JUDGMENT OF THE COURT (Sixth Chamber)
22 October 1998 *

In Case C-154/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal du Travail, Brussels, for a preliminary ruling in the proceedings pending before that court between

Louis Wolfs

and

Office National des Pensions (ONP)

on the interpretation of Article 4(1) and Article 7(1)(a) of 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),

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. F. Mancini, J. L. Murray, H. Ragnemalm (Rapporteur) and R. Schintgen, Judges,

* Language of the case: French.

Advocate General: M. B. Elmer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Louis Wolfs,

— the Office National des Pensions (ONP), by Gabriel Perl, Administrator General, acting as Agent,

— the Belgian Government, by Anne-Marie Snyers, General Adviser in the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, and

— the Commission of the European Communities, by Marie Wolfcarius, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Louis Wolfs, of the Office National des Pensions (ONP), represented by Jean-Paul Lheureux, Deputy Adviser, acting as Agent, of the Belgian Government, represented by Anne-Marie Snyers, and of the Commission, represented by Marie Wolfcarius, at the hearing on 22 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 6 March 1997,

gives the following

Judgment

1 By order of 22 April 1996, received at the Court on 7 May 1996, the Tribunal du Travail (Labour Court), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 4(1) and Article 7(1)(a) of 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, hereinafter 'the Directive').

2 Those questions have been raised in proceedings between Mr Wolfs and the Office National des Pensions (hereinafter 'the ONP') concerning the calculation of his pension.

3 Royal Decree No 50 of 24 October 1967 on the retirement and survival pension of employed workers (*Moniteur Belge* of 27 October 1967, p. 11258, hereinafter 'Royal Decree No 50'), which applied until 1 January 1991, fixed the normal retirement age at 65 for men and at 60 for women.

4 Under Article 10 of Royal Decree No 50, entitlement to a retirement pension accrued, for each calendar year, at the rate of a fraction of the remuneration received by the person concerned, which was determined according to specific rules. In the case of men, the benefit was equal, by calendar year, to 1/45th of the remuneration so calculated and, in the case of women, to 1/40th.

5 In the case of an employment record of more than 40 or 45 years, the most advantageous calendar years in that period were used for the calculation.

6 As from 1 January 1991 a new system, established by the Law of 20 July 1990 introducing a flexible retirement age for employed workers and adapting their pensions to trends in general well-being (*Moniteur Belge* of 15 August 1990, p. 15875, hereinafter 'the 1990 Law') has allowed both men and women to retire as from the first day of the month following that in which the worker reaches the age of 60.

7 As regards the calculation of the pension, the 1990 Law provided that entitlement to a retirement pension accrued, per calendar year, at the rate of a fraction, specified by Royal Decree No 50, of the remuneration of the person concerned, the denominator of that fraction remaining 45 for men and 40 for women.

8 Article 4(1) of the Directive prohibits any discrimination on grounds of sex, either directly or indirectly, in particular as concerns the calculation of benefits, including old-age benefits.

9 However, Article 7(1)(a) of the Directive, allowing for exceptions to that principle, states:

'1. 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;

...'.

10 In Case C-154/92 *Van Cant* v *Rijksdienst voor Pensioenen* [1993] ECR I-3811 the Arbeidsrechtbank (Labour Court), Antwerp, asked the Court to rule on the question whether the method of calculating retirement pensions for male workers, as described above, constituted discrimination on grounds of sex within the meaning of Article 4 of the Directive.

11 In paragraph 13 of its judgment in that case the Court held that if national legislation had abolished the difference in pensionable age that existed between male and female workers — which was a question of fact for the national court to determine — Article 7(1)(a) of the Directive could no longer be relied on in order to justify maintaining a difference, linked to that difference in pensionable age, in the method of calculating the retirement pension.

12 In that judgment the Court accordingly held that Article 4(1) and Article 7(1) of the Directive precluded national legislation which authorised male and female workers to take retirement as from an identical age from retaining in the method of calculating the pension a difference according to sex which was itself linked to the difference in pensionable age which previously existed.

13 In the present case, it is clear from the case file that the ONP granted Mr Wolfs an employee's retirement pension, the annual amount of which was BFR 109 026, on the basis of a representative fraction of his working record, equal to 13/45th, with the years from 1955 to 1967 being taken into account. Mr Wolfs left Belgium in 1968.

14 Noting that the method of calculating the pension applicable to female workers, which takes account of the worker's most advantageous 40 years, produced a higher pension than that which he had been granted, Mr Wolfs brought before the Tribunal du Travail, Brussels, an action for annulment of the decision by which the ONP fixed the amount of his pension and based his action on the judgment in *Van Cant*.

15 The Tribunal du Travail, Brussels, decided to stay proceedings until the Court had given a ruling on the following questions:

'1. Is the introduction by a Member State of a flexible retirement system, in accordance with Council Recommendation 82/857/EEC of 10 December 1982 on the principles of a Community policy with regard to retirement age, covered by the exclusion provided for in Article 7(1)(a) of Directive 79/7/EEC, in the sense that the fixing of a flexible pensionable age for men and women, for instance between the ages of 60 and 65 years, cannot be treated purely and simply in the same way as the setting of an age for terminating employment identical for everyone and, even coupled with maintenance of a different pension calculation for men and women, is not necessarily contrary to the principle of equal treatment for men and women laid down in Article 4(1) of Directive 79/7, since under such a system all future pensioners will have the option of freely determining when their pension will commence on the basis of their own employment record; this will in particular be the case if the system thus introduced corresponds to a necessary aim of the State's social policy and is justified on grounds unrelated to discrimination on grounds of sex?

2. If the answer is in the negative, does the achievement of the objectives laid down by Directive 79/7 and Recommendation 82/857, namely the introduction of a flexible retirement age for everyone and equal treatment for men and women in matters of social security, when account is also taken of the combination of formal equality with substantive discrimination existing between men and women in connection with statutory retirement pensions, require a Member State in mechanical fashion to level the conditions of entitlement to retirement pension downwards, by ensuring that men and women are entitled to take a retirement pension, as they choose, from the lowest age and according to the method of calculation applied hitherto to the category which became entitled from that age to a retirement pension, despite the consequences for the financial equilibrium of retirement systems which were not set up on the basis of those principles?

3. Further, in the event that the first question is answered in the negative, should application of the solution most favourable to the person concerned, with regard to Community law, be carried out for the entire employment record of the person concerned or can it be done only for the years of employment recorded subsequent either to entry into force of the Law of 1990 introducing a flexible pensionable age, or the date of the judgment delivered by the Court of Justice of the European Communities on 1 July 1993 in Case C-154/92 *Van Cant* v *Rijksdienst voor Pensioenen*?'

16 By letter of 12 May 1997, the national court informed the Court that the ONP had appealed against the order of 22 April 1996 to the Cour du Travail, Brussels, seeking, in particular, withdrawal of the reference for a preliminary ruling. In accordance with the opinion of the First President of the Cour du Travail, Brussels, expressed in a letter of 30 May 1997, the Court then suspended the preliminary ruling procedure.

17 By letter of 18 June 1998, the First President of the Cour du Travail, Brussels, then requested the Court to resume the preliminary ruling procedure.

The first question

18 By its first question, the national court asks essentially whether a retirement scheme allowing both men and women to enter into retirement at the age of 60 but under which the method of calculating the pension continues to differ according to sex is covered by the derogation provided for in Article 7(1)(a) of the Directive.

19 This question is essentially the same as that examined in the judgment in *Van Cant*, cited above. However, there is a new factor in the scheme applicable both at the time of the judgment in *Van Cant* and at the time when the reference in this case was made.

20 On 19 June 1996, after this order for reference was made, the Belgian legislature enacted a Law interpreting the 1990 Law (*Moniteur Belge* of 20 July 1996, p. 19579, hereinafter 'the Interpretive Law'), which was then deemed, from that date, to have, as from its entry into force on 1 January 1991, the scope conferred upon it by the Interpretive Law.

21 According to Article 2 of the Interpretative Law, for the purposes of Article 2(1), (2) and (3) and Article 3(1), (2), (3), (5), (6) and (7) of the 1990 Law, 'the term "retirement pension" shall mean the replacement income granted to a beneficiary who is deemed to have become unfit for work by reason of old age, this event being deemed to occur at the age of 65 for male beneficiaries and 60 for female beneficiaries'.

22 It is appropriate, therefore, in order to give a helpful reply to the national court, to interpret the provisions of the Directive with reference to the national rules now in force.

23 It should be mentioned in this regard that in its judgment of 30 April 1998 in Joined Cases C-377/96 to C-384/96 *De Vriendt and Others* [1998] ECR I-2105 the Court has already carried out such an examination.

24 In paragraph 25 of that judgment the Court observed that it is settled case-law that the possibility of derogation provided for in Article 7(1)(a) of the Directive had to be construed strictly (see, in particular, Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247, paragraph 8). Thus where, pursuant to that article, a Member State prescribed different retirement ages for men

and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation was limited to forms of discrimination which were necessarily and objectively linked to the difference in retirement age (*Thomas and Others*, and Case C-137/94 *R* v *Secretary of State for Health, ex parte Richardson* [1995] ECR I-3407, paragraph 18). If, on the other hand, national legislation had abolished the difference in pensionable age, the Member State was not authorised to maintain a difference according to sex in the method of calculating the pension (*Van Cant*, paragraph 13).

25 The Court went on to observe, in paragraph 26, that it followed from the nature of the exceptions contained in Article 7(1) of the Directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored (Case C-9/91 *R* v *Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I-4297, paragraph 15).

26 In view of those findings the Court concluded, in paragraph 27, that it was necessary to determine whether the discrimination relating to the method of calculating retirement pensions was necessarily and objectively linked to the maintenance of national provisions which prescribed different pensionable ages for men and women and therefore came under the derogation provided for in Article 7(1)(a) of the Directive.

27 In this regard, the Court pointed out, in paragraph 28, that it was clear from paragraph 13 of its judgment in *Van Cant* that the question whether national legislation had maintained different pensionable ages for male and female workers was a question of fact which was for the national court to determine.

28 If such a difference had been maintained, then, according to paragraph 29 of the judgment in *De Vriendt*, the specification of the age for award of a retirement pension effectively determined the length of the period during which the persons concerned could contribute to the pension scheme.

29 The Court concluded, in paragraph 30, that it was thus apparent that, in such a case, a form of discrimination in the method of calculating pensions such as that which followed from the national legislation in issue would be necessarily and objectively linked to the difference that had been maintained as regards the specification of the pensionable age.

30 In view of those considerations, the answer to be given to the first question posed in this case must be that Article 7(1)(a) of the Directive must be interpreted as meaning that, if national legislation has maintained a different pensionable age for male and female workers, the Member State concerned is entitled to calculate the amount of pension differently depending on the worker's sex.

The second and third questions

31 Since the second and third questions were posed in the event that the first question had to be answered in the negative, it is not necessary to examine them.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunal du Travail, Brussels, by order of 22 April 1996, hereby rules:

Article 7(1)(a) of 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 must be interpreted as meaning that, if national legislation has maintained a different pensionable age for male and female workers, the Member State concerned is entitled to calculate the amount of pension differently depending on the worker's sex.

Kapteyn Mancini Murray

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 22 October 1998.

R. Grass

Registrar

P. J. G. Kapteyn

President of the Sixth Chamber