JUDGMENT OF THE COURT
13 February 1996 *

In Case C-342/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Court of Appeal in Northern Ireland for a preliminary ruling in the proceedings pending before that court between

Joan Gillespie and Others

and

Northern Health and Social Services Board,

Department of Health and Social Services,

Eastern Health and Social Services Board,

Southern Health and Social Services Board,

on the interpretation of Article 119 of the EEC Treaty, 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

* Language of the case: English.

(OJ 1975 L 45, p. 19) and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Rapporteur), (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray and P. Jann, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— J. Gillespie, M. Hamill, P. Molyneaux and Others, by P. Coghlin QC, N. McGrenera, Barrister-at-Law, B. Jones, Solicitor, and S. Mulhern, Solicitor and Chief Legal Officer of the Equal Opportunities Commission for Northern Ireland,

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, D. Pannick QC, and R. Weatherup, Barrister,

— Ireland, by M. A. Buckley, Chief State Solicitor, and A. O'Caoimh, SC, acting as Agent,

— the Commission of the European Communities, by K. Banks, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicants, represented by P. Coghlin and N. McGrenera, the United Kingdom, represented by J. E. Collins, D. Pannick and R. Weatherup, Ireland, represented by A. O'Caoimh, J. Payne, Barrister-at-Law, and C. Moran, Solicitor, and the Commission, represented by G. Docksey, of its Legal Service, acting as Agent, at the hearing on 5 April 1995,

after hearing the Opinion of the Advocate General at the sitting on 6 June 1995,

gives the following

Judgment

1 By order of 25 June 1993, received at the Court on 5 July 1993, the Court of Appeal in Northern Ireland referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 119 of the EEC Treaty, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19) and Council

Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

2 Those questions were raised in a dispute between the 17 plaintiffs in the main proceedings and their employers, various Northern Ireland Health Services, concerning the amount of benefit which they received during their maternity leave.

3 During 1988, the plaintiffs took maternity leave. Under a collective agreement — paragraph 9 of Section 6 of the General Council Handbook adopted by the Joint Councils for the Health and Personal Social Services (Northern Ireland) — they received during that period the following benefits: full weekly pay for the first four weeks, nine-tenths of full weekly pay for two weeks thereafter and one-half of full weekly pay for 12 weeks.

4 These conditions were more favourable than those laid down by the relevant general legislation. The Social Security (Northern Ireland) Order 1986 and the Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987 provide for the payment of nine-tenths of full weekly pay for six weeks, and a flat-rate allowance of £47.95 per week for 12 weeks thereafter.

5 In November 1988, negotiations within the health services resulted in pay increases backdated to 1 April 1988. However, the plaintiffs in the main proceed-

ings were unable to receive that increase because of the method of calculating the benefit payable during maternity leave, as laid down in the General Council Handbook.

6 According to the decision of the Industrial Tribunal, referred to in the order for reference, the cash benefit payable during maternity leave is determined on the basis of average weekly pay calculated, pursuant to Article 21 of the Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987, from the last two pay cheques received by the women concerned for the two months preceding the reference week ('reference pay'). The reference week is defined as the 15th week before the beginning of the expected week of confinement. No provision was made for an increase in reference pay in the event of a subsequent pay rise.

7 In 1989 the plaintiffs instituted proceedings before the Industrial Tribunal (Northern Ireland), claiming to have suffered discrimination on grounds of sex because, during their maternity leave, their pay had been reduced and, on account of the method of calculating the cash benefits to which they were entitled during that period, they had not received the benefit of the backdated pay rise.

8 The Industrial Tribunal dismissed their application and the plaintiffs appealed to the Court of Appeal in Northern Ireland.

9 The Court of Appeal considered that settlement of the dispute before it required an interpretation of Article 119 of the Treaty, as well as of Directives 75/117 and

76/207; it accordingly stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Do the following provisions, or any of them, namely, (i) Article 119 of the Treaty of Rome, (ii) the Equal Pay Directive (75/117/EEC), or (iii) the Equal Treatment Directive (76/207/EEC) ("the relevant provisions") require that, while a woman is absent from work on the maternity leave provided for by the relevant national legislation or by her contract of service, she be paid the full pay to which she would have been entitled if at the time she had been working normally for her employer?

2. If the answer to Question 1 is "No", do the relevant provisions require that while a woman is on such leave the amount of her pay be determined by reference to certain particular criteria?

3. If the answer to Question 2 is "Yes", what are those criteria?

4. If the answer to each of Questions 1 and 2 is "No", is it the position that none of the relevant provisions has any application or effect as respects the amount of pay to which a woman on such leave is entitled?'

10 By those four questions, which should be considered together, the national court seeks in essence to ascertain whether it follows from the principle of equal pay, laid down in Article 119 of the Treaty and set out in detail in Directive 75/117, or from the principle that pregnant women have a lawful right to protection, contained in Directive 76/207, that women on maternity leave must continue to receive full pay

and, where appropriate, must receive a pay rise awarded before or during maternity leave. If there is no such requirement, the national court asks whether Community law none the less lays down specific criteria — and, if so, what criteria — for determining the amount of benefit to be paid to those women during maternity leave.

