JUDGMENT OF THE COURT
28 September 1994 *

In Case C-28/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Kantongerecht (Cantonal Court), The Hague (Netherlands), for a preliminary ruling in the proceedings pending before that court between

Maria Nelleke Gerda van den Akker and Others

and

Stichting Shell Pensioenfonds

on the interpretation of Article 119 of the EEC Treaty in view of the necessity of equalizing retirement ages for men and women under occupational pension schemes following the judgment of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889,

THE COURT,

composed of: O. Due, President, G. F. Mancini (Rapporteur), J. C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

* Language of the case: Dutch.

Advocate General: W. Van Gerven,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mrs van den Akker and the other applicants in the main proceedings, by H. Coeverden, of the Amsterdam Bar,

— the Stichting Shell Pensioenfonds, by R. A. A. Duk, of the Bar of The Hague,

— the Netherlands Government, by A. Bos, Legal Adviser to the Ministry of Foreign Affairs, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and Claus-Dieter Quassowski, Regierungsdirektor in the same Ministry, acting as Agents,

— the Commission of the European Communities, by Karen Banks and Ben Smulders, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs van den Akker and the other applicants in the main proceedings, the Stichting Shell Pensioenfonds, the Netherlands Government, represented by J. W. de Zwaan, Deputy Legal Adviser to the Ministry of Foreign Affairs, the United Kingdom, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Nicholas Paines, Barrister, and the Commission at the hearing on 15 March 1994,

after hearing the Opinion of the Advocate General at the sitting on 4 May 1994,

gives the following

Judgment

1 By judgment of 12 January 1993, received at the Court on 1 February 1993, the Kantongerecht (Cantonal Court), The Hague, referred to the Court under Article 177 of the EEC Treaty two questions on the interpretation of Article 119 of that Treaty in view of the necessity of equalizing retirement ages for men and women under occupational pension schemes following the judgment of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 ('the *Barber* judgment').

2 The questions have arisen in proceedings between Mrs van den Akker and ten other women, on the one hand, and the Stichting Shell Pensioenfonds, on the other, concerning that pension fund's decision to introduce a uniform retirement age for men and women.

3 The applicants in the main proceedings are all employees of legal entities forming part of the Royal Shell Group and by virtue of that employment are members of the Stichting Shell Pensioenfonds, which is the occupational pension scheme run by that group.

4 Until 31 December 1984 the rules of the scheme made a distinction between male and female employees, for whom the retirement ages were set at 60 years and 55 years respectively.

That distinction was abolished with effect from 1 January 1985 after the normal retirement age had been set uniformly at 60 years.

That change was accompanied by the following transitional arrangements. Female employees who were already members of the scheme on 1 January 1985 had the option of either accepting the raising of the pensionable age from 55 to 60 years or maintaining the pensionable age at 55 years. That election had to be made by 31 December 1986 at the latest and it was provided that in the absence of an express election for raising the pensionable age to 60 years the person concerned would be deemed to have opted to maintain the pensionable age at 55 years.

All the applicants in the main proceedings have elected expressly or by implication to maintain the pensionable age of 55 years.

As a result of the *Barber* judgment, cited above, in which the Court held that the setting of an age condition differing according to sex for pensions paid under an occupational pension scheme is contrary to Article 119 of the Treaty, the pension fund considered it necessary to amend the rules of its scheme by abolishing, with effect from 1 June 1991, the possibility for women to maintain a pensionable age of 55 years.

The applicants in the main proceedings have challenged this step, disputing the pension fund's contention that it was necessitated by the *Barber* judgment.

10 The Kantongerecht, to which the applicants have applied, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'A. In a pension scheme adopted in the framework of a labour agreement in which, after 1 January 1985, the pensionable age for both male and female members is set at 60 years, is it contrary to Article 119 of the EEC Treaty for the pensionable age for a limited group of female members to remain fixed at 55 years after 17 May 1990, where:

(a) that results from transitional provisions adopted with effect from 1 January 1985 (when, as a result of an amendment to the rules, the pensionable age previously fixed for men at 60 years and for women at 55 years was changed to a uniform pensionable age of 60 years), and

(b) the transitional provisions are solely applicable to female members (or prospective members) who on both 31 December 1984 and 1 January 1985 were employed by an employer affiliated to the defendant ("the persons aggrieved"), and

(c) the transitional provisions also provided that the persons aggrieved could elect for a pensionable age of either 55 or 60 years, which election had to be made during a period which had already expired by 31 December 1986?

B. Does it make any difference to the answer to Question A whether the transitional provisions provide that in cases where no express election was made within the time allowed the original pensionable age of 55 years is then applicable, or that the general pensionable age of 60 years is applicable?'

The first question

11 The national court's first question is in substance whether Article 119 of the Treaty allows an occupational pension scheme to maintain in force after 17 May 1990, the date of the *Barber* judgment, a condition as to retirement age differing according to sex where that difference is due to giving female employees the option of maintaining a retirement age of 55 notwithstanding the equalization — prior to the *Barber* judgment — of the retirement age at 60 years for both sexes.

12 As the Court has already had occasion to make clear, in particular in its judgment of 6 October 1993 in Case C-109/91 *Ten Oever* v *Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf* [1993] ECR I-4879, by virtue of the *Barber* judgment the direct effect of Article 119 may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, the date of the *Barber* judgment, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.

13 The Court has thus accepted that retroactive application of the principle of equal treatment in the sphere of occupational pensions, which follows as a matter of principle from the direct effect which Article 119 was found to have in the Court's judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, could have caused pension schemes to incur costs likely to upset their financial balance. However, the Court made it clear that no limitation of the effects of the interpretation given in the judgment could be accepted for periods of service subsequent to 17 May 1990.

14 It follows that occupational pension schemes were required to achieve equal treatment as from 17 May 1990.

15 With regard to the way in which this aim is to be attained, it must be observed that, in paragraph 15 of the judgment in the *Defrenne* case, where there was a claim in the main proceedings for compensation for discrimination in relation to pay, the Court ruled, in view of the connection between Article 119 and harmonization of working conditions while maintaining improvement, against the argument that compliance with Article 119 could be observed otherwise than by raising the lowest salaries.

16 Moreover, in paragraphs 18 to 20 of its judgment of 7 February 1991 in Case C-184/89 *Nimz* v *Freie und Hansestadt Hamburg* [1991] ECR I-297, the Court held that a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by collective bargaining or by any other constitutional procedure, and to apply to members of the disadvantaged group the same arrangements as those enjoyed by other workers, arrangements which, failing correct application of Article 119 in national law, remain the only valid point of reference.

17 It follows that, once the Court has found that discrimination in relation to pay exists and so long as measures to achieve equal treatment have not been adopted by the scheme, the only proper way of complying with Article 119 is to grant persons in the disadvantaged class the same advantages as those enjoyed by persons in the favoured class.

18 Application of this principle to the present case means that, as regards the period between 17 May 1990 (the date of the *Barber* judgment) and 1 June 1991 (the date on which the scheme in question compulsorily set the retirement age for all workers at 60 years), pension rights of men must be calculated on the basis of the same retirement age as that for women.

19 As regards periods of service completed after 1 June 1991, however, Article 119 of the Treaty does not preclude measures which achieve equal treatment by reducing the advantages of the persons previously favoured. Article 119 merely requires that men and women should receive the same pay for the same work, without, however, imposing any specific level of pay.

20 Those conclusions are not affected by the fact that the difference in treatment results, as in this case, from transitional measures adopted by an occupational scheme which, prior to the *Barber* judgment, had fixed a uniform retirement age for both sexes while giving women the option of maintaining their retirement age at a lower level than that for men.

21 As the Court ruled in its judgment in *Defrenne*, the principle of equal pay is one of the foundations of the Community (paragraph 12) and Article 119 produces direct effects by creating rights which national courts must safeguard (paragraph 24). Article 119 being mandatory in nature, the prohibition of discrimination between men and women applies not only to the acts of public authorities but also to contracts between private individuals and to all collective agreements intended to regulate paid employment (paragraph 39).

22 The answer to the first question must therefore be that Article 119 of the Treaty does not allow an occupational pension scheme which, following the *Barber* judgment, sets a uniform retirement age for all its members to maintain in favour of women, as regards benefits payable in respect of periods of service completed after the entry into force of the new rule, a retirement age lower than that for men, even if such a difference is due to an election made by women before the *Barber* judgment. As regards periods of service completed between 17 May 1990 (the date of

the *Barber* judgment) and the date of entry into force of the rule by which the scheme imposes a uniform retirement age, Article 119 does not allow a situation of equality to be achieved otherwise than by applying to male employees the same arrangements as those enjoyed by female employees.

The second question

23 The national court's second question is essentially whether the reply to the first question would be different if, as in this case, the maintenance of a retirement age of 55 years for women was not the result of an express choice made by the women concerned but of the circumstance that, when retirement ages were equalized before the *Barber* judgment, women who had not asked for their retirement age to be raised to 60 years, as for men, were deemed to have opted to maintain their retirement age at 55 years.

24 Suffice it to say that, since the obligation laid down in Article 119 to comply with the principle of equal treatment in the matter of pay is mandatory, an occupational scheme cannot evade that obligation simply because a discriminatory situation has arisen from an election made, expressly or by implication, by employees to whom such an option has been granted.

25 The answer to the second question must therefore be that the reply to the first question is not affected by the fact that, in a case such as this, the female employees concerned were deemed, in the absence of an express election on their part, to have opted to maintain their retirement age at the level prior to equalization.

Costs

26 The costs incurred by the German and Netherlands Governments, the United Kingdom 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 questions referred to it by the Kantongerecht, The Hague, by judgment of 12 January 1993, hereby rules:

1. **Article 119 of the EEC Treaty does not allow an occupational pension scheme which, following the judgment in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, sets a uniform retirement age for all its members to maintain in favour of women, as regards benefits payable in respect of periods of service completed after the entry into force of the new rule, a retirement age lower than that for men, even if such a difference is due to an election made by women before the *Barber* judgment. As regards periods of service completed between 17 May 1990 (the date of the *Barber* judgment) and the date of entry into force of the rule by which the scheme imposes a uniform retirement age, Article 119 does not**

allow a situation of equality to be achieved otherwise than by applying to male employees the same arrangements as those enjoyed by female employees.

2. The reply to the first question is not affected by the fact that, in a case such as this, the female employees concerned were deemed, in the absence of an express election on their part, to have opted to maintain their retirement age at the level prior to equalization.

Due Mancini Moitinho de Almeida

Diez de Velasco Joliet Schockweiler

Rodríguez Iglesias Grévisse Zuleeg

Kapteyn Murray

Delivered in open court in Luxembourg on 28 September 1994.

R. Grass O. Due

Registrar President