntary settlement for workers who, at the time of termination of their employment relationship with the company, were men under 55 years of age or women under 50 years of age. The amount of that settlement is to be calculated according to the seniority of the worker in the undertaking.

17 Point 8 of that social plan reads as follows:

'8. Bridging allowance ("Überbrückungszahlung")

8.1 Scope of application

Employees shall be entitled to the payment of a bridging allowance if, upon termination of the employment relationship, they have reached the age of 55 (men) or 50 (women) and are not yet entitled to a pension under the ASVG.

8.2 The bridging allowance shall commence in the month following termination of the employment relationship and end at the time when a pension under the ASVG can be claimed, but no later than 5 years after the termination of the employment relationship.

8.3 The amount of the bridging allowance shall be 75% (gross) of the final monthly salary and shall be paid 14 times a year. During the bridging period, the worker shall be released from his duties.

In addition, ... a voluntary settlement [shall be granted].

This shall be determined in accordance with the duration of the bridging period:

up to two years: 1 month's salary

two to four years: 2 months' salary

four years or more: 3 months' salary.

The voluntary settlement shall be paid at the same time as the statutory settlement.'

18 As regards rights under the undertaking's occupational pension scheme, a distinction is also drawn according to whether the workers come under point 7 or point 8 of the social plan. According to point 12 thereof, workers who, at the time of their departure from the undertaking, do not meet the conditions for receiving the bridging allowance referred to in point 8 of the social plan, are to be guaranteed settlement of their pension rights at their actuarial value. However, workers coming under point 8 of the social plan are guaranteed entitlement to the retirement pension under the occupational scheme, the respective benefits being paid to them as from the time they receive an ASVG pension. Point 12.2 of the social plan stipulates that the bridging period referred to in point 8 is to be credited in full as a period of service.

19 In the order for reference, the Oberster Gerichtshof (Supreme Court) provides information on the practical implementation of point 8 of the social plan. When a worker was to be dismissed and met the conditions laid down in point 8, a contract was concluded between the undertaking and that worker, following termination of the employment contract. The new contract was concluded for a fixed period not exceeding five years or until the worker in question was entitled to receive a statutory ASVG pension. During that period, the worker in question received the bridging allowance, was irrevocably released from his duties and could engage in other remunerated activity.

20 The possibility of engaging in other remunerated activity whilst receiving the bridging allowance followed directly from point 4 of the social plan, according to which '... during the time they are released from their duties, workers shall be permitted to be in other employment, whilst preserving the rights conferred on them by the present social plan'.

The main proceedings and the questions referred for a preliminary ruling

21 With effect from 1 July 1998, Roche merged with the company for which Mr Hlozek had worked since 1 January 1982. With a view to that merger and in order to alleviate the adverse effects for the workers resulting from the restructuring measures planned as part of that merger, the employer and the works council concluded the social plan of 26 February 1998.

22 Mr Hlozek was dismissed on 30 June 1999 as part of the undertaking's restructuring, which entailed the closure of the factory which he managed. Since he was 54 years old at the time when his employment relationship with Roche ended, Mr Hlozek came under point 7 and not point 8 of the social plan. He accepted the voluntary settlement which was paid to him pursuant to point 7 of the social plan. Given his

years of service in the undertaking, the gross amount of that settlement was fixed at ATS 1 845 000, or ATS 1 274 113.75 net. At a hearing held on 7 December 1999, Mr Hlozek stated that he had found other employment with pay comparable to what he had received earlier.

23 If Mr Hlozek had been a female worker, point 8 of the social plan would have applied to him. In that case, he would have received a voluntary settlement for dismissal in an amount lower than the compensation he received. However, he would have benefited from the provisions relating to the granting of bridging allowance.

24 Taking the view that he had been discriminated against on the basis of sex, Mr Hlozek brought an action before the Arbeits- und Sozialgericht (Labour and Social Court) Wien (Austria) for a declaration that he has an entitlement to a bridging allowance from Roche under the social plan of 26 February 1998 until such time as he receives his ASVG pension. In the alternative he sought a declaration that he is entitled to be paid the bridging allowance for the five years following the date of termination of his employment relationship with Roche or, in the further alternative, for the period during which he was unemployed.

