# JUDGMENT OF THE COURT (Fifth Chamber)
13 December 1989 *

In Case C-102/88

REFERENCE to the Court under Article 177 of the EEC Treaty from the Raad van Beroep (Social Security Court), Groningen, for a preliminary ruling in the proceedings pending before that court between

**M. L. Ruzius-Wilbrink**

and

**Bestuur van de Bedrijfsvereniging voor Overheidsdiensten** (Public Service Social Insurance Board)

on the interpretation of Article 4(1) 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 (Official Journal 1979, L 6, p. 24),

THE COURT (Fifth Chamber)

composed of: Sir Gordon Slynn, President of Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

M. L. Ruzius-Wilbrink, by B. I. Klaassens, of the Groningen Bar,

* Language of the case: Dutch.

the Bestuur van de Bedrijfsvereniging voor Overheidsdiensten, by W. M. Levelt-Overmars, Head of the Legal Department for Social Security Matters of the Gemeenschappelijk Administratiekantoor, acting as Agent,

the Netherlands Government, by E. F. Jacobs, Secretary-General in the Ministry of Foreign Affairs, acting as Agent,

the Commission of the European Communities, by René Barents and Julian Currall, members of its Legal Department, acting as Agents,

having regard to the Report for the Hearing and after hearing oral argument presented on behalf of the plaintiff in the main proceedings, the defendant in the main proceedings, represented by W. J. van Brussel, acting as Agent, the Netherlands Government, represented by J. W. de Zwaan, acting as Agent, and the Commission of the European Communities at the hearing on 15 June 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 July 1989,

gives the following

## Judgment

1 By order of 10 March 1988, which was received at the Court on 30 March 1988, the Raad van Beroep te Groningen, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 4(1) 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 (Official Journal 1979, L 6, p. 24, hereinafter referred to as 'the Directive').

2 Those questions were raised in proceedings brought by M. L. Ruzius-Wilbrink ('the plaintiff') against the Bestuur van de Bedrijfsvereniging voor Overheids-

diensten ('the defendant') concerning the calculation of the allowance for incapacity for work granted to her by the defendant.

3 Article 6 of the Algemene Arbeidsongeschiktheidswet (Law on incapacity for work) of 11 December 1975 (hereinafter referred to as 'the 1975 Law') grants entitlement to a disability allowance to insured persons aged 17 or over who become incapable of working, where, in the year immediately preceding the day on which they became incapable of working, they received income exceeding 15% of the minimum wage.

4 The condition relating to income does not apply to insured persons who are already suffering from incapacity for work on reaching the age of 17 years, self-employed persons working on a full-time basis whose income was lower than the minimum wage, students without income or to unmarried persons who keep house for their parents or for unmarried brothers or sisters.

5 Articles 10 and 12 of the 1975 Law provide that the disability allowance is to be determined by applying a percentage, determined according to the degree of disability, to a basic amount corresponding to a minimum daily wage, which varies according to the civil status of the person concerned, the existence of any dependent children and the amount of income actually received. The amount thus arrived at, known as the 'minimum subsistence income', is intended to guarantee a minimum income depending on the needs of the person concerned.

6 However, pursuant to Article 10(5), that basic amount is not applied if, in the year immediately prior to the onset of the disability of the person concerned, he did not work for a period to be considered normal in his occupation and as a result thereof earned less than an amount 260 times the basic amount normally applicable. In such cases, the average daily income is taken as the basic amount.

7 By decision of 15 October 1985, the defendant granted the plaintiff a disability allowance calculated, pursuant to Article 10(5) of the 1975 Law, on the basis of her average daily earnings in the year immediately prior to the onset of her disability, during which she worked on average only 18 hours a week.

8 The plaintiff challenged that decision before the Raad van Beroep on the ground that Article 10(5) gives rise to indirect discrimination against women prohibited by Directive 79/7/EEC.

9 The Raad van Beroep decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is a system of allowances for (not unemployed) workers in the event of incapacity for work which provides for allowances at the level of the minimum subsistence income except in cases where the wage previously earned by the person entitled to the allowance was, in part because he or she was working on a part-time basis, below that level in accordance with Article 4(1) of Directive 79/7/EEC?

(2) If the answer to Question 1 is in the negative: does the Community rule (which in that case has been infringed) mean that the persons concerned (of both sexes) are entitled to an allowance in the amount of the minimum subsistence income even in the (exceptional) cases referred to in that question?'

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 It is apparent from the order for reference that the national court essentially wishes to know whether Article 4(1) of Directive 79/7/EEC precludes a provision from creating, within the framework of national legislation which guarantees a minimum subsistence income to insured persons suffering from incapacity for work, an exception to that principle in respect of insured persons who had previous worked on a part-time basis and from limiting the amount of the allowance to the wage previously received, where that group of insured persons contains a much larger number of women than of men.

