JUDGMENT OF THE COURT (Sixth Chamber)
30 April 1998 *

In Joined Cases C-377/96 to C-384/96,

REFERENCES to the Court under Article 177 of the EC Treaty by the Belgian Hof van Cassatie/Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

August De Vriendt

and

Rijksdienst voor Pensioenen (C-377/96),

Rijksdienst voor Pensioenen

and

René van Looveren (C-378/96),

Rijksdienst voor Pensioenen

* Languages of the case: Dutch and French.

and

Julien Grare (C-379/96),

Rijksdienst voor Pensioenen

and

Karel Boeykens (C-380/96),

Rijksdienst voor Pensioenen

and

Frans Serneels (C-381/96),

Office National des Pensions (ONP)

and

Fredy Parotte (C-382/96),

Office National des Pensions (ONP)

and

Camille Delbrouck (C-383/96),

and

Office National des Pensions (ONP)

and

Henri Props (C-384/96),

on the interpretation of Article 7 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24),

THE COURT (Sixth Chamber),

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

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Rijksdienst voor Pensioenen/Office National des Pensions, by Gabriel Perl, Administrator General, acting as agent,

— Mr Boeykens, by René Bützler, of the Brussels Bar, and Lieven Lenaerts, of the Antwerp Bar,

— the Belgian Government, by Marcel Colla, of the Ministry of Public Health and Pensions, acting as Agent,

— the Commission of the European Communities, by Pieter Jan Kuijper, Legal Adviser, and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Rijksdienst voor Pensioenen/Office National des Pensions, represented by Jan C. A. De Clerck, Counsellor, acting as agent, the Belgian Government, represented by Jan Devadder, General Adviser in the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent, and the Commission, represented by Pieter Jan Kuijper and Marie Wolfcarius, at the hearing on 27 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 January 1998,

gives the following

Judgment

1 By orders of 4 November 1996, received at the Court on 27 November 1996, the Belgian Hof van Cassatie/Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions

on the interpretation of Article 7 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24, hereinafter 'the Directive').

2 Those questions were raised in proceedings between Mr De Vriendt (C-377/96), Mr van Looveren (C-378/96), Mr Grare (C-379/96), Mr Boeykens (C-380/96), Mr Serneels (C-381/96), Mr Parotte (C-382/96), Mr Delbrouck (C-383/96) and Mr Props (C-384/96) and the Rijksdienst voor Pensioenen/Office National des Pensions (National Pensions Office, hereinafter 'the Pensions Office') concerning the calculation of their pensions.

3 By order of the President of the Court of 9 January 1997, the cases were joined for the purposes of the written procedure, the oral procedure and the judgment.

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

5 Under Article 10 of the Royal Decree, entitlement to a retirement pension accrued, for each calendar year, at the rate of a fraction of the remuneration received by the person concerned, which was determined according to specific rules, either 75% or 60% of such remuneration being taken into account according to whether or not there was a dependant spouse. The fraction for each calendar year had 1 as numerator and a figure not higher than 45 for men and 40 for women as denominator.

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

7 The Royal Decree provided that both men and women could draw their retirement pension five years earlier than the minimum age, with the pension being reduced by 5% for each year of anticipation. The right to an early retirement pension was abolished for women by Royal Decree No 415 of 16 July 1976.

8 As from 1 January 1991 a new system, established by the Law of 20 July 1990 introducing a flexible retirement age for employed workers and adapting their pensions to trends in general well-being (*Staatsblad/Moniteur Belge*, 15 August 1990, hereinafter 'the 1990 Law') has allowed all employees, both male and female, to retire at the age of 60.

9 As regards the calculation of the pension, the 1990 Law provided that entitlement to a retirement pension accrued, per calendar year, at the rate of a fraction, specified by the Royal Decree, of the remuneration of the person concerned, the denominator of that fraction remaining 45 for men and 40 for women.

10 The 1990 Law also abolished, for men too, the reduction of the pension by 5% per year anticipated.

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

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

'1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

...'

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

14 In paragraph 13 of its judgment in that case the Court held that if national legislation has abolished the difference in pensionable age that existed between male and female workers — a question of fact which it is for the national court to determine — Article 7(1)(a) of the Directive may not be relied on in order to justify maintaining a difference, which was linked to that difference in pensionable age, concerning the method of calculating the retirement pension.

15 The Court went on to hold in that judgment that Articles 4(1) and 7(1) of the Directive preclude national legislation which authorises male and female workers

to take retirement as from an identical age from retaining in the method of calculating the pension a difference according to sex which is itself linked to the difference in pensionable age which previously existed.

16 By decisions made between 18 December 1990 and 16 December 1994, the Pensions Office awarded the plaintiffs in the main proceedings, all of whom are male employees, retirement pensions on the basis of a fraction representing their employment record, calculated in forty-fifths.

17 In appeals to the Arbeidshof (Higher Labour Court), Antwerp (Cases C-378/96 to C-381/96), the Arbeidshof (Higher Labour Court), Ghent (Case C-377/96), and the Cour du Travail (Higher Labour Court), Liège (Cases C-382/96 to C-384/96), they applied for their pensions to be calculated in fortieths instead of forty-fifths.

18 The Arbeidshof, Ghent, by judgment of 8 September 1995, upheld the Pensions Office's decision. The Cour du Travail, Liège, on the other hand, by judgments of 10 November and 15 December 1995, set aside the Pensions Office's decisions on the ground that the plaintiffs were entitled to retirement pensions on the basis of an employment record calculated in fortieths. The Arbeidshof, Antwerp, by four judgments of 10 January 1996, also upheld their claims.

