In Case 19/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Employment Appeal Tribunal for a preliminary ruling in the action pending before that court between

ARTHUR BURTON

and

BRITISH RAILWAYS BOARD

on the interpretation of Article 119 of the Treaty 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 (Official Journal L 45, p. 19) and Articles 1 (1), 2 (1) and 5 (1) 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 (Official Journal L 39, p. 40), with regard to payment of a voluntary redundancy benefit,

THE COURT

composed of: G. Bosco, President of the First Chamber, acting as President, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: A. van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

The British Railways Board (hereinafter referred to as "the Board"), the defendant in the main proceedings and Mr Burton's employer, is responsible for operating the railway system in Great Britain. The Board is a statutory body corporate established by the Transport Act 1962 for an indefinite period. By section 30 of that Act the Board is not to be regarded as the servant or agent of the Crown.

Mr Burton, the plaintiff in the main action, is employed by the Board at managerial level in the Chief Finance Officer's organization at Doncaster. He is aged 58 and has been employed by the Board since the age of 16.

As part of a re-organization of its Eastern Region the Board made an offer of voluntary redundancy to some of its employees. A memorandum was drawn up embodying the terms of a collective agreement between management and the recognized trade unions on the terms on which the reorganization of the financial department was to be carried out. Paragraph 6 of the memorandum provides as follows:

"Staff aged 60/55 (Male/Female) may leave the service under the Redundancy and Resettlement arrangements when the Function in which [they are] employed has been dealt with under Organization Planning."

In August 1979 Mr Burton applied for voluntary redundancy. His application was rejected on the ground that he was under the minimum age for male employees. The Board has therefore treated Mr Burton less favourably than it would treat a woman inasmuch as the benefit would have been granted to a woman aged 58.

The documents lodged with the Court reveal that the voluntary redundancy benefits in question are of two main kinds: voluntary redundancy allowances and pension benefits. Section 24 of the Redundancy, Transfer and Resettlement Arrangements for Railway Staff indicates that the allowances claimed by Mr Burton comprise three elements: the lump sum calculated in accordance with the provisions of the Redundancy Payments Act 1965, that is to say, the amount calculated by reference to that Act; an additional payment calculated on similar principles; and an amount equal to 25% of the sum of the first two elements, which the plaintiff considers to be a kind of interest payable on the first two elements. These three elements (statutory, voluntary and interest) are all redundancy allowances, and they are paid directly by British Rail to those who are to benefit from the arrangements. The calculation is in no way related to the amount which Mr Burton would

have been paid at the minimum retirement age provided that he reached that age.

In addition, if Mr Burton had qualified for voluntary redundancy payments he would have been entitled to a special early retirement pension since he would have retired before the minimum pensionable age, which is 60 for men and 55 for women. The special pension would have been financed by British Rail funds. It would not have been funded by contributions to the British Rail pension fund, but paid directly by British Rail. Moreover, Mr Burton would have been entitled to an advance from British Rail equal to the lump sum retirement benefit which he would have received when he reached the normal age of retirement. That sum would be repaid when Mr Burton reached the age of 60, the minimum retiring age. Thus for two years prior to his reaching the age of 60 Mr Burton would have been able to borrow against the lump sum which was payable to him at the normal age of retirement. In other words, that would be an advance on what he would have received at the age of 60. He could have used that money, invested it and recovered interest thereon.

The result is that if Mr Burton had been eligible for the voluntary redundancy benefit at issue he would have received: (1) the three elements of which that benefit is composed, that is, the statutory payment, the additional payment and the 25% sum representing interest on the first two elements, and (2) the early retirement pension, together with an advance equal to the sum which he would have received on reaching the age of 60.

The benefit in question is gratuitous; there is no legal entitlement to have access to it at all; it could as a matter of law be varied or discontinued at any time by British Rail.

After the rejection of his application for voluntary redundancy Mr Burton complained to an Industrial Tribunal under the provisions of the Equal Pay Act 1970, as last amended by the Sex Discrimination Act 1975. However, his claim under the Equal Pay Act was not pursued at the hearing since it was agreed by both parties that voluntary redundancy benefits were non-contractual and therefore outside the scope of the Act.

The Sex Discrimination Act applies to discrimination in non-contractual matters in the field of employment. The combined provisions of section 6 (2) and section 1 (1) make it unlawful for an employer to discriminate against a worker on the ground of sex as regards *inter alia* access to benefits, including voluntary redundancy benefit. By virtue of section 6 (4), however, the Act does not apply to provisions in relation to death or retirement.

The Industrial Tribunal rejected Mr Burton's claim. He appealed to the Employment Appeal Tribunal. In the course of the appeal it was conceded on his behalf that by virtue of section 6 (4) of the Sex Discrimination Act it is not contrary to the Act for an employer to treat a male employee less favourably than he treats a female employee as regards access to voluntary redundancy benefit. However, Mr Burton contended

that Article 6 (4) must be construed as subject to the enforceable Community rights conferred by Article 119 of the Treaty, Article 1 of Directive 75/117 on equal pay and Articles 1, 2 and 5 of Directive 76/207 on equal treatment.

By an order of 16 January 1981 the Employment Appeal Tribunal decided to suspend the proceedings pursuant to Article 177 of the Treaty pending a preliminary ruling from the Court on the following questions:

"(1) Is a voluntary redundancy benefit, which is paid by an employer to a worker wishing to leave his employment, within the scope of the principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Council Directive 75/117/EEC of 10 February 1975?