25 In support of his claims, Mr Hlozek maintains essentially that the scheme relating to the bridging allowance, as laid down in point 8 of the social plan of 26 February 1998, is unlawful and void under both national law and Community law in that it provides for a different age for men (55) and for women (50). He submits that the provision relating to the lower age should also apply to men and that, since he was 54 at the time of his dismissal, he is entitled to a bridging allowance.

26 By judgment of 17 October 2000, the Arbeits- und Sozialgericht Wien upheld Mr Hlozek's claim and held that he was entitled to a bridging allowance from Roche until such time as he received his ASVG pension, but only for a maximum period of five years as from 30 June 1999, the date on which his employment relationship ended. That court considered that, having regard to the case-law of the Court of Justice, in particular Case C-262/88 *Barber* [1990] ECR I-1889, the scheme in question had to be regarded as contrary to the principle of equal treatment laid down in Article 141 EC in that it fixed different ages for men and women for the granting of the bridging allowance. The national court found that, since Article 141 EC is binding and directly applicable, the different age conditions are void and the bridging allowance must be available to men and women who have reached the age of 50 when their employment relationship ends and who are not yet entitled to an ASVG pension.

27 After that judgment was upheld on appeal to the Oberlandesgericht (Higher Regional Court) Wien (Austria), Roche applied for review on a point of law ('Revision') to the Oberster Gerichtshof. It contends that the bridging allowance in question does not fall to be assessed in the light of Article 141 EC and that there is no discrimination. It maintains essentially that it must be ascertained whether the condition for entitlement to the bridging allowance is discriminatory and that, in accordance with Case 19/81 *Burton* [1982] ECR 555, that question is to be assessed in the light not of Article 141 EC but of Directive 76/207. According to Roche, it is possible to adjust entitlement to a benefit of that nature on the basis of the different ages at which the statutory social security scheme starts paying out benefits. It adds that, in the bridging allowance, work performed and pay are dissociated and that, if the age at which the benefits are paid out were identical for men and women, that would give rise to discrimination against women.

28 In the order for reference, the Oberster Gerichtshof refers to statistics compiled by the Arbeitsmarktservice Wien for the years 1998 to 2000, relating to the number of

unemployed persons in Austria according to sex and age. It states that, according to those statistics, the number of unemployed persons in age groups under 49 is fairly constant and equal for both sexes. However, in the 50 to 54 age group, the number of unemployed women is almost double the figure for the preceding age group. Moreover, in the same age group, the number of unemployed women is much higher than the number of unemployed men. By contrast, in the 55 to 59 age group, the number of unemployed men is higher than in the preceding age group. It is also higher than the number of unemployed women in the same age group.

29 According to the national court, it is possible to explain that situation by the fact that the risk of unemployment increases with the approach of the statutory retirement age for each sex. Thus, for women, whose retirement age is lower than men's, that risk reaches its peak earlier than it does for men. The national court notes that the defendant in the main proceedings stated that the social plan in question is intended specifically to take into account the higher risk of unemployment for workers who are dismissed during the five years preceding their retirement.

30 The national court also states that the granting of the bridging allowance, as provided for by the social plan in dispute, does not establish an employment relationship within the meaning of Paragraph 2(1)(1) of the Gleichbehandlungsgesetz nor is it a promotion within the meaning of Paragraph 2(1)(3) of that same law. It points out that the workers concerned will not be required to perform any work.

31 Since the bridging allowance is not intended to supplement statutory pension insurance, nor is it a pension under an occupational social security scheme. There is no link to the duration of the employment relationship or to periods of membership

in the scheme. According to the findings of the national court, simply as a result of their belonging to the workforce of the undertaking and by virtue of the employer's obligation to establish social protection for them, essentially workers are protected against the risk of not finding new employment when their employment relationship ends at an age when it is known to be very difficult to find new employment.

