OPINION OF ADVOCATE GENERAL ELMER

delivered on 30 September 1997 *

1. Does a provision in an employer's pay regulations according to which the employee is to be granted a pay benefit in the form of travel concessions for a cohabitee of the opposite gender to the employee, but is denied such concessions for a cohabitee of the same gender as the employee, constitute gender discrimination in breach of Article 119 of the EC Treaty?

The case before the national court and the questions referred for a preliminary ruling

2. On 4 June 1993 Lisa Grant was engaged as a clerical officer by the British Railways Board. On 31 March 1995 the employment relationship was transferred to South-West Trains, a wholly-owned subsidiary, which was privatised on 4 February 1996. Clause 18 of her contract of employment, entitled 'Travel facilities', states:

'You will be granted such free and reduced rate travel concessions as are applicable to a member of your grade. Your spouse and dependents will also be granted travel concessions. Travel concessions are granted at the discretion of [the employer] and will be withdrawn in the event of their misuse.'

3. Those travel concessions are further regulated in the Staff Travel Facilities Privilege Ticket Regulations (hereinafter 'the Ticket Regulations'), issued by the British Railways Board and adopted by South-West Trains after privatisation. Clause 8 of the Ticket Regulations, entitled 'Spouses', provides *inter alia*:

'Privilege tickets are granted for one common law opposite sex spouse of staff ... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more ...'

4. Under Clauses 10 and 11 of the Ticket Regulations, the employee is also entitled to concessions for unmarried children living at home. Under Clause 12 it is further stated that 'Privilege tickets may be issued ... for a relative acting as a bona fide permanent resident housekeeper to and entirely dependent upon the applicant ...' if the employee is

* Original language: Danish.

either living alone or with an invalid spouse. Under that clause 'relative' is defined as a mother, father, brother, sister, daughter or son.

5. Mr Potter, who was Lisa Grant's predecessor in post, had in his time made a statutory declaration that a meaningful relationship had existed between him and his female cohabitee for a period of two years or more, and on that basis had obtained travel concessions for her.

6. On 9 January 1995 Lisa Grant similarly applied for travel concessions for her female cohabitee, Jillian Percey, at the same time making a declaration that she lived together with 'the individual described as my common law spouse on my application for concessionary travel facilities in a "Common law relationship" and that I have so lived for a continuous period of two years or more ...'. Lisa Grant's application was rejected on the ground that, under Clause 8 of the Ticket Regulations, travel concessions were not granted for cohabitees of the same sex.

7. Lisa Grant then brought a case against South-West Trains before the Industrial Tribunal, Southampton, United Kingdom, claiming that Article 119 of the EC Treaty precluded her being denied part of her pay consisting in obtaining travel concessions for her female cohabitee, when a male employee in the same circumstances would obtain travel concessions for his female cohabitee.

8. By order registered at the Court of Justice on 22 July 1996 the Industrial Tribunal stayed the proceedings and referred the following questions to the Court:

'1. Is it (subject to (6) below) contrary to the principle of equal pay for men and women established by Article 119 of the Treaty establishing the European Community and by Article 1 of Council Directive 75/117 for an employee to be refused travel concessions for an unmarried cohabiting same-sex partner where such concessions are available for spouses or unmarried opposite-sex cohabiting partners of such an employee?

2. For the purposes of Article 119 does "discrimination based on sex" include discrimination based on the employee's sexual orientation?

3. For the purposes of Article 119, does "discrimination based on sex" include discrimination based on the sex of that employee's partner?

4. If the answer to Question (1) is yes, does an employee, to whom such concessions are refused, enjoy a directly enforceable Community right against his employer?

5. Is such a refusal contrary to the provisions of Council Directive 76/207?

6. Is it open to an employer to justify such refusal if he can show (a) that the purpose of the concessions in question is to confer benefits on married partners or partners in an equivalent position to married partners and (b) that relationships between same-sex cohabiting partners have not traditionally been, and are not generally, regarded by society as equivalent to marriage; rather than on the basis of an economic or organisational reason relating to the employment in question?'

Which rules are relevant?

9. In the *Garland* case [1] the Court held that travel concessions for employees and members of their family should be treated as pay within the meaning of Article 119 of the EC Treaty.

10. 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, [2] which on certain points clarifies the content of Article 119 of the Treaty, [3] has no independent significance where a pay benefit falling within the scope of Article 119 is involved. Directive 75/117 is therefore not relevant to this case. [4]

11. 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 [5] does not cover pay benefits, and is therefore also irrelevant to the present case.

12. The questions referred to the Court must therefore be answered on the basis of Article 119 of the Treaty alone. Since the

1 — Case 12/81 *Garland* [1982] ECR 359.

2 — OJ 1975 L 45, p. 19.

3 — See Case 43/75 *Defrenne (II)* [1976] ECR 455, paragraph 54.

4 — See paragraph 12 of *Garland*, cited in footnote 1.

5 — OJ 1976 L 39, p. 40.

above Directives supplement and develop the basic principle of equal treatment contained in Article 119 of the Treaty, the Court's case-law concerning those Directives is nevertheless of great importance in this case.

General remarks concerning gender discrimination

13. In its judgment of 30 April 1996 in Case C-13/94 *P* v *S and Cornwall County Council* [6] (hereinafter '*P* v *S*'), the Court had an opportunity to give a ruling that dealt more fundamentally with the scope of the Community rules prohibiting discrimination based on sex. The case concerned an employee who was dismissed after informing his employer that he intended to undergo gender reassignment. The Court held that the dismissal constituted discrimination based on sex that was contrary to Directive 76/207. In paragraph 21 the Court attributed great weight to the fact that such discrimination was 'based, essentially if not exclusively, on the sex of the person concerned'. It was therefore irrelevant as far as the Court was concerned that there was discrimination because of P's transsexuality.

6 — [1996] ECR I-2143.

14. I would in particular refer to paragraphs 19 to 22 of the judgment, where the Court stated as follows:

'Moreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure (paragraph 19).

Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned (paragraph 20).

Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment (paragraph 21).

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard (paragraph 22).'

15. In that judgment the Court, in my view, took a decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and a male employee. The Court thus held that it did not matter that there was no reason to think that a woman who wished to undergo gender reassignment would have been treated more favourably than a man who wished to do so. I would refer in particular to paragraph 20 of the judgment, where the Court refused to confine the principle of equal treatment simply to discrimination based on the fact that a person is of one or other sex. The essential point was that the discrimination was based exclusively, or essentially, on gender. The Court thereby, in my view, interpreted the Community principle of equal treatment in a way that renders the principle appropriate for dealing with the cases of gender discrimination that come before the courts in present-day society.

16. The Court's judgment in *P* v *S* technically concerned Directive 76/207, but because of its general character it has corresponding significance for Article 119 of the EC Treaty which sets out the basic principle prohibiting discrimination based on sex. In order to give full effect to that principle, in my view it is, in the same way as in the *P* v *S* case, appropriate to construe Article 119 of the Treaty as precluding forms of discrimination against employees based exclusively, or essentially, on gender. The provision must further, in order to be effective, be understood as prohibiting discrimination against employees not solely on the basis of the employee's own gender but also on the basis of the gender of the employee's child, parent or other dependent. The provision must therefore also be regarded as precluding an employer from, for instance, denying a household allowance to an employee for sons under 18 living at home when such an allowance in otherwise equivalent circumstances was given for daughters living at home. Such a construction, which generally attaches weight to the fact that gender is the factor giving rise to discrimination, would also appear to accord with the formulation of Article 119, which in its first paragraph does indeed refer to the principle that men and women should receive equal pay for equal work, but in its third paragraph expands on that principle by speaking more generally of 'equal pay without discrimination based on sex'. Article 119 of the Treaty must therefore be construed as covering all cases where gender is objectively the factor causing an employee to be paid less.

17. It is important to bear in mind that, in examining whether there is gender discrimination, a purely objective assessment must be made. The decisive point is whether *de jure* or *de facto* there is objective gender discrimination, not, however, what the subjective motivation of the employer's discriminatory conduct may be. The delimitation of the

scope of Article 119 must be kept free of conceptions of morality which may vary from Member State to Member State and change with time. Only a purely objective assessment will ensure the clarity and foreseeability which are of crucial significance for legal certainty. In *P* v *S*, conceptions of morality in connection with transsexuality were thus irrelevant to the Court's decision. The Court has thus confirmed that the Treaty cannot be interpreted on the basis of the moral conceptions of a Member State (in this respect see also Case C-159/90 *Society for the Protection of Unborn Children* v *Grogan*). [7]

18. In summary, I therefore consider that Article 119 of the Treaty covers all cases where, on an objective assessment, there is *de jure* or *de facto* discrimination based exclusively or essentially on gender.

Is there gender discrimination in this case?

19. South-West Trains, the French Government and the United Kingdom contend that in this case there is discrimination based, not on sex, but rather on sexual orientation.