Article 119 of the Treaty and Directive 75/117

According to Article 1 of Directive 75/117, the principle that men and women should receive equal pay for equal work, as laid down in Article 119 of the Treaty and set out in detail in the directive, is designed to eliminate, for the same work or for work to which equal value is attributed, all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

2 The definition in the second paragraph of Article 119 provides that the concept of pay used in the abovementioned provisions includes all consideration which workers receive directly or indirectly from their employers in respect of their employment. The legal nature of such consideration is not important for the purposes of the application of Article 119 provided that it is granted in respect of employment (see Case 12/81 *Garland* v *British Rail Engineering* [1982] ECR 359, paragraph 10).

3 Consideration classified as pay includes, inter alia, consideration paid by the employer by virtue of legislative provisions and under a contract of employment whose purpose is to ensure that workers receive income even where, in certain cases specified by the legislature, they are not performing any work provided for in their contracts of employment (see Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin* v *Bötel* [1992] ECR I-3589, paragraphs 14 and 15; also Case C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591, paragraph 11, and Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraph 12).

14 It follows that, since the benefit paid by an employer under legislation or collective agreements to a woman on maternity leave is based on the employment relationship, it constitutes pay within the meaning of Article 119 of the Treaty and Directive 75/117.

15 Article 119 of the Treaty and Article 1 of Directive 75/117 therefore preclude regulations which permit men and women to be paid at different rates for the same work or for work of equal value.

16 It is well settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, paragraph 30).

17 The present case is concerned with women taking maternity leave provided for by national legislation. They are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work.

18 As to whether Community law requires women on maternity leave to continue to receive full pay or lays down specific criteria determining the amount of benefit payable during maternity leave, Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) provides for various measures to protect inter alia the safety and health of female workers, especially before and

after giving birth. Those measures include, as regards rights connected with contracts of employment, a continuous period of maternity leave of at least 14 weeks, including compulsory maternity leave of at least two weeks, and maintenance of a payment to, and/or entitlement to an adequate allowance for, female workers covered by the directive.

9 However, that directive does not apply *ratione temporis* to the facts of the present case. It was therefore for the national legislature to set the amount of the benefit to be paid during maternity leave, having regard to the duration of such leave and the existence of any other social advantages.

0 That being so, it follows that at the material time neither Article 119 of the EEC Treaty nor Article 1 of Directive 75/117 required that women should continue to receive full pay during maternity leave. Nor did those provisions lay down any specific criteria for determining the amount of benefit to be paid to them during that period. The amount payable could not, however, be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth. In order to assess the adequacy of the amount payable from that point of view, the national court must take account, not only of the length of maternity leave, but also of the other forms of social protection afforded by national law in the case of justified absence from work. There is nothing, however, to suggest that the main proceedings the amount of the benefit granted was such as to undermine the objective of protecting maternity leave.

:1 As to the question whether a woman on maternity leave should receive a pay rise awarded before or during that period, the answer must be Yes.

22 The benefit paid during maternity leave is equivalent to a weekly payment calculated on the basis of the average pay received by the worker at the time when she was actually working and which was paid to her week by week, just like any other worker. The principle of non-discrimination therefore requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.

Directive 76/207

23 The national court also asks whether Directive 76/207 applies to the facts of the case.

24 In that regard, it should be borne in mind that the benefit paid during maternity leave constitutes pay and therefore falls within the scope of Article 119 of the Treaty and Directive 75/117. It cannot therefore be covered by Directive 76/207 as well. That directive, as is clear from its second recital in the preamble, does not apply to pay within the meaning of the abovementioned provisions.

25 In the light of the foregoing considerations, the answer to the four questions referred by the Court of Appeal in Northern Ireland must be that the principle of equal pay laid down in Article 119 of the Treaty and set out in detail in Directive 75/117 neither requires that women should continue to receive full pay during maternity leave, nor lays down specific criteria for determining the amount of benefit payable to them during that period, provided that the amount is not set so low as to jeopardize the purpose of maternity leave. However, to the extent that it is

calculated on the basis of pay received by a woman before the commencement of maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by reference pay and the end of maternity leave, as from the date on which they take effect.

Costs

26 The costs incurred by the United Kingdom, Ireland and 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

in answer to the four questions referred to it by the Court of Appeal in Northern Ireland by order of 25 June 1993, hereby rules:

The principle of equal pay laid down in Article 119 of the EEC Treaty and set out in detail in 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 neither requires that women should continue to receive full pay during maternity leave, nor lays down specific criteria for determining the amount of benefit payable to them during

that period, provided that the amount is not set so low as to jeopardize the purpose of maternity leave. However, to the extent that it is calculated on the basis of pay received by a woman before the commencement of maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by reference pay and the end of maternity leave, as from the date on which they take effect.

Rodríguez Iglesias Edward Puissochet Hirsch

Mancini Schockweiler Moitinho de Almeida Kapteyn

Gulmann Murray Jann

Delivered in open court in Luxembourg on 13 February 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President