32 Having regard to the foregoing, the Oberster Gerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) Are Article 141 EC and Article 1 of Directive 75/117/EEC ... to be interpreted, — where an employer who dismisses a large group of employees as a result of a merger with another company is required, on account of its social obligation towards the entire workforce, to agree with the works council a social plan, which is binding in relation to the employees, in order to alleviate the effects of dismissal, in particular the risk of age-related unemployment, — as precluding a social plan under which all female employees aged 50 and over at the time of their dismissal and all male employees aged 55 and over at the time of their dismissal are entitled, irrespective of the period of employment, that is to say with no account being had to any "qualification periods" and solely on the basis of age — or to the fact that the risk of long-term unemployment for men and women generally differs according to their age — to a "bridging allowance" amounting to 75% of their final gross monthly salary for five years, but at most until they become entitled to a statutory pension?

(b) In particular, is the concept of pay in Article 141 EC and Article 1 of the directive to be construed as including, in the case of benefits which are

related not to work performed but solely to membership of a workforce and the social obligation on the employer, allowance for the risk of long-term unemployment so that pay must be regarded as equal where — overall — it covers the same degree of risk even though this risk normally occurs in different age groups in the case of men and women?

(c) Or can, if the concept of "pay" in these provisions after all covers only the cash benefit as such, the varying risk thus construed justify different treatment of men and women?

2. (a) Is the concept of "occupational social security schemes" within the meaning of Article 2(1) of Council Directive 86/378/EEC ... to be construed as including bridging allowances in the above sense?

(b) Is the concept of the risk of "old age, including early retirement" in Article 4 of the directive to be construed as including such "bridging allowances"?

(c) Does the concept of "scheme" in Article 6(1)(c) of the directive cover only the question of fulfilment of the requirements for entitlement to the bridging allowance or also membership of the workforce as a whole?

3. (a) Is Council Directive 76/207/EEC of 9 February 1976 ... to be interpreted to the effect that the bridging allowance described above constitutes a condition governing dismissal within the meaning of Article 5 of this directive?

(b) Is that directive to be interpreted as precluding a social plan under which all female employees aged 50 and over at the time of their dismissal and all male employees aged 55 and over at the time of their dismissal are entitled, irrespective of the period of employment, that is to say with no account being had to any "qualification periods" and solely on the basis of age — or to the fact that the risk of long-term unemployment for men and for women generally differs according to their age — to a "bridging allowance" amounting to 75% of their final gross monthly salary for five years, but at most until they become entitled to a statutory pension?'

The questions referred for a preliminary ruling

The first question

33 By its first question, which is divided into three parts (questions 1(a) to 1(c)), the national court asks essentially whether a bridging allowance such as that at issue in the main proceedings falls within the definition of 'pay' within the meaning of Article 141 EC and Article 1 of Directive 75/117 and, if so, whether those provisions preclude such an allowance from being granted, when account is taken of the

general difference in the risk of long-term unemployment for men and women according to age or whether, conversely, the difference in risk thus construed may justify a difference in the treatment of male and female workers as regards the age from which they may be entitled to that allowance in the event of dismissal.

First part: classification of the benefit

34 As regards the first part of this question, all the parties which have submitted observations to the Court, with the exception of Roche, maintain that a benefit such as the bridging allowance at issue in the main proceedings constitutes 'pay' within the meaning of Article 141 EC and Article 1 of Directive 75/117. Roche takes the view that it is not necessary to classify the benefit as such, but rather to determine whether the conditions of eligibility for the bridging allowance are discriminatory. Referring to *Burton*, cited above, it states that the issue is governed by Directive 76/206.

35 According to the settled case-law on Article 119 of the Treaty, the concept of 'pay', within the meaning of Article 141 EC and Article 1 of Directive 75/117, 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. 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 the abovementioned provisions (see, in particular, *Barber*, cited above, paragraph 12; and Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 23 and 24).

36 Although it is true that in *Burton*, cited above, the Court held that Directive 76/207 applies to the conditions for granting a voluntary redundancy benefit paid by an employer to a worker wishing to leave his employment, the Commission has rightly pointed out that that case-law has not been cited in more recent judgments concerning benefits paid after termination of the employment relationship.