(2) If the answer to Question (1) is in the affirmative, does the principle of equal pay have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?

(3) If the answer to Question (1) is in the negative:

(i) is such a voluntary redundancy benefit within the scope of the principle of equal treatment for men and women as regards 'working conditions' contained in Article 1 (1), Article 2 (1) and Article 5 (1) of Council Directive 76/207/EEC of 9 February 1976?

(ii) if so, does the said principle have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?"

The order made by the Employment Appeal Tribunal was lodged at the Court Registry on 4 February 1981.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were submitted by Arthur Burton, represented by Anthony Lester, Q.C., and Judith Beale, Barrister, instructed by Elaine Donnelly, Deputy Legal Adviser at the Equal Opportunities Commission; by the British Rail Board, represented by N. E. Beddard, Barrister, instructed by Evan Harding, Solicitor; by the Government of the United Kingdom, represented by P. Scott, Q.C., instructed by R. D. Munrow of the Treasury Solicitor's Department, acting as Agent; by the Danish Government, represented by L. Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs; and by the Commission of the European Communities, represented by John Forman, acting as Agent.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

Mr Burton submits that the answer to the first question should be that a voluntary redundancy benefit, which is paid by an employer to a worker wishing to leave

his employment, is within the scope of the principle of equal pay.

Article 119 of the Treaty pursues a double aim. The first aim is to avoid a situation in which undertakings established in the States which have effectively implemented the principle of equal pay suffer a competitive disadvantage as compared with undertakings in Member States which have not implemented it. Secondly, Article 119 forms part of the social objectives of the Community, intended, by common action, to ensure social progress, and seeks the constant improvement of the living and working conditions of the people of Europe, as is emphasized by the preamble to the Treaty (judgment of 8 April 1976 in Case 43/75, *Defrenne (No 2)* [1976] ECR 455). It is essential to the attainment of these aims that the principle of equal pay be applied to protect the rights of workers to redundancy benefits. Otherwise the double aim of Article 119 would be frustrated. Undertakings established in States which have applied the principle to redundancy benefits would suffer a competitive disadvantage as compared with undertakings established in States which have not. Furthermore, there would be an obvious denial of the full and effective enjoyment of the right to equal pay if the concept of "pay" were restrictively interpreted so as to exclude from the scope of the principle a vital element in the remuneration of millions of workers within the Community, of particular importance during periods of economic recession and high unemployment.

Article 119 states that pay includes not only the ordinary basic or minimum wage or salary but also "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 his opinion in Case 69/80 *Worringham and Humphreys* v *Lloyds Bank*, (judgment of 11 March 1981, [1981] ECR 767), Mr Advocate General Warner stated that the phrase "consideration, whether in cash or in kind" seemed to him "one of wide import". The Court's decision in that case took the concept of pay to be a wide one.

A redundancy payment is paid directly by an employer to a worker employed by him. Mr Burton submits that this feature alone raises a strong presumption that a redundancy payment is within the scope of the principle of equal pay. Employer and worker are directly related to each other by the job which the worker does for the employer. A redundancy payment is plainly an advantage to the worker arising from his employment. It is a payment made "by reason of the links binding the worker to his employer" (Opinion of Mr Advocate General Roemer in Case 20/71, *Sabbatini* v *European Parliament* [1972] ECR 345).

The method of calculation of a redundancy payment shows that it is inextricably linked to the service given by the worker to his employer. It is calculated by reference to three factors, two of which, length of service and amount of periodic pay, are basic elements in the employment relationship.

The third factor is age: older workers are considered to have a greater interest in the continuity of their employment. The redundancy payment is part of the bargain struck between employer and worker in respect of the service which the latter provides to the former. In place of the obligation to continue to provide employment and to pay periodic wages, the employer pays a lump sum. The payment is made in respect of the worker's employment, not in the sense of particular tasks performed, but in the sense of the job or position itself.

It makes no difference to the interpretation of Article 119 whether the particular worker is voluntarily or compulsorily redundant, as that is simply a matter of who makes the selection. Whether willingly or not, the worker is still losing his job, which he has an interest in keeping. One purpose of a general system of redundancy payments is to make workers more ready to accept necessary redundancies in the interests of productive efficiency. Such a purpose is perfectly achieved when workers are willing to volunteer for redundancy because of the redundancy benefits which are offered to them. If is of no significance that, in the present case, the redundancy payments are not made pursuant to the terms of the worker's contract of employment.

In its judgment of 25 May 1971 in Case 80/70, *Defrenne (No 1)* [1971] ECR 445, the Court ruled that:

"A retirement pension established within the framework of a social security scheme laid down by legislation does not constitute consideration which the worker receives indirectly in respect of his employment from his employer within the meaning of the second paragraph of Article 119 of the EEC Treaty."

Mr Burton considers that the redundancy payment under consideration in the present case has none of the characteristics which led the court to rule in *Defrenne No 1* that the retirement pension was not pay, and in the circumstances of the present case the redundancy benefit is within the principle of equal pay. It is paid because the requirements of the employer's business for employees to carry out work of a particular kind have diminished or are expected to diminish. The worker is entitled to the payment because the employer no longer needs him to do his particular job. The amount of the payment is calculated by reference to features of the worker's particular post in the employment of his employer. A self-employed worker would not receive such a payment.