20. Examination of the question whether, in this case, there is *de jure* gender discrimination must start with a more detailed analysis of Clause 8 of the Ticket Regulations. Under that clause, an employee is entitled to travel concessions for a cohabitee of the opposite sex, but not for a cohabitee of the same sex. The issue is therefore whether the different treatment of the two cases, viewed objectively, is exclusively or essentially gender-based.

21. I would point out more generally that the travel concessions under the Ticket Regulations are in reality household benefits. Under Clauses 10 to 12 of the Ticket Regulations employees are entitled to travel concessions for children and close relatives maintained by the employee and under those clauses the sexual orientation of the employees or their relatives is irrelevant. If, therefore, Lisa Grant was maintaining a child or a mother or father, she would, regardless of her sexual orientation, have received travel concessions for them.

7 — [1991] ECR I-4685.

22. Where, under Clause 8 of the Ticket Regulations, an employee is also entitled to travel concessions for a cohabitee, under the wording of the provision the same applies as for the concessions under Clauses 10 to 12. The concessions are in fact a household benefit. Clause 8, like Clauses 10 to 12, makes no mention of the sexual orientation of the employee or cohabitee, and the question of sexual orientation is thus, under the objective content of that clause, irrelevant as far as entitlement to the concessions is concerned. Nor does South-West Trains investigate the question of the employee's sexual orientation either by requiring the employee to provide such information in the declaration to be produced or by inspecting the joint home.

23. Clause 8 of the Ticket Regulations makes the concessions conditional, however, on the cohabitee's being of the 'opposite sex' to the employee. The discrimination is therefore, under the objective content of the provision, exclusively gender-based. Gender is simply the only decisive criterion in the provision. If the rule had been gender-neutral so that the concessions were given, without discrimination, to all employees who submitted a declaration that for at least the last two years they had been living in a permanent relationship, Lisa Grant would have obtained the pay benefit in question which, according to her undisputed evidence, is worth UK £1 000 per annum (corresponding to ECU 1 500). Gender is thus, objectively, the factor that leads to discrimination relating to pay against a particular group of employees.

24. Thus Clause 8 of the Ticket Regulations makes the grant of the pay benefit in question dependent on the gender of the employee, inasmuch as employees must be of the opposite sex to their cohabitees. At the same time the clause contains a requirement that the cohabitee must be of the opposite sex to the employee. Whether the requirement for obtaining the concessions is satisfied accordingly depends on the gender both of the employee and of the cohabitee. Travel concessions for a male cohabitee may only be obtained if the employee is a woman. Travel concessions for a female cohabitee may only be obtained if the employee is a man.

25. The fact that Clause 8 of the Ticket Regulations does not refer to a specific sex as the criterion for discrimination, but lays down a more abstract criterion ('opposite sex') can, in my view, make no difference, since the decisive point, as laid down in *P* v *S* is whether discrimination is exclusively or essentially based on sex, whereas the fact that the discrimination is, *de jure* or *de facto*, on the basis of a specific sex cannot be decisive.

26. In the light of the foregoing, it is my view that a provision in an employer's pay regulations under which the employee is granted travel concessions for a cohabitee of the opposite sex to the employee but refused such concessions for a cohabitee of the same sex as the employee constitutes discrimi-

nation on the basis of gender which falls within the scope of Article 119 of the Treaty.

Does the case concern a family law issue falling outside the EC Treaty?

27. A further question that must, however, be examined is whether that discrimination is a consequence of the family law legislation in the Member State in question. The Commission has thus stated that the case concerns the definition of a 'common law spouse' and is thus a family law issue which does not fall under the EC Treaty.

28. Had Clause 8 of the Ticket Regulations specified, as the determinant criterion, that the employee and the cohabitee must have contracted marriage, that would, in my opinion, have been a restriction on the travel concessions which was not contrary to Community law, because it would be by reference to a family law concept, the content of which is laid down by the Member States.

29. There would, nevertheless, have been a precondition that male and female employees and their spouses be treated in the same way. If an employer, on the basis of his private moral views, wished to combat the breaking-down of the traditional sex roles by giving employees whose wives stayed at home a special benefit but refusing to give employees whose husbands stayed at home a corresponding benefit, such a rule would be contrary to Article 119 of the Treaty, since that would involve discrimination based on both the employees' gender and the gender of their spouses, and would not simply refer to family law status.

30. Clause 8 of the Ticket Regulations does not, however, refer to a concept which in English law confers a family law status, but rather uses the expression 'common law spouse'. However, neither in statute law nor common law does that expression have any legal significance in England. English law has put unmarried cohabitees on the same footing as married couples only in limited circumstances, for example under rent legislation, and here a more precise formulation is used such as, for example 'a man and a woman who lived with each other as husband and wife'. Such provisions are assumed in general to require that the couple in question have shared finances, share a social life and have sexual relations, although the absence of the last is not decisive. [8]

8 — See, further, P. M. Bromley and N. V. Lowe, *Family Law*, 8th ed., p. 5 et seq.

31. The term 'common law spouse' and similar terms are thus not used in English family law legislation and, in a case in the social law area, [9] the members of the House of Lords expressed a certain reluctance to employ the term in a legal context when stating *inter alia* that the case in question concerned 'an unmarried woman commonly but not very appropriately referred to as "a common law wife"'. The expression 'common law spouse' or similar expressions must therefore be regarded simply as an expression used in everyday language with no specifically defined content which is liable to change in accordance with changes in the general view, so that in principle there is nothing to prevent the expression 'common law spouse' extending to cohabitees of the same gender. [10]

32. The fact that two persons of the same sex may, in the United Kingdom, be regarded as 'common law spouses' would also appear to be the case on an *a contrario* construction of Clause 8 of South-West Trains' own Ticket Regulations. If the expression 'common law spouses' referred exclusively to persons of different sexes, there would be no reason to refer to a 'common law *opposite sex* spouse'.

33. It was South-West Trains itself which introduced that restriction, leading to gender discrimination, into the term.

34. Gender discrimination is accordingly, in this case, not the result of family law legislation in the Member State in question and for that reason outside the scope of Community law.

May gender discrimination be justified by reference to an employer's conception of morality?

35. South-West Trains' reason for restricting employees' entitlement to travel concessions for cohabitees to entitlement for persons of the opposite sex is, according to the evidence, its intention to benefit only persons who are married or living in a heterosexual relationship, but not persons living in a homosexual relationship, since cohabitation

9 — *Davis* v *Johnson* [1979] AC 264, [1978] 1 All ER 1132, HL.

10 — In English contract law the expression 'agency of cohabitation' is, moreover, used to mean that in certain circumstances cohabitation entitles a person to enter into certain legal transactions which will bind his or her cohabitee (See Cheshire, Fifoot & Furmston's *Law of Contract*, 13th ed., p. 491 et seq.). Such entitlement is based on society's view of the permanency and character of the cohabitation, and therefore there does not seem to be anything, in principle, to prevent cohabitees of the same sex from satisfying the conditions for an 'agency of cohabitation'.

with a person of the same sex is not traditionally regarded as equivalent to a heterosexual relationship. As the national court implies in its sixth question, consideration must be given to the question of whether gender discrimination can be justified on the basis of conceptions of morality.

36. Lisa Grant submits that discrimination under Article 119 of the Treaty may only be justified if it is on essential economic or business grounds or is required by law. On the other hand, an employer cannot justify gender discrimination which is prohibited under the Treaty by reference to his private conception of morality, regardless of the fact that it might correspond to the prevalent conception of morality in the Member State in question.

37. I would begin my examination of that question by pointing out that in its assessment of whether discrimination based on sex might be justified, the Court has traditionally drawn a distinction between direct and indirect discrimination. [11] Whether discrimination is direct or indirect depends on whether it follows directly from the legal criteria applied (direct discrimination) or whether, without being evident under the legal criteria, in practice it proves detrimental to one sex (indirect discrimination). Only where discrimination is indirect does the Court appear to accept the possibility that it might be justified by reference to objective circumstances. [12]

38. In the present case gender discrimination results directly from the legal criterion laid down in Clause 8 of the Ticket Regulations, and according to the Court's case-law such direct discrimination cannot be justified by reference to objective circumstances.

39. Even were it assumed, however, that this was a case of indirect discrimination that might be justified by reference to objective circumstances, I find it difficult to see how discrimination such as this could be so justified. An employee's household's expenses in travelling by train must, all things being equal, be just as high regardless of whether the household consists of cohabitees of different sexes or of the same sex. South-West Trains' justification consists in reality simply in a reference to the purely subjective circumstance that its intention is to treat homosexuals differently from heterosexuals. That constitutes therefore, in my view, a purely subjective reason as opposed to objective circumstances such as, for instance, actuarial

11 — See Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 13; Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 15; and Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 14.

12 — See paragraph 13 of *Dekker*, cited in footnote 11, as compared with paragraph 14 of *Enderby*, also cited in footnote 11.

calculations relating to the value of contributions paid in under certain forms of pension arrangements in relation to average life expectancy for men and women. [13]

40. South-West Train's justification amounts, in reality, to nothing more than saying that on the basis of its own private conceptions of morality that employer wishes to set aside a fundamental principle of Community law in relation to some people because it does not care for their life style.