12 Article 4(1) of Directive 79/7/EEC provides that: 'the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly . . . as concerns:

(i) . . .

(ii) . . .

(iii) the calculation of benefits'.

13 It is apparent from the documents before the Court that the national legislation at issue grants all insured persons, with the exception of those who previously worked on a part-time basis, entitlement to an allowance which corresponds to a minimum subsistence income, the amount of which is not dependent on the previous earnings of the insured person. Certain groups of recipients of the allowance who had no earnings at all in the year before their incapacity arose or who had only very low income, such as self-employed persons working on a full-time basis whose income was less than 15% of the minimum wage, students and unmarried persons keeping house for their parents, are also entitled to that minimum subsistence income. Only the allowance granted to part-time workers is calculated by reference to the insured person's income and that allowance, by virtue of the application of Article 10(5) of the 1975 Law, is necessarily lower than the said minimum subsistence income.

14 It also appears from the documents before the Court that in the Netherlands there are considerably fewer male than female part-time workers.

15 Accordingly, it must be stated that a provision such as the one at issue leads, in principle, to discrimination against female workers in relation to male workers and must be regarded as contrary to the objective pursued by Article 4(1) of Directive 79/7/EEC, unless the difference of treatment as between the two categories of workers is justified by objective factors unrelated to any discrimination on grounds of sex (see the judgment of 13 July 1989 in Case 171/88 *Rinner-Kühn* [1989] ECR 2743).

16 The only reason put forward in the main proceedings to justify the difference of treatment between persons who worked on a part -time basis before the onset of their disability and other beneficiaries of the allowance in question, namely that it would be unjust to grant them an allowance higher than the income previously received, cannot objectively justify that difference of treatment since, in a substantial number of other cases, the amount of the allowance granted under the 1975 Law is higher than that previous income.

17 It must therefore be stated in reply to the first question that Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as precluding a provision from creating, within the framework of national legislation which guarantees a minimum subsistence income to insured persons suffering from incapacity for work, an exception to that principle in respect of insured persons who had previously worked on a part-time basis and from limiting the amount of the allowance to the wage previously received, where that measure affects a much larger number of women than of men, unless that legislation is justified by objective factors unrelated to any discrimination on grounds of sex.

18 The second question relates to the consequences of a finding by the national court that the national legislation in question is incompatible with Article 4(1) of Directive 79/7/EEC.

19 It must be observed in that regard that, as the Court has already ruled (most recently in its judgment of 24 June 1987 in Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865), Article 4(1), standing by itself and seen in the light of the objective and content of that directive, is sufficiently precise to be relied upon by an individual before a national court in order to have any national provision not in conformity with that article declared inapplicable. It should be remembered in that regard that the directive requires the Member States to abolish any provisions which are contrary to the principle of equal treatment.

20 It is apparent from the judgment of 4 December 1986 in Case 71/85 *Netherlands* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855 that, in a case of direct discrimination, women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the directive has not been correctly implemented, those rules remain the only valid point of reference. By analogy, in a case of indirect discrimination such as that in the main proceedings, the members of the group placed at a disadvantage, be they men or women, are entitled to have the same rules applied to them as are applied to the other recipients of the allowance.

21 It must therefore be stated in reply to the second question that if no appropriate measures exist for implementing Article 4(1) of Directive 79/7/EEC and there is indirect discrimination by the State, the class of persons placed at a disadvantage by reason of that discrimination must be treated in the same way and according to the same rules as other recipients of the allowance, such rules remaining the only valid point of reference so long as the directive has not been implemented correctly.

## Costs

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

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions submitted to it by the Raad van Beroep te Groningen, by order of 10 March 1988, hereby rules:

**(1) Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as precluding a provision from creating, within the framework of national legislation which guarantees a minimum subsistence income to insured**

**persons suffering from incapacity for work, an exception to that principle in respect of insured persons who had previously worked on a part-time basis and from limiting the amount of the allowance to the wage previously received, where that measure affects a much larger number of women than of men, unless that legislation is justified by objective factors unrelated to any discrimination on grounds of sex.**

**(2) If no appropriate measures exist for implementing Article 4(1) of Directive 79/7/EEC and there is indirect discrimination by the State, the class of persons placed at a disadvantage by reason of that discrimination must be treated in the same way and according to the same rules as other recipients of the allowance, such rules remaining the only valid point of reference so long as the directive has not been implemented correctly.**

Slynn Zuleeg

Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 13 December 1989.

J.-G. Giraud
Registrar

Gordon Slynn
President of the Fifth Chamber