37 As regards, in particular, the compensation granted by an employer to a worker on termination of his employment, the Court has already stated that such compensation is a form of deferred pay to which the worker is entitled by reason of his employment but which is paid to him on termination of the employment relationship with a view to enabling him to adjust to the new circumstances arising from such termination (see *Barber*, cited above, paragraph 13, and Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 10; and *Seymour-Smith and Perez*, cited above, paragraph 25).

38 In this case, it should be noted that the bridging allowance originates from the social plan of 26 February 1998, which was the result of an agreement between management and labour and that it must be paid by the undertaking by reason of the employment relationship which existed between it and certain workers dismissed as part of the restructuring operation dealt with in that plan. Point 8.3 thereof, under

which the amount of the allowance is to be calculated on the basis of the final gross monthly salary, confirms that the bridging allowance constitutes a benefit granted in connection with the employment relationship with the workers concerned.

39 It is common ground that the abovementioned social plan was drawn up with a view to alleviating the social consequences of an operation to restructure the undertaking. Thus it reserves the benefit of the bridging allowance to workers who have reached an age close to the statutory retirement age at the time of their dismissal and provides that that allowance is to be paid to them for a maximum of five years, without their being required to perform any work. Consideration classified as pay specifically includes consideration paid by the employer under a contract of employment whose purpose is to ensure that workers receive income even where, in certain cases specified by the legislature, they are not performing any work provided for in their contracts of employment (see, to that effect, Case C-218/98 *Abdoulaye and Others* [1999] ECR I-5723, paragraph 13 and case-law cited). Moreover, the fact that such benefits are in the nature of pay cannot be called in question merely because they can also be regarded as reflecting considerations of social policy (Case C-173/91 *Commission* v *Belgium* [1993] ECR I-673, paragraph 21; and Case C-7/93 *Beune* [1994] ECR I-4471, paragraph 45).

40 Accordingly, the Court finds that the bridging allowance at issue in the main proceedings falls under the concept of 'pay' within the meaning of Article 141 EC and Article 1 of Directive 75/117.

Second and third parts: existence of discrimination based on sex

41 It is appropriate to consider together the second and third parts of the first question referred for a preliminary ruling, aimed at elucidating whether, in the circumstances

of the main proceedings, the difference in the treatment of male and female workers provided for in the social plan of 26 February 1998 as regards the age at which there is entitlement to a bridging allowance constitutes discrimination prohibited by Article 141 EC and Article 1 of Directive 75/117.

42 The principle of equal pay for equal work for male and female workers, as laid down in Article 141 EC and specified further in Article 1 of Directive 75/117, precludes inter alia the application of provisions which establish any discrimination based on sex.

43 It must be borne in mind that the prohibition on discrimination between male and female workers contained in Article 141 EC, being mandatory, not only applies to the action of public authorities but extends also to all agreements which are intended to regulate paid labour collectively (see Case 43/75 *Defrenne* [1976] ECR 455, paragraph 39; *Kowalska*, cited above, paragraph 12; and Case C-284/02 *Sass* [2004] ECR I-11141 paragraph 25).

44 However, in accordance with the Court's case-law, the principle of equal pay, like the general principle of non-discrimination which it embodies in a specific form, presupposes that the men and women to whom it applies are in identical or comparable situations (see Case C-132/92 *Roberts* [1993] ECR I-5579 (*'Birds Eye Walls'*), paragraph 17; Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraphs 16 to 18; *Abdoulaye and Others*, cited above, paragraph 16; and Case C-206/00 *Mouflin* [2001] ECR I-10201, paragraph 28).

45 In this case, it is common ground that the provisions of the social plan of 26 February 1998 provide for a difference in the treatment of workers based directly on their sex, because they fix the age giving entitlement to the bridging allowance at 55 for men and 50 for women. However, according to Roche and the Republic of Austria, those provisions are not intended to give rise to discrimination against male workers nor do they have that effect. They maintain essentially that men who are dismissed when they are between 50 and 54 years old are not in a situation that is identical or comparable to that of women in the same age group. Consequently, it would be contrary to the principle of equal treatment to apply the same rule to objectively different situations.