41. Whether the private conceptions of morality held by the employer in question correspond to those prevalent in the United Kingdom or not must be irrelevant in this connection. Under the Treaty it is the rule of law in the Community that the Court must safeguard; it is not its task to watch over questions of morality either in the individual Member States or in the Community, nor does it have any practical possibility of or political mandate for doing so. If a choice should have to be made in the Community between various views of morality that must be a task for the Community's political institutions, and hence it is for the legislature to make such choices by way of treaty or Community legislation.

42. There is nothing in either the EU Treaty or the EC Treaty to indicate that the rights and duties which result from the EC Treaty, including the right not to be discriminated against on the basis of gender, should not apply to homosexuals, to the handicapped, to persons of a particular ethnic origin or to persons holding particular religious views. Equality before the law is a fundamental principle in every community governed by the rule of law and accordingly in the Community as well. The rights and duties which result from Community law apply to all without discrimination and therefore also to the approximately 35 million citizens of the Community, depending on the method of calculation used, who are homosexual. [14]

43. To summarise, I consider that the answer to that part of the questions referred should therefore be that the said gender discrimination cannot be justified by reference to the fact that the employer's intention is to confer benefits on heterosexual couples as opposed to homosexual couples.

Direct applicability

44. By its fourth question, the national court wishes to ascertain whether Article 119 of the Treaty is directly applicable and therefore, in a case such as this, may be enforced directly before national courts.

13 — See Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 76 et seq. and Case C-152/91 *Neath* [1993] ECR I-6935, paragraphs 28 to 33.

14 — See in this respect paragraph 22 of *P* v *S*, cited in point 14 above.

45. The Court held in the *Defrenne* judgment [15] that Article 119 of the Treaty is directly applicable if direct discrimination is involved, in other words discrimination that can be ascertained by applying the criteria laid down in the provision. As an example, the Court mentions discrimination which has its origin in legislative provisions or in collective labour agreements, as well as discrimination in relation to pay, operating in one and the same private or public undertaking or service, inasmuch as such discrimination can be detected on the basis of a purely legal analysis of the situation.

46. In this case discrimination against employees whose cohabitees are of the same sex in relation to employees whose cohabitees are of the opposite sex can be detected in one and the same undertaking and one and the same set of regulations, namely South-West Trains and Clause 8 of the Ticket Regulations. The precondition for Article 119 having direct effect must, therefore, be satisfied.

47. The national court is accordingly required to ensure that the disadvantaged group is treated in the same way as the favoured group, [16] and thereby to ensure that employees of South-West Trains Ltd who have a cohabitee of the same gender are put on the same footing as employees who have a cohabitee of the opposite gender and accordingly receive travel concessions for their cohabitee.

48. The answer to that question must therefore, in my opinion, be that Article 119 of the Treaty is directly applicable and it is for the national courts to ensure that the disadvantaged group of employees is treated in the same way as the favoured group.

Temporal effect

49. In its observations the United Kingdom requested the Court to limit the temporal effect of the judgment if the questions referred to it are answered in the affirmative. The United Kingdom did not repeat that request at the hearing and has not produced evidence to show that in this case there is a need for temporal effect to be restricted. In my view a judgment that followed my Opinion would not depart from the Court's case-law hitherto and would also be founded on its facts. I do not see any reason for laying down any temporal restriction on the effect of the judgment.

15 — Cited in footnote 3. See paragraphs 18 and 22.

16 — See Case C-200/91 *Coloroll Pension Trustees*, cited in footnote 13, paragraph 32; Case C-154/92 *Van Cant* [1993] ECR I-3811, paragraph 22; and Case 286/95 *McDermott and Cotter* [1987] ECR 1453, paragraph 19.

Conclusion

50. In the light of the foregoing, I would suggest that the Court reply to the questions referred by the Industrial Tribunal, Southampton, as follows:

(1) A provision in an employer's pay regulations under which the employee is granted a pay benefit in the form of travel concessions for a cohabitee of the opposite gender to the employee, but refused such concessions for a cohabitee of the same gender as the employee, constitutes discrimination on the basis of gender, which is contrary to Article 119 of the EC Treaty.

(2) Such discrimination on the basis of gender cannot be justified by reference to the fact that the employer's intention is to confer benefits on heterosexual couples as opposed to homosexual couples.

(3) Article 119 of the EC Treaty is directly applicable and it is for the national courts to ensure that the disadvantaged group of employees is treated in the same way as the favoured group.