In its judgment of 15 June 1978 (Case 149/77 *Defrenne (No 3)* [1978] ECR 1365) the Court ruled that:

"Article 119 of the EEC Treaty cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women".

It might therefore be argued, on the basis of that decision, that any financial inequality arising from prescription of different age requirements for men and women for any purpose is not within the principle of equal pay.

Mr Burton maintains that it is clear, however, that the principle of equal pay covers some financial inequalities which arise from differential age requirements. *Worringham* is an example. In that case it was a condition of women's entitlement to pay equal to the pay of men doing the same work that they should be not less than 25 years old. Women under 25 were financially at a disadvantage as a result of this condition. The Court held that this financial disadvantage arising from the minimum age requirement imposed upon women contravened the principle of equal pay.

Mr Burton submits that there are fundamental differences between the facts in *Defrenne (No 3)* and the facts of the present case which place the former outside and the latter within the concept of pay in Article 119. The relevant provision in Miss Defrenne's contract did not concern the payment of money. It simply provided that her employment ended automatically at a certain age. By contrast, the minimum age requirements set by the collective agreement for entitlement to take voluntary redundancy are requirements directly concerned with the payment of money by employer to worker. The only function of the age requirement is to determine whether or not the worker would be entitled to payment from his employer upon leaving his employment. Further, the effect of the age requirement applied to Mr Burton is not simply that he has to wait longer than his female equivalent for the same financial settlement, but that he, unlike his female equivalent, is not entitled to the payment at all. Only those who satisfy the condition at the specified time receive the payment. Accordingly, a woman of 58 has the following choices: to leave with a redundancy payment or to stay until normal retirement. A man of 58 on the other hand has different and less favourable choices: to leave without a redundancy payment ot to stay until retirement.

Accordingly, Mr Burton submits that the age requirement is not a requirement concerned with something other than pay which has incidental financial consequences. It resembles rather an age requirement directly governing the worker's pay, within the extended meaning of pay in Article 119.

Mr Burton submits that the answer to the second question should be that the principle of equal pay does have direct effect in Member States so as to confer upon individuals, by virtue of Community law, rights of which they may avail themselves in the circumstances of the present case.

The Court has ruled that Article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application (judgment in Case 69/80, referred to above, and judgment of 31 March 1981 in Case 96/80, *Jenkins,* [1981] ECR 911).

The form of discrimination complained of by Mr Burton may, he claims, be

identified by the national courts and tribunals solely with the aid of the criteria of equal work and equal pay referred to in Article 119.

As to the third question, Mr Burton observes that if the answer to the first question is in the negative, so that a voluntary redundancy benefit falls outside the concept of pay in Article 119, such a benefit is within the scope of the principle of equal treatment for men and women as regards "working conditions" contained in Articles 1 (1), 2 (1) and 5 (1) of Directive 76/207.

The purpose of the directive on equal treatment is to put into effect in the Member States the principle of "equal treatment" as regards *inter alia* working conditions (Article 1 (1)). It thereby implements a general principle of Community law prohibiting discrimination based on sex as regards the conditions of employment and working conditions of men and women. The first recital in the preamble to the directive on equal treatment refers to "working conditions, including pay", and it is clear that the words "working conditions" encompass more than even the extended definition of "pay" in Article 119. This is further indicated by Article 5 (1) of the directive on equal treatment, which refers to "working conditions" including the conditions governing dismissal.

Mr Burton submits that it is apparent from the Court's interpretation of Article 48 of the Treaty and Article 7 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition, 1968 (II), p. 475) that the prohibition of discrimination includes, as "working conditions", the payment of voluntary redundancy benefit by an employer to a worker wishing to leave his employment. Mr Burton considers that the words "working conditions" in the directive on equal treatment should be interpreted in a manner consistent with the Court's interpretation of the similar phrase in Article 48 of the Treaty and Article 7 of Regulation No 1612/68.

Article 5 (1) of the directive on equal treatment, like Article 7 of Regulation No 1612/68, specifically includes "dismissal" within its scope. It requires that "men and women shall be guaranteed the same conditions without discrimination on grounds of sex" with regard to "working conditions, including the conditions governing dismissal". Plainly, the phrase "the conditions governing dismissal" refers to any termination of a worker's contract of employment by his employer in whatever form it occurs.

Article 1 (1) of the directive on equal treatment distinguishes between working conditions and other matters which are within its scope, and social security, which is dealt with on the conditions referred to in Article 1 (2). The principle of equal treatment has been applied in matters of social security by Council Directive 79/7/EEC of 19 December 1978 (Official Journal 1979 L 6, p. 24). That directive does not apply to redundancy benefits, whether statutory or otherwise. Redundancy benefits are not paid to give protection against the risks of unemployment, and they are entirely different in nature from social security. Redundancy benefits have

therefore been consistently omitted from the definition of social security in international and Community legislation.

In answer to the second part of the third question, Mr Burton submits that the principle of equal treatment does have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case.

Article 1 (1) of the directive on equal treatment states that the purpose of the directive is "to put into effect in the Member States the principle of equal treatment". The provisions of the directive, especially Article 6, show that it was intended by its drafters that individual men and women would be entitled to effective remedies before national courts or tribunals for breaches of the principle laid down in the directive.

Mr Burton submits that the provisions of the directive on equal treatment on which he relies in the present case are sufficiently clear and precise to have direct effect. Indeed, they are as clear and precise as other provisions in Community law against discrimination (in Articles 48, 59 and 119 of the Treaty, for instance) which have been held by the Court to create individual rights which national courts must protect. They stipulate the protection to which individuals are entitled and which they may seek to have enforced in national courts in order to enjoy the fundamental right bestowed by the Treaty. They give the necessary precision to enable the right to be protected and enforced by national courts solely with the aid of the criteria in the directive on equal treatment itself. Furthermore, since the expiry of the period for compliance, the relevant provisions of the directive on equal treatment (that is to say, Articles 1 (1), 2 (1) and 5 (1)) have become complete and unconditional.

Mr Burton submits that the legal status of the Board and the Board's relationship with the United Kingdom have no relevance to the present dispute. He considers that in the field of employment discrimination, it would be wrong in principle to confine the direct effect of a Community rule prohibiting discrimination to the public sector. In the field of employment discrimination, a Community rule contained in a directive and prohibiting such discrimination may have a "horizontal" direct effect as between workers and private employers. If, contrary to his submissions, the relevant provisions of the directive on equal treatment have effect only as against "public employers" then it is submitted that the Board is a public employer, and that the answer to Question 3 (ii) ought therefore to be in the affirmative in any event.

The *British Railways Board* is of the opinion that a voluntary redundancy benefit which is paid by an employer to a worker wishing to leave his employment is not within the scope of the principle of equal pay contained in Article 119 and in Article 1 of Directive No 75/117.

The language of Article 119 of the Treaty is not appropriate to include benefits arising outside the terms of the contract of employment. A voluntary redundancy benefit cannot properly be described as a "wage", "salary" or

"other consideration" which is received by an employee directly or indirectly in respect of his employment.

As to Article 1 of Directive 75/117, the Board observes that the Court has already held that Article 1 of that directive, which is designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty, in no way alters the content or scope of that principle as defined in that article. Consequently the voluntary redundancy benefit falls outside the scope of Directive 75/117.

The Board considers that the principle of equal pay laid down in Article 119 of the Treaty does not, in the present circumstances, have direct effect in the Member States in such a manner as to confer enforceable Community rights upon individuals. In its judgment of 8 April 1976 *Defrenne (No 2)* the Court held that the principle that men and women should receive equal pay which is laid down in Article 119 of the Treaty may be relied upon before the national courts of Member States. However, the Court decided that a distinction must be drawn between, first, direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by Article 119 and, secondly, indirect and disguised discrimination which may be identified only by reference to more explicit implementing provisions of Community or national character. The inference to be drawn from that judgment, and from the more recent judgment in the *Jenkins* case which has been referred to above, is that it is only in the former circumstances that Article 119 has direct effect.

The Board submits that the discrimination of which Mr Burton complains is indirect or disguised discrimination and, accordingly, the provisions of Article 119 do not have direct effect.

The Board is of the opinion that a voluntary redundancy benefit of the type provided for in the British Rail scheme is not within the scope of the principle of equal treatment for men and women as regards "working conditions" contained in Articles 1 (1) and 5 (1) of Directive 76/207. In Article 5 of the said directive it is stated that working conditions include conditions governing dismissal, but no mention is made of conditions governing voluntary redundancy or retirement. Article 1 (2) of Directive 76/207 expressly excludes from its ambit matters of social security and contains no reference to voluntary redundancy or retirement schemes. The Board therefore maintains that the general provisions of the directive were not intended to affect such schemes.

The *United Kingdom Government* is of the opinion that the voluntary redundancy payment does not amount to "pay" within the meaning of Article 119 of the Treaty. It maintains that the difference in the ages of access to the voluntary retirement benefits for men and women springs directly from the differences between their minimum pension ages. According to the United Kingdom Government the sums needed to provide the benefits are paid from a British Rail Pension Scheme, and the amount of each payment may be smaller for a woman (because of her fewer years of service) but is paid five years earlier than it would be to a man. The value of the redundancy benefit is not directly

linked to the amount of work done or the value of such work. It is related to the amount that would be payable at minimum retirement age if the individual had reached that age. In return for the benefit, the employee must give up his employment which until then enables him to earn more than the pension which he receives under the scheme. This introduces a further complication into any attempt to equate the value of the benefit to the work done or the value of such work. The period for which the benefit is enjoyed, and thus its value, depends upon a combination of the age of retirement from which the benefit commences and the chances of survival until normal pension age. It is well known that in general women have a longer expectation of life than men.

The second part of Article 119 contains a definition of the concept of "pay". The provision defines both the nature and the scope of the principle of equal treatment which forms the basis of Article 119.

That principle depends upon the relationship between what the workers receive, directly or indirectly, and the amount or value of the work which they do in return. The test of whether there is unlawful discrimination based on sex is whether the relationship between pay on the one hand and work or work's value on the other is different because of the worker's sex.

The nature of the benefit claimed in the present case is such that neither its cost nor its value may be compared with the amount or value of the work which has been performed by male and female employees. It is true of course that the benefit may in a general sense be described as arising out of the worker's employment and that without some such employment, it would not have been granted, but once the benefit cannot be related to the work done, the principle of Article 119 cannot be invoked.

The non-contractual, gratuitous and discretionary nature of the benefit, which is generally admitted, emphasizes the fact that the benefit is not for work done, but is conferred in return for a promise to give up work.

As the Court stated in Case 149/77, *Defrenne (No 3)* ([1978] ECR 1365) "Article 119 . . . cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women".