46 The Court notes that the social plan of 26 February 1998, adopted pursuant to the provisions of the ArbVG, was concluded between the undertaking and the elected body of the workforce with a view to alleviating the social consequences of the dismissal of a large number of employees as part of a merger with another company. In that context the social plan provided for a bridging allowance to be granted only to those workers who had reached a relatively advanced age at the time of their dismissal, thus taking account of the greater risk of long-term unemployment normally encountered by such workers.

47 It is true that the actual risk of unemployment encountered by each worker does not depend entirely on factors such as age and sex, but also, as stated by Mr Hlozek, on other factors specific to that person, such as his qualifications and professional mobility. The fact remains, however, that in the light of generally accepted experience at the time when the undertaking was restructured, management and labour could legitimately expect that workers approaching statutory retirement age constituted a category different from that of other workers as regards the likelihood of their not finding other employment. That assessment explains why the social plan provided for a difference in treatment, for the purposes of the grant of the bridging allowance, based directly on the age of the workers at the time of their dismissal.

48 Since, at the time the social plan was concluded, women were entitled to an early retirement pension under the statutory scheme from the age of 55, whereas men were entitled to such a pension only from the age of 60, management and labour took the view that, in order to ensure equal treatment for all workers, it was necessary for women to be entitled to the bridging allowance five years earlier than the age fixed for their male colleagues. That provision of the social plan was not intended to give rise to discrimination against male workers of the undertaking and nor did it have that effect. Male workers, such as Mr Hlozek, who were in the 50 to 54 years age group at the time of their dismissal were further away from the statutory age for early retirement and, accordingly, were not in a situation identical to that of female workers in the same age group in terms of the likelihood of unemployment to which they were exposed.

49 It must therefore be noted that, in fixing different ages from which men and women would be entitled to the bridging allowance, the social plan provided for a neutral mechanism, which confirms the absence of any discrimination (see *Birds Eye Walls*, cited above, paragraph 23).

50 Furthermore, the provisions of the social plan of 26 February 1998 concerning the grant of a bridging allowance are not intended to apply generally or for an indefinite period. Those provisions were agreed on by management and labour for the purposes of a single restructuring operation of the undertaking and the payment of all bridging allowances granted to workers dismissed in the context of that operation is to end at the latest five years after their dismissal. Accordingly, contrary to the line of argument put forward by the Commission, there is no reason to fear that the application of the social plan will serve to reinforce or perpetuate the provisions of the statutory scheme in Austria which establish a difference in treatment between men and women as regards the age of entitlement to a retirement pension, even though there is a close link between the provisions of the social plan and those of the statutory scheme.

51 Accordingly, the answer to the first question should be that a bridging allowance such as that at issue in the main proceedings falls under the concept of 'pay' within the meaning of Article 141 EC and Article 1 of Directive 75/117. In circumstances such as those of the main proceedings, those provisions do not preclude the application of a social plan providing for a difference in the treatment of male and female workers in terms of the age at which they are entitled to a bridging allowance since, under the national statutory scheme governing early retirement pensions, they are in different situations with regard to the factors relevant to the grant of that allowance.

The second and third questions

52 By its second question, the national court asks essentially whether the bridging allowance at issue in the main proceedings is an 'occupational social security scheme' within the meaning of Directive 86/378. By its third question, which is divided into two parts, it wishes to ascertain whether that bridging allowance is a 'condition governing dismissal' within the meaning of Article 5 of Directive 76/207 and, if so, whether that directive precludes such an allowance being granted in accordance with rules such as those laid down in the social plan at issue in the main proceedings.

53 In the light of the answer to the first question, namely that the bridging allowance falls under the concept of 'pay' within the meaning of Article 141 EC, the interpretation of Directives 86/378 and 76/207 is of no relevance to the outcome of the main proceedings. Accordingly, it is not necessary to answer the second and third questions referred to the Court.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) rules as follows:

A bridging allowance such as that at issue in the main proceedings falls under the concept of 'pay' within the meaning of Article 141 EC and Article 1 of 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. In circumstances such as those of the main proceedings, those provisions do not preclude the application of a social plan providing for a difference in the treatment of male and female workers in terms of the age at which they are entitled to a bridging allowance, since, under the national statutory scheme governing early retirement pensions, they are in different situations with regard to the factors relevant to the grant of that allowance.

Signatures.