

OPINION OF MR ADVOCATE GENERAL
VERLOREN VAN THEMAAT
DELIVERED ON 8 DECEMBER 1981¹

*Mr President,
Members of the Court,*

1. Introduction

Mr Arthur Burton is the first to confront the Court with the fact that the principle that men and women should receive equal pay for equal work laid down in Article 119 of the EEC Treaty and put into effect in Council Directive 75/117/EEC logically implies that not only should women enjoy the same benefits as men but conversely that men may not be treated worse than women.

As an employee of the British Railways Board he believes that for that reason he is entitled at 58 years of age to avail himself of the opportunity, which female employees have when they attain 55 years of age, offered by a voluntary redundancy scheme and the benefits which it confers. He submitted an application to that effect in August 1979. However, as a male employee he was not eligible for voluntary redundancy under the relevant rules of British Railways until the age of 60. British Railways therefore rejected his application. To put

it somewhat simply, the advantages accompanying voluntary redundancy consisted chiefly but not exclusively in the enjoyment of benefits equal to the pension payable at pensionable age for a maximum period of five years prior to the attainment of that age. Mr Burton complained to an Industrial Tribunal against the decision to refuse to grant him the benefit payable under the voluntary redundancy scheme. He relied on the Equal Pay Act 1970 as amended by the Sex Discrimination Act 1975. Once it emerged that the Equal Pay Act did not apply because the payments under the voluntary redundancy scheme were non-contractual he based his appeal on the Sex Discrimination Act alone. That Act applies to discrimination as regards non-contractual payments, which according to the national court also include voluntary redundancy payments. By virtue of section 6 (4), however, the Act does not apply to provision in relation to pensions. I shall return to that provision of the Act later. The Industrial Tribunal dismissed the complaint, whereupon Mr Burton appealed to the Employment Appeal Tribunal. It was before that tribunal that he claimed that the Sex Discrimination Act must be construed in accordance with Article 119 of the EEC Treaty and Council Directives 75/117/EEC and 78/207/EEC.

The Employment Appeal Tribunal then submitted the following questions of interpretation to the Court under Article 177 of the Treaty:

¹ — Translated from the Dutch.

“(1) Is a voluntary redundancy benefit, which is paid by an employer to a worker wishing to leave his employment, within the scope of the principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Council Directive 75/117/EEC of 10 February 1975?

Further matters which it might be useful to mention at this point are that when he made his application in 1979 Mr Burton had worked for British Railways for 42 years and that by virtue of Article 30 of the Transport Act 1962 the British Railways Board is neither a servant nor an agent of the Crown.

(2) If the answer to Question 1 is in the affirmative, does the principle of equal pay have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?

(3) If the answer to Question 1 is in the negative:

(i) is such a voluntary redundancy benefit within the scope of the principle of equal treatment for men and women as regards ‘working conditions’ contained in Article 1 (1), Article 2 (1) and Article 5 (1) of Council Directive 76/207/EEC of 9 February 1976?

(ii) if so, does the said principle have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?”

Written observations have been submitted on those questions in accordance with Article 20 of the Protocol on the Statute of the Court of Justice by Mr Burton, the British Railways Board, the Government of the United Kingdom, the Danish Government and the Commission of the European Communities.

At this point I refer to the Report for the Hearing for the rest of the facts and for a summary of the written observations. Where necessary I shall return to the facts and the observations made in the written and oral procedure in the rest of my opinion, which will be constructed as follows: after this introduction I shall first indicate the previous decisions of the Court which may be relevant to this case; that will be followed by a summary of the provisions of the directives relied upon; I shall then analyse the questions submitted in the light of the case-file and the Court’s previous decisions; finally, I shall then formulate my opinion on the questions submitted, taking into account the written observations which have been made.

2. The relevant decisions of the Court

2.1. In the first *Defrenne* judgment (Case 80/70 [1971] ECR 445) the Court ruled that: “A retirement pension established within the framework of a social security scheme laid down by legislation does not constitute consideration which the worker receives indirectly in respect of his employment from his employer within the meaning of the second paragraph of Article 119 of the EEC Treaty.” That decision makes it desirable for me to examine the relationship between the voluntary redundancy scheme in question and statu-

tory pension schemes. The Government of the United Kingdom in particular bases its view of the case primarily on this relationship, which it considers to be of vital importance. It claims that the relationship affects both the amount and the duration of the voluntary redundancy benefits. Mr Burton however denies that there is such a relationship.

2.2. In the second *Defrenne* judgment (Case 43/75 [1976] ECR 455) the Court ruled *inter alia* that: "The principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public." That judgment is cited not only by Mr Burton, whose view is supported by the Commission, but also by British Railways and the Government of the United Kingdom, in order to support opposite conclusions. In this regard the term "pay" and the difference between "direct and overt discrimination" on the one hand and "indirect and disguised discrimination" on the other are important in these proceedings. The prohibition of discrimination contained in Article 119 is directly applicable to the first kind of discrimination but not to the second. In later judgments, most recently in Case 96/80

Jenkins [1981] ECR 911, the Court has repeatedly emphasized the significance of this distinction as regards the direct applicability of Article 119.

2.3. In the third *Defrenne* judgment (Case 149/77 [1978] ECR 1365) the Court ruled that: "Article 119 of the EEC Treaty cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women. At the time of the events which form the basis of the main action there was, as regards the relationships between employer and employee under national law, no rule of Community law prohibiting discrimination between men and women in the matter of working conditions other than the requirements as to pay referred to in Article 119 of the Treaty." As regards the events forming the basis of the main action, the question submitted to the Court in that case referred in particular to the age-limit for the termination of a female employee's contract of employment, an age-limit which the contracts of employment of comparable male staff did not contain. Mr Burton and the Government of the United Kingdom cite that judgment to support opposite conclusions. Although the Employment Appeal Tribunal has not raised any explicit question on this point, the difference in age-limits is in fact of crucial importance in this case also, albeit not in the same way as in the third *Defrenne* judgment. The Commission therefore rightly devotes much attention to this point in its written observations (pages 9 to 13). It believes that the second sentence of that judgment of the

Court implies that the decision on the age-limit would have been different if Directive 76/207 had been in force at that time. I shall come back to the details of the Commission's observations concerning the significance of this when I consider the relevant provisions of Directive 76/207.

2.4. The Court's judgment of 29 July 1979 in Case 129/79 *McCarthy's Limited v Wendy Smith* [1980] ECR 1275 concerned unequal ordinary wages and does not appear to be relevant to this case.

2.5. However, the Court's judgment in Case 69/80 *Worringham and Humphreys v Lloyds Bank Limited* [1981] ECR 767 is relevant to this case. In that judgment the Court ruled *inter alia* that: "A contribution to a retirement benefits scheme which is paid by an employer in the name of employees by means of an addition to the gross salary and which therefore helps to determine the amount of the salary constitutes 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty." It appears from that judgment that not all benefits conferred on employees which are related to a pension scheme fall outside the ambit of Article 119 just because they are so related.

2.6. Finally, in Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911 the Court made it clear that the distinction drawn in the second *Defrenne* judgment between overt and disguised discrimination, which is important in determining whether or not Article 119 is directly applicable, does not coincide with a factual distinction between direct

discrimination or discrimination in form, on the one hand, and indirect discrimination or discrimination in substance, on the other. The Court put it in the following words:

"1. A difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.

2. Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the payment of lower hourly rates of remuneration for part-time work than for full-time work represents discrimination based on difference of sex the provisions of Article 119 of the Treaty apply directly to such a situation."

According to a recent interesting study by A. W. Govers (*Gelijkheid van vrouwen en mannen in het Europees sociaal recht, Geschriften van de Vereniging voor Arbeidsrecht No 6, Alphen aan de Rijn 1981*), in making the distinction in paragraph (1) between direct and indirect discrimination the Court was subscribing to a well-established international tradition, besides confirming its previous decisions on this subject. The distinction drawn in the second *Defrenne* judgment between overt and disguised discrimination is, however, related to the distinction between direct and indirect

applicability, as the second paragraph of the *Jenkins* judgment once again shows. Since the terminology of both distinctions is virtually identical in some Community languages, use of the terminology contained in the second *Defrenne* judgment might lead to misunderstanding following the judgment in the *Jenkins* case. In the rest of my opinion therefore, I shall use other terminology where necessary. Perhaps a distinction between "discrimination directly ascertainable by the courts" and "discrimination not directly ascertainable by the courts" might be adequate for present purposes to clarify the terminology used in paragraph 18 of the second *Defrenne* judgment.

2.7. The *Burton* case now before the Court is the first in which questions on the interpretation of directives concerning equal treatment of men and women must also be answered.

3. Some comments on the directives concerning equal treatment of men and women

3.1. The parties to the main action are agreed that Article 1 of Directive 75/117/EEC (Official Journal 1975 L 45, p. 19) has nothing material to add to Article 119 of the Treaty for the purposes of this case. Bearing in mind the Court's earlier decisions on equal treatment, that directive may therefore be ignored.

3.2. That is not the case with Directive 76/207/EEC (Official Journal 1976 L 39, p. 40) on the implementation of the principle of equal treatment for men and women as regards *inter alia* working conditions. Article 1 explains that the purpose of the directive is to put into effect the principle of equal treatment for men and women as regards working conditions, and Article 2 (1) provides that "for the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status". Article 5 (1) of the directive provides that "application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex." The third question of the employment Appeal Tribunal seeks to ascertain whether, should Article 119 not apply, voluntary redundancy benefits come under the principle, thus defined, of equal treatment for men and women as regards their working conditions.

3.3. Finally Directive 79/7/EEC (Official Journal 1979, L 6, p. 24) on the progressive implementation of the principle of equal treatment for men and women in matters of social security is perhaps indirectly relevant. Referring to Article 1 (2) of the aforementioned Directive 76/207/EEC, which envisages a separate directive on this subject, this third directive, provides *inter alia* in Article 7 (1) that the 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”.

Although that directive does not have to be implemented until 1984 it is clear from its terms that at the time of Mr Burton's application the Council had already reached the conclusion that under Community law a difference in age-limits in schemes such as those contemplated by Article 7 (1) of Directive 79/7/EEC is not contrary to the principle of equal treatment. Moreover, Member States are of course empowered to make use of that provision before 1984. I shall come back later to the question whether the provision is also relevant to the redundancy payments at issue in these proceedings. Counsel for Mr Burton denied this at the hearing on the ground that by its nature the power given to the Member States in Article 7 can apply only to social security matters covered by that directive.

4. Examination of the questions submitted

In order to answer preliminary questions in a manner useful to the national court it is almost always important to give consideration to the facts relevant to the main dispute. What is more, previous decisions may throw more light on aspects of the questions submitted which require particular attention.

That is certainly true when the national court has framed its questions in very general terms, as in this case. In Question 1 the Employment Appeal Tribunal asks the Court whether a

voluntary redundancy benefit, which is paid by an employer to a worker wishing to leave his employment, is within the scope of the principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Council Directive 75/117/EEC of 10 February 1975. It appears from the facts forming the basis of the dispute, from the arguments put forward in the written and oral procedure and from the Court's other decisions that as far as such benefits are concerned a distinction must be drawn between their nature and composition or the method of calculating them, on the one hand, and the duration of and access to them, on the other.

The nature and composition or method of calculating the voluntary redundancy benefits in question did not become clear until the oral procedure. The benefits concerned are those referred to in paragraphs 24 and 25 of the document entitled “Redundancy, Transfer and Resettlement Arrangements for Railway Staff — Salaried and Conciliation” dated 20 September 1978. That document was produced by the Government of the United Kingdom at a late stage in the written procedure after reference was made only to an extract at an earlier stage.

The actual redundancy payments are dealt with in paragraph 24 of the document and comprises:

- (i) the statutory lump-sum redundancy payment under the Redundancy Act 1965 (now replaced by the Employment Protection (Consolidation) Act 1978, Part VI, sections 81 to 120),
- (ii) a supplementary severance payment (equal to one week's standard pay

for each year of service in excess of 15 years or after 45 years of age), and

inflation provides greater purchasing power.

- (iii) an amount equal to 25% of the sum of the other two payments.

Paragraph 25 deals with:

- (i) a special early retirement pension scheme. Where an employee is retired on grounds of redundancy within five years prior to minimum pension age (60 in the case of men and 55 in the case of women) and has an entitlement to pension the British Railways Board pays a pension equal to the pension from the minimum pension age; and

Further details of the two schemes are set out in a memorandum of 9 March 1979 agreed on by the British Railways Board and the trade unions. Paragraph 6 of that memorandum states: "Staff aged 60/65 (male/female) may leave the service under the Redundancy and Resettlement arrangements when the Function in which [they are] employed has been dealt with under Organization Planning." It follows in particular from that additional stipulation that the different age-limits for access to the payments also apply to the payments referred to in paragraph 24 of the main document. Although we were told at the hearing that the special early retirement pension scheme is no longer at issue, the dispute forming the basis of the reference related both to the payments provided for by paragraph 24 and to those provided for by paragraph 25 of the main document. Since the substantive connexion with pension schemes is especially relevant in the case of the early retirement pension scheme, I shall consider it separately in my opinion.

- (ii) An advance for men aged 55 or over and for women aged 50 or over equal to the amount of the lump-sum retirement benefit upon the attainment of the normal pensionable age; however, the advance falls due for repayment when the minimum pensionable age is attained and is thus in the nature of a loan. But by investing it the employee receives interest during the relevant period and by spending it he has the advantage of enjoying the benefit earlier, which at a time of high

As regards access to, or the duration of, the payments in question it may be observed first of all that the dispute in fact revolves around this aspect of the voluntary redundancy benefits on which the Court's ruling is sought. Furthermore, the arguments put forward during the written and oral procedure show that the Court's answer on this aspect of the reference need not necessarily be the same as its answer as regards the nature and composition of the payments or the method of calculating them. I refer here in particular to the Commission's arguments.

I have already given a summary of the relevant previous decisions of the Court. In addition to the exception which the Court made in the *Defrenne* judgment for statutory pension schemes, it seems to me that the exception which the Court made in the third *Defrenne* judgment for working conditions other than pay is especially important in this case. In the latter judgment the other working conditions also concerned in particular a difference in age-limits for male and female employees. On balance I think that the judgment in the *Worringham* case is relevant only in so far as it makes the point that not all schemes which are directly related to a pension scheme fall outside the scope of Article 119 for that reason alone.

perhaps the Employment Appeal Tribunal was indicating that Directive 76/207 might be regarded as putting into effect a generally recognized fundamental or human right. Moreover, since the Commission believes that the question whether the directive has direct effect can be avoided by construing the relevant provisions of the Sex Discrimination Act 1975 in accordance with the directive, I think that it would be useful to cite here the relevant provisions of that Act.

Section 6 (2) of the Sex Discrimination Act reads as follows: "It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her:

An answer to Question 1 which draws a careful distinction between the different aspects of the benefit scheme may also affect the Court's answer to Question 2. Unlike Question 1, the wording of Question 2 gives express consideration to the facts of the actual case and thus, in my view, to the age-limit aspect which I have mentioned. For an analysis of Directive 76/207, which is relevant for the purposes of Question 3 (i), I refer to my previous observations on that directive.

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment."

With regard to Question 3 (ii), I think, in the first place, that it may be relevant that the question asks, not whether a particular provision of Directive 76/207 has direct effect, but whether the *principle* of equal treatment contained therein as regards working conditions has direct effect. In using those words

Section 6 (4) provides: "Subsections (1) (b) and (2) do not apply to provision in relation to death or retirement."

In my opinion those provisions taken on their own are indeed no bar to the solution proposed by the Commission. In my view, too, the question whether "other benefits" also include voluntary redundancy benefits and the question whether those benefits are related to "death or retirement", as referred to here, could certainly both be answered in the light of Community law. In my judgment there is no question here of manifest departure from Community law, as laid down or defined in directives or in the Court's decisions. Even the fact that the section cited at first sight appears to deal only with discrimination against women does not prevent the approach proposed by the Commission from being adopted, for section 2 of the Sex Discrimination Act provides: "Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite."

Section 6 belongs to Part II of the Sex Discrimination Act. Nevertheless in my opinion that solution could only be adopted if the second part of the question raised were reformulated or interpreted to some degree. That reformulation or interpretation might read as follows: "If so, may the principle put into effect in the said directive be relied on before the national court applying national legislation intended or partly intended to implement that directive?" An answer to the question formed in that way could have regard to the possibility, which emerged during these proceedings, that implementing legislation might depart appreciably from the terms of the relevant directive.

5. Conclusions on the questions submitted

5.1. *Question 1:* Let me remind the Court that the first question put to it reads: "Is a voluntary redundancy benefit, which is paid by an employer to a worker wishing to leave his employment, within the scope of the principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Council Directive 75/117/EEC of 10 February 1975?" In examining this question I have already indicated that in order for the Court's answer to be of practical help in resolving the dispute in the main action a clear distinction must be drawn in these proceedings between different aspects of the benefit scheme at issue. It has been sufficiently established in the written and oral procedure that all the payments at issue are made directly by the employer to the worker and are mostly for the employer's account. Only in the case of that part of the benefits which is dealt with in paragraph 24 of the relevant scheme can 41% of the expenditure at present be reclaimed from a fund in which employers participate and which is administered by the government.

Moreover, it is clear that the payments are not due under a statutory scheme but under voluntary agreements between the

employers and workers. This is true both for the payments made under paragraph 24 and for those made under paragraph 25 of the relevant scheme. I do not think that it is relevant, for the purpose of determining whether Article 119 applies, that the method of calculating the amount of the benefits partly depends on statutory provisions. As was rightly pointed out in the course of the proceedings, such a criterion would mean that statutory minimum wages which discriminated between the sexes would not fall under Article 119 either. Such a criterion was clearly rejected in the second *Defrenne* judgment, where the Court held that "forms of discrimination which have their origin in legislative provisions or collective labour agreements" are contrary to Article 119. The parties also agreed at the hearing that in order to answer the question it does not matter whether or not the relevant payments are based on a contract.

considerations of social policy". In the present case it is a question of a direct connection between employers and workers and of a retirement scheme introduced voluntarily by the employer with the agreement of, or at any rate after consultation with, the trade unions concerned.

In order to determine whether the nature of the voluntary redundancy benefits in question or the method of calculating them, render Article 119 inapplicable it is necessary to begin by examining the wording of the second paragraph of that article. If those benefits are not ordinary wages they may be other consideration in cash or in kind which the worker receives

(a) directly or indirectly, from his employer,

(b) in respect of his employment.

It is clear from what I have just said that the voluntary redundancy benefits under the scheme operated by British Railways are not pension rights in the context of a statutory social security scheme which, according to the Court's judgment in the first *Defrenne* judgment, are not subject to Article 119. A consideration relevant to the Court's decision in the present case is the fact that it based its decision in that judgment on the finding in paragraphs 6 to 10 that Article 119 does not apply to "schemes ... directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers" and are financed from contributions which are "determined less by the employment relationship between the employer and the worker than by

On the basis of the information before the Court it seems indisputable that the payments in question are received directly or indirectly from the employer. As regards the required connection with the employment, I would consider that in the light of the passages which I have cited from the decision in the first *Defrenne* judgment the decisive question is whether the benefits are received by the worker concerned from his employer owing to his employment. The French and Italian texts of Article 119 containing the words "*en raison de l'emploi*" and "*in ragione dell'impiego*",

also show that the test is not whether the payment is consideration for work performed. Only the English text of Article 119, which contains the words "in respect of his employment", might perhaps point to a more restrictive meaning. What is required for the purposes of the final words of the second paragraph of Article 119, and what incidentally I believe is also required by the English text logically construed, is rather an unseverable causal link between the payment and a worker's employment.

In my judgment that requirement of an unseverable causal link between payment and employment is certainly fulfilled in the case of voluntary redundancy benefits; if he has no such employment a worker cannot lay claim to such benefits. Consequently the question whether Article 119 applies to consideration provided in respect of employment in the past need not be answered in the Burton case. As regards that question I refer to my opinion in the *Garland* case. As I said earlier, the fact that the amount of the benefits referred to in paragraphs 24 and 25 of the scheme in question is determined in whole or in part by statutory pension rules cannot in my judgment shake those conclusions reached on the basis of the wording of Article 119. My opinion on this aspect of the first question is therefore that voluntary redundancy benefits paid voluntarily, or otherwise than by contract, by an employer to a worker do not fall outside the ambit of Article 119 by reason of their nature or the fact that their composition or the method of calculating them is partly dependent on statutory rules. That conclusion means that, subject to the points to be made concerning the other aspect of the dispute, discrimination on the basis of

sex in the granting or the calculation of such benefits is contrary to Article 119.

The case before the Court is however concerned solely with the other aspect of the benefit scheme which I mentioned in my analysis of the questions. That other aspect concerns the alleged discrimination on grounds of sex in the provisions on the duration of, or access to, the benefit scheme. Given the wording of Article 119 and considering the third *Defrenne* judgment, I think it is beyond argument that Article 119 does not cover this aspect. As the Commission seems to have implicitly conceded in its written submissions, the stipulation of the age-limit which must be attained in order to qualify for access to the voluntary redundancy scheme is, at most, to be included amongst the working conditions referred to in Directive 76/207.

Consequently, my examination of the first question submitted to the Court leads me to the ultimate conclusion that this question must be answered as follows:

"The principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Directive 75/117/EEC of 10 February 1975 applies to voluntary redundancy benefits paid by an employer to a worker wishing to leave his employment and to the method of calculating them, but not to age-limits placed on qualification for such payments."

5.2. *Question 2.* This question presupposes an affirmative answer to Question 1 and reads as follows: "If the answer to Question 1 is in the affirmative, does the principle of equal pay have direct effect in Member States so as to confer enforceable Community rights upon individuals in the circumstances of the present case?" Bearing in mind the second *Defrenne* judgment, the *Jenkins* judgment and the answer I have proposed to Question 1, I consider that the answer to Question 2 might read as follows:

redundancy benefit within the scope of the principle of equal treatment for men and women as regards 'working conditions' contained in Article 1 (1), Article 2 (1) and Article 5 (1) of Council Directive 76/207/EEC of 9 February 1976?" It follows from my answer to Question 1 that I should now examine this question solely in relation to the age-limit, for I infer from the third *Defrenne* judgment that an age-limit which is a condition for the enjoyment of benefits such as those in question cannot as such be regarded as falling under Article 119.

"Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the benefits in question and the method of calculating them being determined, whether or not by reference to statutory provisions, by a voluntary redundancy scheme applied by the employer voluntarily or otherwise than by contract, constitute discrimination on the basis of sex, the provisions of Article 119 apply directly to such a situation."

On closer examination Question 3 (i), with its scope thus restricted, divides into two parts. The first part comprises the question whether an age-limit operating as a condition for the enjoyment of benefits such as those in question comes under the term "working conditions" contained in Directive 76/207. Given the customary distinction in labour law between wages and comparable consideration, on the one hand, and other working conditions, on the other hand, I consider that an affirmative answer to this question is, for one thing, logical if a balanced system is to be arrived at. Age-limits relating to the right to specific wages or other consideration in respect of employment are of such concern to workers that a negative answer to this part of the question would create an incomprehensible and illogical gap in the additional guarantees of equal treatment for men and women as regards their employment which Directive 76/207/EEC seeks to secure. On no account does the very general term "working conditions" call for any other answer either. Last but not least, however, I can refer to the third

5.3. *Question 3.* As my answer to Question 1 is in the negative on the crucial point of the age-limit, I cannot avoid examining Question 3 also. I shall start with the first part of that question, which, I would remind the Court, assumes a negative answer to Question 1 and runs: "Is such a voluntary

Defrenne judgment in which the Court expressly described the age-limit in question as a "working condition". Because of that judgment I need not for the purposes of this part of my opinion place reliance on the use of the phrase "including the conditions governing dismissal" contained in Article 5 (1) of Directive 76/207. Besides, to my mind this case is not concerned with conditions governing dismissal but with working conditions relating to the receipt of consideration within the meaning of Article 119.

However, I think that it is much more difficult to answer the *second part* of Question 3 (i), namely the question of the interpretation of the principle of equal treatment in a case such as this. I have already referred to Article 7 (1) (a) of Directive 79/7. I would remind the Court that that provision states that the directive is to be without prejudice to the right of Member States to exclude from its scope "the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits". It follows from that provision that the difference in pensionable age which Member States fix for men and women and the effects which that may have on other benefits do not constitute a prohibited form of sex discrimination under Community law.

Where a private scheme is tied to or derived from the statutory difference in pensionable age such a difference in the

private scheme can hardly be regarded as being contrary to the principle of equal treatment under Community law if a similar provision in a statutory scheme must be regarded as being unprohibited discrimination on the basis of sex under Community law.

Moreover, in my opinion it is perfectly possible to argue that, for the purposes of the application of the principle of equal treatment for men and women to benefits such as those in question, it is not just the date from which they are payable which is important but also, perhaps even primarily, the way in which that date is determined and the duration of the relevant benefits in practice. As both the qualifying age for all the types of benefits at issue and their duration are determined according to criteria which are identical for men and women, there is no question of conflict with the principle of equal treatment.

For those reasons I suggest that the Court should answer Question 3 (i) as follows: "Although the age-limit for access to a voluntary redundancy scheme such as that in question and the determination of the duration of the relevant benefits fall within the term 'working conditions' contained in Articles 1 (1), 2 (1) and 5 (1) of Council Directive 76/207/EEC of 9 February 1976, such a benefits scheme is not contrary to the last-mentioned provision if the qualifying age for all the benefits in question and their duration in practice is derived from the pensionable age in the same way for men and women."

On account of the similarities between the two types of benefit referred to in paragraphs 24 and 25 of the scheme I do not think that they call for separate consideration in this respect.

The answer which I have proposed to Question 3 (i) makes it unnecessary to examine Question 3 (ii).

5.4. To sum up therefore I propose that the Court should answer the questions put to it as follows:

1. The principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Directive 75/117/EEC of 10 February 1975 applies to voluntary redundancy benefits paid by an employer to a worker wishing to leave his employment and to the method of calculating them, but not to age-limits placed on qualification for such payments.
2. Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the benefits in question and the method of calculating them, being determined, whether or not by reference to statutory provisions, by a voluntary redundancy scheme applied by the employer voluntarily or otherwise than by contract, constitute discrimination on the basis of sex, the provisions of Article 119 apply directly to such a situation.
3. (i) Although the age-limit for access to a voluntary redundancy scheme such as that in question and the determination of the duration of the relevant benefits fall within the term "working conditions" contained in Articles 1 (1); 2 (1) and 5 (1) of Council Directive 76/207/EEC of 9 February 1976, such a benefits scheme is not contrary to the last-mentioned provision if the qualifying age for all the benefits in question and their duration in practice is derived from the pensionable age in the same way for men and women.
 (ii) This question does not need to be answered.