The pension element of the payment is an area of special concern to the United Kingdom.

The benefit is paid from a British Rail Pensions Scheme. This scheme is a "contracted-out" pension scheme and is an approved pension scheme subject to the requirements of the Social Security Act 1973, the Social Security Pensions Act 1975 and the Finance Act 1970. As the United Kingdom explained in its written observations in the above-mentioned case of *Worringham and Humphreys* v *Lloyds Bank*, its social policy, reflected in its legislation, requires all employees to participate in

the State pension scheme, but such employees may receive part of their benefit from an occupational pension scheme. The first type of scheme is directly governed by legislation without any element of agreement within the undertaking or occupational branch concerned. The second type, which is therefore supplementary to the first, must now fulfil certain detailed statutory criteria under the Social Security Pensions Act which ensures that the benefits given to the individual worker are adequate in terms of social policy. Whether or not they are used for contracting-out purposes, pension schemes must be approved by the Board of Inland Revenue under the Finance Act 1970 (as amended by the Finance Act 1971). The two types of pension scheme are now inextricably linked, and in effect operate in partnership with one another.

Most occupational pension schemes in the United Kingdom follow the pattern of the State scheme in providing pensions for men at age 65 and for women at 60. The benefits of private schemes are usually structured to take account of the benefits flowing from the State scheme.

Thus, employers may contract out from part (but not the whole) of the State scheme (as does the Board) or participate fully in the State scheme. Reduced contributions to the national insurance fund are payable by both the employer and the employees who are contracted out of the State retirement benefits scheme. The State subsidizes the national insurance fund for those who are contracted out of the State scheme, and pensioners who receive the equivalent of the State additional pension from a contracted-out scheme receive the same measure of protection against inflation as that given by the State to those who have been members of only the State scheme.

United Kingdom legislation protects the pension rights of those who are in occupational pension schemes.

If for any reason a contracted-out occupational pension scheme fails to provide benefits equivalent to those provided under the State scheme, a member of that scheme who has contracted out may be treated as though he had always been a full member of the State scheme and be given full State scheme benefits. Finally, exempt approved schemes enjoy considerable tax advantages in recognition of the contribution which they make towards employees' retirement income.

The United Kingdom Government supports the opinion expressed by Mr Advocate General Dutheillet de Lamothe in the first *Defrenne* case that State schemes are not within Article 119 and that it would be odd if the legal requirements imposed by Community law on the contracted-out schemes were different from those imposed on State schemes. The United Kingdom submits in accordance with the views of the Advocate General in *Worringham and Humphreys,* cited above, that where, as in the United Kingdom, there is a private pension scheme designed not to supplement the State social security

scheme, but to be a substitute for it or part of it, it must be regarded as outside the scope of Article 119 and as falling to be dealt with under the broader headings of Article 118.

It is true that the sums paid in the present case as voluntary redundancy benefits are not pensions or other retirement benefits in the usual sense of sums paid on and following retirement if and when the employee reaches normal retiring age or ceases work owing to ill-health, although the sums are paid as a matter of convenience through a pension scheme, are calculated in the case of the periodic benefits by reference to the normal pension payable at minimum pension age, and are payable from ages which are directly linked to the normal pensionable ages. The lump sum payable at the latter age and the death benefit under the pension scheme determine the amount of the advance which the employer is prepared to make to the employee by way of lump sum at early retirement. Because the amount of the pension varies according to the minimum retiring age (which itself is different for men and women), the amount of the voluntary redundancy benefit as well as the date from which it may be claimed differs as between the sexes.

The United Kingdom Government concedes that there are similarities between the normal pension and the voluntary redundancy benefits. It considers that these similarities are so substantial that even if the sums were regarded as pay it would, quite apart from other considerations, be illogical to give direct effect to the provisions of Article 119 so as to require equality of treatment in relation to such benefits, particularly when to do so would undoubtedly discourage such schemes, making them substantially more expensive and unattractive for employers. Such schemes serve a useful social and economic purpose in industries which would otherwise have to resort to compulsory redundancies, and should not be discouraged except on clear and compelling grounds.

As far as the direct applicability of Article 119 is concerned, the United Kingdom Government considers it unnecessary to do more than cite the judgment of 31 March 1981 in the *Jenkins* case, mentioned above:

"As the Court has stated in previous decisions (judgment of 8 April 1976 in Case 43/75, *Defrenne* [1976] ECR 455; judgment of 27 March 1980 in Case 129/79, *Wendy Smith* [1980] ECR 1275 and judgment of 11 March 1981 in Case 69/80, *Worringham)* Article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the Court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private".

The United Kingdom Government submits that if, contrary to its other submissions, voluntary redundancy benefits are pay for the purpose of Article

119, the provisions of that article cannot be applied so as to confer on individuals, in a case like the present, rights on which they may rely directly, without the aid of national or Community measures which resolve the questions of how to achieve equality.

The United Kingdom Government further submits that it has been clear since the Court's ruling in the second *Defrenne* case that Article 119 cannot be given direct effect in respect of indirect and disguised discrimination, that is to say discrimination which cannot be identified solely with the aid of criteria based on equal work and equal pay.

Thus, in the view of the United Kingdom it is clear that if, contrary to its submissions, Article 119 does apply either to pensions generally or to the benefits under consideration, the article in so applying cannot have direct effect.

As to Article 1 of Council Directive 75/117, if the benefit is not pay for the purposes of Article 119 the directive is irrelevant to the present case (see *Worringham and Humphreys* v *Lloyds Bank Ltd.*).

If on the other hand the benefit is pay for the purposes of Article 119, but the Court finds that it is not within the scope of that article in so far as it is directly applicable, a question might, in theory, arise as to the effect of the directive.

The United Kingdom wishes to remind the Court briefly that it does not consider that directives can have the effect of imposing obligations upon individuals. Directives are addressed only to Member States and purport to impose obligations only upon those States.

As to Articles 1 (2), 2 (2) and 5 (1) of Council Directive 76/207, in the opinion of the United Kingdom Government those articles in no way affect the lawfulness of the voluntary redundancy benefits paid after retirement.

Of the items referred to in Article 1 of the directive, the only one which might conceivably be relevant is social security. But as to that Article 1 (2) provides that:

"With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application".

Thus matters of social security are, except to the extent indicated in Article 2 (1), excluded from the directive on the assumption that further measures are to be taken in that field and that the Commission is to produce a draft directive which will deal specifically with equal treatment in occupational schemes.

The *Danish Government* concerns itself solely with Question 3 (ii), that is to say, whether provisions of a directive may or must form the basis for the settlement of cases pending before the national courts even though such provisions have not been implemented in the national legal system.

The rulings which have been given by the Court of Justice on the direct effect of directives have established that individuals may rely upon the provisions of a directive in order to avoid the consequences of a national measure which adversely affects the individual. A directive may thus be relied upon against

a Member State in so far as the provision in question is capable of having such direct effect (judgment of 6 October 1970 in Case 9/70, *Grad* [1970] ECR 825; judgment of 4 December 1974 in Case 41/74, *Van Duyn* [1974] ECR 1337 and judgment of 1 February 1977 in Case 51/76, *Verbond van Nederlandse Ondernemingen* [1977] ECR 113).

The case-law of the Court of Justice leans towards enabling individuals to rely upon the provisions of directives in proceedings between them and the State. The reasoning underlying that case-law is that it would be incompatible with the binding effect attributed to the directive by Article 189 to exclude as a matter of principle the possibility that the obligations which it imposes on Member States may be invoked by those affected. If an individual were prevented from relying upon a directive which obliges the Member State to pursue a particular course of conduct, the legal effectiveness of such an instrument would be weakened and the uniform application of Community law would be prejudiced.

In the view of the Danish Government there is no reason to extend this case-law to include cases where recognition of the direct effect of a directive would entail imposing an obligation on an individual. That view is confirmed by the judgment of 18 November 1975 (Case 30/75, *Unil-It* [1975] ECR 1419) in which the Court held that a Member State which has not adopted substantive measures to implement a decision cannot claim that individuals have failed to fulfil their obligations under the decision.

In a judgment of 5 April 1979 (Case 148/78, *Ratti* [1979] ECR 1629) both the Court and the Advocate General stated that a directive by its nature imposes obligations only on Member States. The fact that an individual may rely upon a directive does not alter the legal status of the directive as an obligation imposed upon the Member State.

According to Article 189 a directive is binding upon the Member States to which it is addressed as to the aim to be achieved, but leaves to the Member State the choice of form and methods. As a result national measures must always be adopted in order to implement a directive even if, exceptionally, a directive is directly applicable (judgment of 6 May 1980 in Case 102/79, *Commission* v *Belgium* [1980] ECR 1473).

In principle, therefore, the national authorities and the courts must apply the national implementing measures and not the provisions of the directive.

The definition of regulations, directives, decisions, recommendations and opinions in Article 189 shows that individuals cannot incur obligations directly on the basis of the provisions of a directive.

Regulations can bind all persons, both Member States and individuals. They have general application. Decisions can bind only the persons to whom they are addressed. On the other hand they may be addressed both to Member States and to individuals.

The rules of the Treaty concerning publication of legal instruments also show

decisively that it is only Member States upon which obligations may be imposed by the provisions of a directive. Article 191 of the Treaty indicates that regulations must be published in the Official Journal of the European Communities, whereas directives and decisions are notified to the persons to whom they are addressed and take effect on such notification. In the opinion of the Danish Government that is a fundamental principle in the legal systems of the Member States, which requires that instruments with general applicability must be published if they are to be enforceable on individuals. The principle is expressed in Article 22 of the Danish Constitution.

In accordance with that principle Article 191 has laid down a duty of publication only in the case of the instruments which according to Article 189 may be binding on individuals. Directives need not be published; hence it may be inferred that directives by their nature may not contain provisions which are binding upon individuals.

Directives are published in that section of the Official Journal of the European Communities which is headed "Acts whose publication is not obligatory" and which contains primarily instruments whose publication must be considered as having, at most, informative value for individuals. The latter, however, face a major problem inasmuch as they cannot know the date on which a directive enters into force, or when its provisions become applicable in domestic law, as their publication in the Official Journal does not indicate the date on which Member States were notified of the directive.

The Danish Government considers that paramount importance must be attached to legal certainty in the case of individuals. Private persons are now required not only to investigate national sources of law but also to take into account the sources of Community law. If it were permissible in some situations to rely on a directive as against an individual the result would be to create latent legal uncertainty making it difficult for the individual to arrange his affairs in reliance on the national legal situation. The Danish Government is of the opinion that that would be unacceptable.

As a result the Danish Government is of the opinion that the individual must be able to proceed in accordance with the case-law of the Court of Justice on the assumption that directives must be implemented in national law by means of national provisions. In particular the combined provisions of Articles 189 and 191 of the Treaty rule out the possibility that persons other than Member States may have obligations imposed on them by the provisions of a directive.

The Danish Government suggests that the Court might reply to Question 3 (ii) of the order for reference with a ruling that the principle of equal treatment for men and women as regards "working conditions", contained in Articles 1 (1), 2 (1) and 5 (1) of Council Directive 76/207 of 9 February 1976 does not have direct effect in the Member States as against individuals.

The view of the *Commission* is that a voluntary redundancy benefit which is paid by an employer to a worker wishing to leave his employment falls within the scope of "pay" as defined in the second paragraph of Article 119. In so far as the amount of a redundancy payment is related to the length of service of the

worker, payment of the allowance is made largely in respect of that service. Even payment of a lump sum which does not depend exclusively on length of service would be dependent on the fact that the worker had been in the service of the employer.

The Commission observes that the concept of equal pay extends to voluntary redundancy benefit. That concept may be relied upon before the national courts by workers as against their employer directly on the basis of Article 119. It is not necessary to show the existence of implementing provisions at Community or national level in order to establish that the payment of a particular benefit did or did not involve discrimination between the sexes. Any such discrimination would be direct and overt and could only be identified on the basis of the exclusive criteria of equal pay referred to in Article 119 (judgment of 8 April 1976 in Case 43/75, *Defrenne).*

On the question of the difference in the age at which men and women may apply for voluntary redundancy benefit, the Commission observes that where payment of such benefit is subject to the attainment of a certain age, that condition must be considered to be included in his working conditions for the purposes of Directive 76/207.

It is not necessary to decide whether Directive 76/207 has direct effect, for if it is accepted that the question of age falls within the provisions of that directive it follows that the Member States are obliged to ensure that this effect of the directive is implemented at national level. As there need not be any conflict on that point between the directive and the national law at issue (the Sex Discrimination Act 1975) the Commission is of the opinion that it is unnecessary to go further and consider whether the directive has such "horizontal" direct effect, that is to say, whether the individual may rely directly on one of its provisions, in the absence of any national legislation in the matter or in the presence of national provisions which conflict with the directive, as against his employer before the national courts. If the Court were to hold that Directive 76/207 meant specifically, for instance, that the question of age represented a working condition for the purposes of Articles 1 (1), 2 (1) and 5 (1) of the directive in question, the national authorities would be obliged to interpret national law, for instance section 6 (4) of the Sex Discrimination Act 1975, accordingly. For the purposes of the present case that section cannot be interpreted so as to permit discrimination between the sexes based on age where payment of voluntary redundancy benefits is concerned.

The Commission suggests that the replies to the questions which have been raised by the Employment Appeal Tribunal should be as follow:

1. A "voluntary redundancy benefit", which is paid by an employer to a worker wishing to leave his employment, constitutes "pay" within the meaning of the second paragraph of Article 119 of the Treaty.

2. Where the receipt of such benefit is made subject to the attainment of a particular age that condition is to be regarded as a working condition for the purposes of Council Directive 76/207.

III — Oral procedure

At the sitting on 7 October 1981 oral argument, and replies to the questions raised by the Court, were presented by the following: A. Lester Q.C., of Lincoln's Inn, for Mr Burton; N. E. Beddard, Barrister of the Inner Temple, for the British Railways Board; P. Scott Q.C., of the Middle Temple, for the United Kingdom; and J. Forman, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 8 December 1981.

Decision

1 By an order of 16 January 1981 which was received at the Court on 4 February 1981 the Employment Appeal Tribunal referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions concerning the interpretation, with regard to payment of voluntary redundancy benefit, of Article 119 of the Treaty, 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 (Official Journal L 45, p. 19) and Articles 1 (1), 2 (1) and 5 (1) 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 (Official Journal L 39, p. 40).

2 According to the case-file Mr Burton, the plaintiff in the main action, is an employee of the British Railways Board (hereinafter referred to as "the Board"), a body established by the Transport Act 1962 and responsible for operating the railway system in Great Britain.

3 As a result of an internal reorganization the Board made an offer of voluntary redundancy to some of its employees. A memorandum was drawn up embodying the terms of a collective agreement between management and the recognized trade unions on the terms on which certain aspects of the reorganization were to be carried out. Paragraph 6 of the memorandum provides as follows:

"Staff aged 60/55 (Male/Female) may leave the service under the Redundancy and Resettlement arrangements when the Function in which [they are] employed has been dealt with under Organization Planning."

4 In August 1979 Mr Burton applied for voluntary redundancy but his application was rejected on the ground that he was under the minimum age of 60 specified for male employees by the above-mentioned memorandum. Mr Burton therefore claimed that he was treated less favourably than female employees inasmuch as the benefit would have been granted to a woman of his age (58).

5 After the rejection of his application Mr Burton complained to an Industrial Tribunal under the provisions of the Equal Pay Act 1970, as last amended by the Sex Discrimination Act 1975. The Industrial Tribunal rejected Mr Burton's claim and he appealed to the Employment Appeal Tribunal. In the course of the appeal it was conceded on his behalf that by virtue of section 6 (4) of the Sex Discrimination Act 1975 it is not contrary to the Act for an employer to treat a male employee less favourably than he treats a female employee as regards access to voluntary redundancy benefit. However, Mr Burton contended that section 6 (4) must be construed as subject to the enforceable Community rights conferred by Article 119 of the Treaty, Article 1 of Directive 75/117 on equal pay and Articles 1, 2 and 5 of Directive 76/207 on equal treatment.

6 In order to resolve the issue the Employment Appeal Tribunal referred to the Court three questions worded as follows:

"(1) Is a voluntary redundancy benefit, which is paid by an employer to a worker wishing to leave his employment, within the scope of the principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Council Directive 75/117/EEC of 10 February 1975?

(2) If the answer to Question (1) is in the affirmative, does the principle of equal pay have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?

(3) If the answer to Question (1) is in the negative:

(i) is such a voluntary redundancy benefit within the scope of the principle of equal treatment for men and women as regards 'working conditions' contained in Article 1 (1), Article 2 (1) and Article 5 (1) of Council Directive 76/207/EEC of 9 February 1976?

(ii) if so, does the said principle have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?"

7 The principal issue raised by those questions is whether the requirement that a male worker should have reached the age of 60 in order to be eligible for payment of a voluntary redundancy benefit whereas women workers become eligible at the age of 55 amounts to discrimination prohibited by Article 119 of the Treaty or by Article 1 of Directive 75/117 or, at least, by Directive 76/207 and, if so, whether the relevant provision of Community law may be relied upon in the national courts.

8 Consequently the question of interpretation which has been referred to the Court concerns not the benefit itself, but whether the conditions of access to the voluntary redundancy scheme are discriminatory. That is a matter covered by the provisions of Directive 76/207 to which reference was made by the national court, and not by those of Article 119 of the Treaty or Directive 75/117.

9 According to Article 5 (1) of Directive 76/207 application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women are to be guaranteed the same conditions without discrimination on grounds of sex. In the context of the directive the word "dismissal" must be widely construed so as to include termination of the employment relationship between a worker and his employer, even as part of a voluntary redundancy scheme.

10 In deciding whether the difference in treatment of which the plaintiff in the main action complains is discriminatory within the meaning of that directive

account must be taken of the relationship between measures such as that at issue and national provisions on normal retirement age.

11 Under United Kingdom legislation the minimum qualifying age for a State retirement pension is 60 for women and 65 for men.

12 From the information supplied by the United Kingdom Government in the course of the proceedings it appears that a worker who is permitted by the Board to take voluntary early retirement must do so within the five years preceding the normal minimum age of retirement, and that he may receive the following benefits: (1) the lump sum calculated in accordance with the provisions of the Redundancy Payments Act 1965, (2) a lump sum calculated on the basis of the total length of his employment with the Board, and (3) 25% of the sum of the first two amounts. In addition he is entitled up to the minimum retiring age to an early retirement pension equal to the pension to which he would have been entitled had he attained the minimum statutory retirement age and to an advance, repayable at the minimum retiring age, equal to the sum to which he becomes entitled at that age.

13 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 (Official Journal 1979, L 6, p. 24), which was adopted with particular reference to Article 235 of the Treaty, provides in Article 7 that the directive shall be without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

14 It follows that the determination of a minimum pensionable age for social security purposes which is not the same for men as for women does not amount to discrimination prohibited by Community law.

15 The option given to workers by the provisions at issue in the present instance is tied to the retirement scheme governed by United Kingdom social security

provisions. It enables a worker who leaves his employment at any time during the five years before he reaches normal pensionable age to receive certain allowances for a limited period. The allowances are calculated in the same manner regardless of the sex of the worker. The only difference between the benefits for men and those for women stems from the fact that the minimum pensionable age under the national legislation is not the same for men as for women.

16 In the circumstances the different age conditions for men and women with regard to access to voluntary redundancy cannot be regarded as discrimination within the meaning of Directive 76/207.

17 In the light of that answer to the first part of the third question it is not necessary to give a reply to the second part.

18 The answers to be given to the questions which have been raised by the Employment Appeal Tribunal are therefore as follows:

1. The principle of equal treatment contained in Article 5 of Council Directive 76/207 of 9 February 1976 applies to the conditions of access to voluntary redundancy benefit paid by an employer to a worker wishing to leave his employment.

2. The fact that access to voluntary redundancy is available only during the five years preceding the minimum pensionable age fixed by national social security legislation and that that age is not the same for men as for women cannot in itself be regarded as discrimination on grounds of sex within the meaning of Article 5 of Directive 76/207.

Costs

19 The costs incurred by the Government of the United Kingdom, the Government of the Kingdom of Denmark and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Employment Appeal Tribunal by order of 16 January 1981, hereby rules:

1. **The principle of equal treatment contained in Article 5 of Council Directive 76/207 of 9 February 1976 (Official Journal L 39, p. 40) applies to the conditions of access to voluntary redundancy benefit paid by an employer to a worker wishing to leave his employment.**

2. **The fact that access to voluntary redundancy is available only during the five years preceding the minimum pensionable age fixed by national social security legislation and that that age is not the same for men as for women cannot in itself be regarded as discrimination on grounds of sex within the meaning of Article 5 of Directive 76/207.**

Bosco Touffait Due Pescatore Mackenzie Stuart

O'Keeffe Koopmans Chloros Grévisse

Delivered in open court in Luxembourg on 16 February 1982.

P. Heim
Registrar

G. Bosco
President of the First Chamber,
acting as President