19 Mr de Vriendt (Case C-377/96) and the Pensions Office (Cases C-378/96 to C-384/96) appealed to the Court of Cassation.

20 On 19 June 1996, while those proceedings were still pending, the Belgian Parliament enacted a law interpreting the 1990 Law (*Staatsblad/Moniteur Belge*, 20 July 1996, hereinafter 'the interpretative law').

21 Article 2 of the interpretative law defines the term 'retirement pension' as follows:

'For the purposes of Article 2(1), (2) and (3) and Article 3(1), (2), (3), (5), (6) and (7) of the Law of 20 July 1990 introducing a flexible retirement age for employed workers and adapting their pensions to trends in general well-being, the term "retirement pension" shall mean the replacement income granted to a beneficiary who is deemed to have become unfit for work by reason of old age, this event being deemed to occur at the age of 65 for male beneficiaries and 60 for female beneficiaries.'

22 Finally, it appears from the documents in the case that a framework law of 26 July 1996 modernising the social security system and ensuring the viability of statutory pension schemes (*Staatsblad/Moniteur Belge*, 1 August 1996) and a Royal Decree of 23 December 1996 implementing that framework law (*Staatsblad/Moniteur Belge*, 17 January 1997) have been adopted. That legislation entered into force on 1 July 1997 and provides that:

— in the case of men, the pensionable age is to be maintained at 65 and the pension calculated in forty-fifths;

— in the case of women, the pensionable age is to be progressively raised to 65 over a transitional period of 13 years ending in 2009, and the rate of pension is also to be progressively raised over that period;

— in the case of women, age-limits in the other sectors of social security are to be concurrently adjusted, at the same rate, so as likewise to reach a limit of 65 years of age for the award of benefits in 2009;

— the flexible retirement age is to be maintained, that is, the possibility, for men and women, of taking their pension early at the age of 60 on proof of satisfying an employment-record requirement. That requirement is 20 years' employment in 1997 and will change progressively until, in 2005, an employment record of 35 years will be required.

23 Since it was uncertain whether the 1990 Law, as amended by the interpretative law, was compatible with Community law, the Court of Cassation stayed proceedings and referred the following three questions to the Court for a preliminary ruling:

'1. Is Article 7 of Council Directive 79/7/EEC of 19 December 1978 to be interpreted as leaving the Member States free to determine differently for men and women the age at which they are respectively deemed to have become unfit for work by reason of old age, for the purpose of acquiring entitlement to a retirement pension for employees, and consequently to calculate those pensions differently, in the manner indicated in this judgment?

2. Is that article to be interpreted as precluding men and women deemed to have become unfit for work by reason of old age as from the age of 65 and 60 respectively who, from that age, also lose their rights to social security benefits, such as unemployment benefit, from claiming an unconditional right to a pension as from the age of 60 years, the amount of the pension being calculated differently, according to whether the claimant is a man or a woman?

3. Should the expression "pensionable age" in Article 7 of Council Directive 79/7/EEC of 19 December 1978 be understood as meaning the age which gives rise to entitlement to a pension, or is it the age at which the employee is deemed to have become unfit for work by reason of old age, in accordance with national criteria, and enjoys the benefit of a replacement income excluding other social security benefits of the same description?

Can that expression be interpreted as covering both of the above definitions?'

24 By its questions, which should be examined together, the national court essentially asks whether Article 7(1)(a) of the Directive must be interpreted as leaving it open to Member States to fix the age at which employed workers are deemed to become unfit for work by reason of old age in order to become entitled to a retirement pension at 65 for men and 60 for women, and consequently to calculate the amount of the pension differently depending on the worker's sex, even though male workers may claim an unconditional right to replacement income in the form of a pension from the age of 60.

25 It should first be noted that it is settled case-law that the possibility of derogation provided for in Article 7(1)(a) of the Directive must be construed strictly (see, in particular, Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247, paragraph 8). Thus where, pursuant to that article, a Member State prescribes different retirement ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation is limited to forms of discrimination which are necessarily and objectively linked to the difference in retirement age (*Thomas and Others*, and Case C-137/94 *R* v *Secretary of State for Health, ex parte Richardson* [1995] ECR I-3407, paragraph 18). If, on the other hand, national legislation has abolished the difference in pensionable age, the Member State is not authorised to maintain a difference according to sex in the method of calculating the pension (*Van Cant*, paragraph 13).

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

27 It is therefore necessary to determine whether in a case such as that in point in the main proceedings the discrimination relating to the method of calculating retirement pensions is necessarily and objectively linked to the maintenance of national provisions which prescribe different pensionable ages for men and women and therefore come under the derogation provided for in Article 7(1)(a) of the Directive.

28 As may be seen from paragraph 13 of the judgment in *Van Cant*, the question whether national legislation has maintained different pensionable ages for male and female workers is a question of fact which it is for the national court to determine.

29 It should be observed that, if it is the case that such a difference has been maintained, the specification of the age for award of a retirement pension effectively determines the length of the period during which persons can contribute to the pension scheme.

30 It is thus apparent that, in such a case, a form of discrimination in the method of calculating pensions such as that which follows from the national legislation in issue would be necessarily and objectively linked to the difference that had been maintained as regards the specification of the pensionable age.

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

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Belgian Hof van Cassatie/Cour de Cassation by orders of 4 November 1996, hereby rules:

Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that, if national legislation has maintained a different pensionable age for male and female workers, the Member State concerned is entitled to calculate the amount of pension differently depending on the worker's sex.

Ragnemalm Schintgen Mancini

Murray Hirsch

Delivered in open court in Luxembourg on 30 April 1998.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber