

JUDGMENT OF THE COURT

26 February 1986 *

In case 151/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Court of Appeal of England and Wales for a preliminary ruling in the proceedings pending before that court between

Joan Roberts

and

Tate & Lyle Industries Limited

on the interpretation of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976, L 39, p. 40),

THE COURT

composed of: Lord Mackenzie Stuart, President, U. Everling and K. Bahlmann (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn

Registrar: D. Loutermann, Administrator

after considering the observations submitted on behalf of

the appellant in the main proceedings, by A. Lester, QC, and D. Pannick, Barrister-at-law, during the written procedure, and by A. Lester during the oral procedure,

the respondents, by D. Vaughan, QC, and C.S.C.S. Clarke, Barrister-at-law, during the written procedure, and by J. D. Sabel and D. Vaughan, QC, during the oral procedure,

* Language of the Case: English.

the Government of the Kingdom of Denmark, by Laurids Mikaelson, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, during the written procedure,

the United Kingdom, by S. J. Hay, of the Treasury Solicitor's Department, acting as Agent, during the written procedure, and by S. J. Hay and P. Goldsmith, Barrister-at-law, during the oral procedure,

the Commission of the European Communities, by its Legal Adviser, A. Toledano Laredo, acting as Agent, during the written procedure, and by A. Toledano Laredo and J. R. Currall, a member of its Legal Department, during the oral procedure,

after hearing the Opinion of the Advocate General delivered at the sitting on 18 September 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

- 1 By an order of 12 March 1984, which was received at the Court on 19 June 1984, the Court of Appeal of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976, 39, p. 40).
- 2 The questions were raised in the course of proceedings between Joan Roberts (hereinafter referred to as 'the appelland') and Tate & Lyle Industries Limited, previously Tate & Lyle Food and Distribution Limited, (hereinafter referred to as 'the respondents') concerning the question whether the appellant's dismissal was in accordance with section 6 (4) of the Sex Discrimination Act 1975 and with Community law.

- 3 The appellant was employed by the respondents at their Liverpool depot for 28 years and, at the age of 53, was made redundant on 22 April 1981, following the closure of the depot, together with other employees, under a mass redundancy.
- 4 The appellant was a member of an occupational pension scheme, which had been created in 1978 by the respondents for their employees and which was contracted out of the State retirement pension scheme. That scheme is funded partly by the respondents themselves and partly by voluntary contributions by employees. It provides for compulsory retirement with a pension at the age of 65 for men and 60 for women. Nevertheless, men and women over the age of 50 may, with the respondents' consent, retire before attaining the aforementioned normal retirement age, in which case they are entitled to a reduced pension immediately. An employee who has been a member of the scheme for 10 years may choose to retire at any time up to five years before the normal retirement age and receive the pension earned up to that date.
- 5 On the closure of the Liverpool depot the respondents agreed severance terms with the trade union of which the appellant was a member. Under those terms all employees made redundant were to be offered either a cash payment or an early pension out of the pension scheme up to five years before the date of their entitlement under the scheme. The pension was therefore payable immediately to women over the age of 55 and men over the age of 60. Nevertheless, as a result of representations made by male employees against the allegedly discriminatory nature of those arrangements with regard to men aged between 55 and 60, the respondents amended them by agreeing to grant an immediate pension to both men and women over the age of 55, with the amount of their cash payment reduced.
- 6 The appellant, who was aged 53 at the date of redundancy, brought proceedings against the respondents before an Industrial Tribunal, claiming that her dismissal constituted unlawful discrimination contrary to the Sex Discrimination Act and to Community law, since under the new arrangements, a male employee was entitled to receive an immediate pension 10 years before the normal retirement age for men whereas a female employee was not so entitled until five years before the normal retirement age for women.

- 7 After her case was dismissed by the Industrial Tribunal she appealed to the Employment Appeal Tribunal, which held that, even if it was assumed that the appellant had been treated in a discriminatory manner, the respondents had not acted unlawfully since, in the first place, section 6 (4) of the Sex Discrimination Act provided that the provisions of the Act concerning the prohibition of discrimination on the basis of sex did not apply to 'provision in relation to death or retirement', and, in the second place, Directive No 76/207 was not directly applicable before the courts of the United Kingdom.
- 8 The appellant appealed to the Court of Appeal, which decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Whether or not the respondents discriminated against the appellant contrary to the Equal Treatment Directive by arranging for male employees who were made redundant to receive a pension from the occupational pension fund 10 years prior to their normal retirement age of 65 but arranging for female employees (such as the appellant) who were made redundant to receive a pension only five years prior to their normal retirement age of 60, thereby arranging for both men and women to receive an immediate pension at the age of 55.

(2) If the answer to (1) above is in the affirmative, whether or not the Equal Treatment Directive can be relied upon by the appellant in the circumstances of the present case in national courts and tribunals notwithstanding the inconsistency (if any) between the directive and section 6 (4) of the Sex Discrimination Act 1975.'

Relevant legal provisions

- 9 Article 1 (1) of Directive No 76/207 provides as follows:

'The purpose of this directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph (2), social security. This principle is hereinafter referred to as "the principle of equal treatment".'

10 Article 2 (1) of the directive provides that:

‘... 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’.

11 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.’

12 Article 1 (2) of the directive provides that:

‘With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.’

13 Pursuant to the last-mentioned provision, the Council adopted Directive No 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), which Member States were to transpose into national law, according to Article 8 (1) thereof, within six years of its notification. The directive applies, according to Article 3 (1) thereof, to:

‘(a) statutory schemes which provide protection against the following risks:

sickness,
invalidity,
old age,
accidents at work and occupational diseases,
unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).’

14 According to Article 7 (1) thereof, the directive is to 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;

...’.

15 With regard to occupational social security schemes, Article 3 (3) of the directive provides that with a view to ensuring implementation of the principle of equal treatment in such schemes ‘the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application’. On 5 May 1983 the Commission submitted to the Council a proposal for a directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes (Official Journal 1983, C 134, p. 7). The proposed directive would, according to Article 2 (1) thereof, apply to ‘benefits intended to supplement the benefits provided by statutory social security schemes or to replace them’. The Council has not yet responded to that proposal.

16 The minimum qualifying age for a State retirement pension under United Kingdom legislation is 60 for women and 65 for men.

17 Observations were submitted to the Court by the United Kingdom, the Kingdom of Denmark and the Commission, in addition to the appellant and the respondents.

The first question

18 By the first question the Court of Appeal seeks to ascertain whether Article 5 (1) of Directive No 76/207 must be interpreted as meaning that a contractual provision which lays down a single age for the dismissal of both men and women under a mass redundancy involving the grant of an early retirement pension, whereas the normal retirement age is different for men and women, namely 65 for

the former and 60 for the latter, constitutes discrimination on grounds of sex contrary to that directive.

- 19 The appellant considers that the first question must be answered in the affirmative.
- 20 According to her the question falls to be considered, by virtue of the Court's judgment of 16 February 1982 (Case 19/81 *Burton v British Railways Board* [1982] ECR 555), under Directive No 76/207. The terms 'working conditions' and 'conditions governing dismissal' contained in that directive also encompass the grant of an early retirement pension under a mass redundancy.
- 21 The appellant claims that she suffered discriminations as a result of the respondents' failure to take into account the fact that its normal retirement scheme is linked to the State retirement scheme, which provides for a different normal retirement age for men and women. Although the first variation of the respondents' scheme adopted that age difference in respect of access to early retirement, in accordance with the principles stated by the Court in the *Burton* case, those principles were not taken account of in the second variation.
- 22 The appellant claims that she is entitled, according to the judgment in the *Burton* case, to compare her treatment with that of a male employee who is an equal number of years away from the normal retirement age. A scheme which applies an age differential with regard to the retirement of men and of women, and which departs from that differential in the case of a mass redundancy in a manner less favourable to women than to men, gives rise to discrimination on grounds of sex, contrary to the provisions of the directive.
- 23 In contrast, the respondents argue first of all that it is unnecessary to reply to the first question in view of the fact that they propose that the reply to the second question should be in the negative.
- 24 They contend that they did not, in any event, discriminate against the appellant, because men and women of the same age (55) are treated in an identical manner.

- 25 According to the respondents, a woman cannot demand to be treated differently in all cases for the sole reason that there is a difference in treatment with regard to the normal retirement age applied by the employer under its occupational social security scheme. On the contrary, such a difference of treatment should not be reflected in other matters prior to the normal date of retirement.
- 26 The fact that the Court held in its judgment in the *Burton* case that a difference in the age which men and women must have attained for access to voluntary retirement cannot be regarded as discrimination does not mean, according to the respondents, that identical age conditions are necessarily discriminatory. In any event, the treatment applied in this case is justified objectively by the need to ensure that all employees who are dismissed and are over the age of 55 receive a pension.
- 27 The United Kingdom is also of the opinion that there is no discrimination, either direct or indirect, in this case. It considers that the normal way to ensure equality of treatment is to base the right to benefits linked to employment on the same age requirement for men and women and that the *Burton* judgment is not relevant to this case.
- 28 The Commission also maintains that there is no discrimination in this case and that the reply to the question is to be found in Article 5 of Directive No 76/207 and in an analysis of the Court's judgment in the *Burton* case. In that judgment the Court recognized the existence of a link between access to voluntary redundancy and national social security schemes.
- 29 According to the Commission, Article 7 (1) of Directive No 79/7 does not aim to entrench the difference between the pensionable ages for men and women but merely creates an exception in a case where national law provides for such a difference. In the absence of a provision to that effect national provisions imposing such a difference might be incompatible with the directive. The position might be the same with regard to Article 9 (1) (a) of the proposed directive concerning occupational social security schemes.

- 30 The Court observes in the first place that the question of interpretation which has been referred to it does not concern the conditions for the grant of the normal old-age or retirement pension but the termination of employment in connection with a mass redundancy caused by the closure of part of an undertaking's plant. The question therefore concerns the conditions governing dismissal and falls to be considered under Directive No 76/207.
- 31 Article 5 (1) of Directive No 76/207 provides that application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women are to be guaranteed the same conditions without discrimination on grounds of sex.
- 32 In its judgment in the *Burton* case the Court has already stated that the term 'dismissal' contained in that provision must be given a wide meaning. Consequently, an age limit for the compulsory redundancy of workers as part of a mass redundancy falls within the term 'dismissal' construed in that manner, even if the redundancy involves the grant of an early retirement pension.
- 33 Even though the retirement scheme at issue does not *prima facie* discriminate between men and women with regard to the conditions for dismissal, it is still necessary to consider whether the fixing of the same age for the grant of an early pension nevertheless constitutes discrimination on grounds of sex in view of the fact that under the United Kingdom statutory social security scheme the pensionable age for men and women is different. Under United Kingdom legislation the minimum qualifying age for a State retirement pension is 60 for women and 65 for men.
- 34 As the Court emphasized in its judgment in the *Burton* case, Article 7 of Directive No 79/7 expressly provides that the directive does not prejudice 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 falling within the statutory social security schemes. The Court thus acknowledged that benefits linked to a national scheme which lays down a different minimum pensionable age for men and women may lie outside the ambit of the aforementioned obligation.

- 35 However, in view of the fundamental importance of the principle of equality of treatment, which the Court has reaffirmed on numerous occasions, Article 1 (2) of Directive No 76/207, which excludes social security matters from the scope of that directive, must be interpreted strictly. Consequently, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7 (1) (a) of Directive No 79/7 applies only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and to the consequences thereof for other social security benefits.
- 36 In that respect it must be emphasized that, whereas the exception contained in Article 7 of Directive No 79/7 concerns the consequences which pensionable age has for social security benefits, this case is concerned with dismissal within the meaning of Article 5 of Directive No 76/207. In those circumstances the grant of a pension to persons of the same age who are made redundant amounts merely to a collective measure adopted irrespective of the sex of those persons in order to guarantee them all the same rights.
- 37 Consequently, the answer to the first question referred to the Court of Justice by the Court of Appeal must be that Article 5 (1) of Directive No 76/207 must be interpreted as meaning that a contractual provision which lays down a single age for the dismissal of men and women under a mass redundancy involving the grant of an early retirement pension, whereas the normal retirement age is different for men and women, does not constitute discrimination on grounds of sex, contrary to Community law.

The second question

- 38 Since the second question is contingent upon the reply to the first question being in the affirmative, it is not necessary to give a reply to it.

Costs

- 39 The costs incurred by Denmark, the United Kingdom and 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 before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Court of Appeal by an order of 12 March 1984, hereby rules:

Articles 5 (1) of Directive No 76/207 must be interpreted as meaning that a contractual provision which lays down a single age for the dismissal of men and women under a mass redundancy involving the grant of an early retirement pension, whereas the normal retirement age is different for men and women, does not constitute discrimination on grounds of sex, contrary to Community law.

Mackenzie Stuart

Everling

Bahlmann

Bosco

Koopmans

Due

O'Higgins

Delivered in open court in Luxembourg on 26 February 1986.

P. Heim

A. J. Mackenzie Stuart

Registrar

President