JUDGMENT OF THE COURT (Sixth Chamber)
9 October 2001 *

In Case C-379/99,

REFERENCE to the Court under Article 234 EC by the Bundesarbeitsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG

and

Hans Menauer

on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric, C. Gulmann, J.-P. Puissochet and V. Skouris (Rapporteur), Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG, by J. Bornheimer, Rechtsanwalt,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Commission of the European Communities, by H. Michard and C. Ladenburger, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 27 March 2001,

gives the following

Judgment

1 By order of 23 March 1999, received at the Court on 7 October 1999, the Bundesarbeitsgericht (Federal Labour Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

2 The question has been raised in proceedings between Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG (Barmer Ersatzkasse Employees' Pension Fund, hereinafter 'the Fund') and Hans Menauer, concerning the question whether Mr Menauer is entitled to a widower's pension and whether the Fund must guarantee that right.

Legal background

Community law

3 Article 119 of the Treaty sets out the principle that men and women should receive equal pay for equal work.

4 The second paragraph of Article 119 provides:

'For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.'

National law

Gesetz zur Verbesserung der betrieblichen Altersversorgung (German Law on the Enhancement of Occupational Old-Age Pensions ('BetrAVG')

5 It appears from the file on the case that, in the Federal Republic of Germany, benefits relating to companies' supplementary old-age pensions may be provided in various ways. The employer may provide the benefits for which it is liable under a company occupational pension scheme directly. Alternatively, it may have the benefits provided through the intermediary of outside bodies. In that event, it does not pay any benefits but provides them indirectly through either a 'Direktversicherung' (life insurance concluded by the employer in favour of the employee), an 'Unterstützungskasse' (a provident fund) or a 'Pensionskasse' (a

pension fund entrusted by the employer with administering the company's occupational pension scheme).

6 In the latter case, Paragraph 1(3) of the BetrAVG provides that the pension fund is a pension institution with legal capacity which gives employees or their survivors a legal claim.

7 According to the national court, if the insurance conditions laid down by the rules of the pension fund concerned fall short of the pension cover which the employer is obliged to provide under the terms of the employment contract, the employer itself is obliged to make good that shortfall; in that case, the liability of an employer is a pension obligation based on the principle of equal treatment within the meaning of Paragraph 1(1)(4) of the BetrAVG.

8 The resultant right of the employee as against his employer is secured in the event of insolvency under Paragraph 7 of the BetrAVG.

The Fund's rules

9 Paragraph 11(2)(a) of the rules of the Fund, entitled 'Types of benefits', provides:

'The following benefits are paid to members who leave the service of the Barmer

Ersatzkasse on materialisation of the insured risk...:

...

2. a survivor's pension on cessation of payments of pension or payments of salary to members:

   (a) a widow's pension to the widow of a deceased member. A widower's pension is paid to a husband on the death of a wife who was a member where the deceased was the main breadwinner in the family.'

The dispute in the main proceedings and the question referred to the Court

10 Mr Menauer's wife was employed by the Barmer Ersatzkasse (Barmer Private Sickness Insurance Fund) in Straubing (Germany) from 1 September 1956 until her death on 12 November 1993. Under a clause in Mrs Menauer's contract of employment the contract was governed by the Ersatzkassentarifvertrag (Private Sickness Insurance Funds' Collective Agreement, hereinafter 'the EKTV').

11 Under the provisions of the EKTV, the Barmer Ersatzkasse is liable to pay its male and female employees occupational pension benefits. The pension payments comprise a retirement pension, which the Barmer Ersatzkasse itself is liable to pay, and a supplementary pension, which is paid by the Fund to male and female employees of the Barmer Ersatzkasse who are members of the pension fund. Under the terms of the EKTV, the Barmer Ersatzkasse is responsible for payment of contributions to the pension fund on behalf of its male and female employees. Mr Menauer's late wife was a member of the Fund throughout the time of her employment by the Barmer Ersatzkasse.

12 Mr Menauer brought an action against the Barmer Ersatzkasse and the Fund before the Arbeitsgericht (Labour Court), claiming a widower's pension. The Arbeitsgericht upheld his claim against the Fund but dismissed his claim against the Barmer Ersatzkasse. The Fund appealed to the Landesarbeitsgericht (Higher Labour Court). Since Mr Menauer did not appeal, his claim against the Barmer Ersatzkasse was definitively dismissed. The Landesarbeitsgericht dismissed the Fund's appeal. The Fund appealed on a point of law to the Bundesarbeitsgericht, seeking to have the decisions of the lower courts set aside and Mr Menauer's claim dismissed.

13 Mr Menauer claimed that the additional requirement to be met under Paragraph 11 of the Fund's rules for payment of a widower's pension was discriminatory and therefore invalid. He argued that he was entitled to the same survivor's benefits as a widow of a former employee of the Barmer Ersatzkasse. Accordingly he considered that the Fund was liable for their payment as the body entrusted by the Barmer Ersatzkasse with administering its occupational pension scheme.

14 In its order for reference, the Bundesarbeitsgericht states *inter alia* that the survivor's pension claimed by Mr Menauer constitutes other consideration within the meaning of Article 119 of the Treaty and that Paragraph 11(2)(a) of the Fund's rules is contrary to that Treaty provision. It has doubts, however, as to whether Mr Menauer can assert a claim against the Fund. It points out that extending the scope of Article 119 of the Treaty to pension funds would give rise to serious anomalies and lacunae in German law which are not necessary to protect employees against any discrimination based on sex.

15 The Bundesarbeitsgericht indicates in particular that:

— under German labour law, the employer remains liable to provide the pension to which the employee is entitled, even in a case such as the present where the Fund's rules contravene the prohibition on discrimination. It must therefore make good the shortfall itself by providing the benefits concerned, and cannot avoid that obligation. Furthermore the employee is protected against the employer's insolvency;

— it is in the light of those considerations that, despite the fact that, under Paragraph 1(3) of the BetrAVG, pension funds take on the responsibility, as assurers, for certain pension and related risks, most German legal writers do not accept that a pension fund is itself liable to fulfil equal treatment obligations deriving from employment law. It is pointed out in this respect that, apart from its legally independent status, a pension fund is subject to insurance supervision and insurance law; the principle of equal treatment under insurance law, a quite separate principle, requires that equal insurance

benefits be paid in return for the same contributions. If the volume of a pension fund's insurance obligations, as set out in its rules, were increased, this would have to be offset by higher contributions which, where an employer has not undertaken to pay on its own the insurance contributions on behalf of its insured employees, would affect not the employer liable to pay the benefits but the entire body of employee members.

16 However, in view of the Court's rulings in Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389 and Case C-128/93 *Fisscher* [1994] ECR I-4583, the Bundesarbeitsgericht decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 119 of the EC Treaty be interpreted as meaning that pension funds must be considered to be employers and obliged to treat men and women equally as regards payment of occupational old-age pensions, even though disadvantaged employees have an entitlement, which is secured against insolvency and excludes discrimination, against the body directly responsible for provision of a pension, that is to say the employer as a party to the employment contract?'

The question referred to the Court for a preliminary ruling

17 It must be borne in mind in this connection that, according to settled case-law, a retirement pension paid under an occupational scheme set up under a collective agreement constitutes consideration paid by the employer to the employee in

respect of his employment and consequently falls within the scope of Article 119 of the Treaty, whether it replaces a statutory scheme or is supplementary to it (see, in particular, Case 170/84 *Bilka* [1986] ECR 1607, paragraphs 20 and 22; Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 28; and Case C-110/91 *Moroni* [1993] ECR I-6591, paragraph 15).

18 The Court has also recognised that a survivor's pension provided for by such a scheme falls within the scope of Article 119 of the Treaty. It has stated in that regard that the fact that such a pension, by definition, is not paid to the employee but to the employee's survivor does not affect that interpretation because, such a benefit being an advantage deriving from the survivor's spouse's membership of the scheme, the pension is vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the spouse's employment (Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraphs 12 and 13; *Coloroll Pension Trustees*, cited above, paragraph 18; and Case C-147/95 *Evrenopoulos* [1997] ECR I-2057, paragraph 22).

19 It follows that surviving spouses of deceased employees may rely on Article 119 of the Treaty in order to have the principle and scope of their entitlement to payment of a survivor's pension recognised (see, to that effect, *Coloroll Pension Trustees*, cited above, paragraph 19).

20 On the question whether a surviving spouse can rely on that article with regard to an outside body, such as a pension fund under German law ('Pensionskasse'), to which the employer has entrusted payment of the benefits concerned and which is legally independent, it must be recalled that, according to the above-cited judgments in *Barber* and *Coloroll Pension Trustees*, the applicability of Article 119 of the Treaty to an occupational pension scheme is not thwarted by the fact that the scheme has been set up in the form of a trust and is administered

by trustees who are technically independent of the employer, since Article 119 also applies to consideration received indirectly from the employer (see *Barber*, paragraphs 28 and 29, and *Coloroll Pension Trustees*, paragraph 20).

21 The Court has also held that the trustees themselves, although not party to the employment relationship, are required to pay benefits which do not thereby lose their character of pay within the meaning of Article 119 of the Treaty and that they are therefore bound, in so doing, to do everything within the scope of their powers to ensure compliance with the principle of equal treatment (*Coloroll Pension Trustees*, paragraph 22).

22 At paragraph 31 of the judgment in *Fisscher*, cited above, the Court came to the same conclusion as regards the administrators of an occupational pension scheme under Netherlands law who, like trustees, were not party to the employment relationship.

23 It follows from the foregoing that if the persons who are entrusted with administering an occupational pension scheme are required to pay benefits which constitute pay within the meaning of Article 119 of the Treaty, they are bound to comply with the principle of equal treatment laid down in that provision, whatever the legal form of those persons or the manner in which they are responsible for administering that pension scheme.

24 That finding applies equally to pension funds governed by German law, such as that in the main proceedings. Since they are entrusted with administering occupational pension schemes and are required to pay to affiliated members and their dependants benefits which, as is stated in paragraphs 17 and 18 of this judgment, fall within the scope of Article 119 of the Treaty, they are bound to comply with the principle of equal pay laid down in that provision and neither

the legal independence that they enjoy nor indeed their status as insuring bodies are of any importance in that respect.

25 In particular, the circumstance that, as an insuring body, a German pension fund is subject to insurance law and therefore to the entirely separate principle of equal treatment applicable under that law and that the increase in the volume of its insurance obligations as a consequence of the application of Article 119 of the Treaty may give rise to measures designed to cover that increase, which might include an increase in contributions for all affiliated employees, is an issue which must be resolved by national law. In any event, the existence of such a problem does not affect the finding in the previous paragraph.

26 As the Court held in paragraphs 42 and 43 of the judgment in *Coloroll Pension Trustees*, with regard to an occupational pension scheme in the form of a trust, the fact that there are difficulties in applying the principle of equal pay because the funds held by the trustees are insufficient is a problem to be resolved in accordance with national law. So, any problems arising because the funds held by the trustees are insufficient to equalise benefits must be resolved on the basis of national law in the light of the principle of equal pay. Such problems cannot affect in particular the finding in paragraph 24 of the *Coloroll Pensions Trustees* judgment, according to which the direct effect of Article 119 of the Treaty may be relied on by both employees and their dependants against the trustees of an occupational pension scheme who are bound, in the exercise of their powers and performance of their obligations, to observe the principle of equal treatment.

27 The same finding applies to the analogous problems of insufficient funds with which a German pension fund would be faced, because of the particularities of German insurance law, if required to apply Article 119 of the Treaty.

28 Also to be examined is the question whether the obligation to comply with Article 119 of the Treaty also extends to a body such as a German pension fund if employees who are discriminated against by that body on the basis of sex, or dependants of those employees, may turn to the employer, who, under national legislation, remains directly liable for the benefits paid by that body, and they enjoy to that end a protected right in the event of the insolvency of the employer that excludes all discrimination.

29 In that connection, it must be pointed out that, according to the Court's case-law, the effectiveness of Article 119 of the Treaty would be considerably diminished and the legal protection required to ensure real equality would be seriously impaired if an employee or an employee's dependants could rely on that provision only as against the employer, and not as against those who are expressly charged with performing the employer's obligations (see to that effect *Coloroll Pension Trustees*, paragraph 23, and *Fisscher*, paragraph 31).

30 Contrary to the doubts expressed on this point by the national court, that finding remains valid even in a case where, under national law, employees discriminated against on the basis of sex, or their dependants, enjoy complete legal protection as against their employer. For Article 119 of the Treaty to be effective, any person who has to pay benefits falling within the scope of that provision must comply with it. To force employees or their dependants to turn to the employer alone, to the exclusion of the body responsible for paying benefits, would amount to limiting the number of persons against whom the employees concerned or their dependants can enforce their rights.

31 Such a limitation would diminish the effectiveness of Article 119 of the Treaty. It would in addition be all the more incompatible with Article 119 because the

discrimination involved may result, as in the case in the main proceedings, from the rules of the body that is responsible for paying benefits and is therefore seen, particularly by the dependant, to be normally responsible for paying the benefit concerned.

32 It follows that the applicability of Article 119 to pension funds governed by German law is necessary to guarantee complete and uniform legal protection to employees discriminated against on the basis of sex or, as the case may be, to their dependants.

33 In view of the foregoing, the answer to the question referred to the Court must be that Article 119 of the Treaty is to be interpreted to the effect that bodies such as German pension funds ('Pensionskassen') entrusted with providing benefits under an occupational pension scheme are required to ensure equal treatment between men and women, even if the employees discriminated against on the basis of sex have, as against those directly liable, namely their employers in their capacity as parties to their employment contracts, a protected right in the event of insolvency that excludes all discrimination.

Costs

34 The costs incurred by the German and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 question referred to it by the Bundesarbeitsgericht by order of 23 March 1999, hereby rules:

Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) must be interpreted to the effect that bodies such as German pension funds ('Pensionskassen') entrusted with providing benefits under an occupational pension scheme are required to ensure equal treatment between men and women, even if the employees discriminated against on the basis of sex have, as against those directly liable, namely their employers in their capacity as parties to their employment contracts, a protected right in the event of insolvency that excludes all discrimination.

Macken Colneric Gulmann

Puissochet Skouris

Delivered in open court in Luxembourg on 9 October 2001.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber