OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 28 JANUARY 1981

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling by the Employment Appeal Tribunal, sitting in London. It raises questions of interpretation of Article 119 of the EEC Treaty in relation to the rights of part-time workers. On one view, it raises also, in relation to the rights of such workers, questions of interpretation of Council Directive 75/117/EEC, the "Equal Pay Directive".

The appellant in the proceedings before the Employment Appeal Tribunal is Mrs Jeanette Pauline Jenkins. The respondent is her employer, Kingsgate (Clothing Productions) Limited.

The respondent carries on business at Harlow, in Essex, and at Milton Constable, in Norfolk, as a manufacturer of ladies' suits and coats. Mrs Jenkins is employed at its factory at Harlow as a part-time machinist. She works about 30 hours a week. She is a skilled worker, capable of operating, and in fact operating in her work, a variety of machines, such as button-holing machines, basting machines and so forth.

We are not concerned, in this case, with the situation at the respondent's Milton Constable factory, where, it appears, there are no part-time workers.

At its Harlow factory the respondent employs around 90 people. According to particulars given by the respondent to the Industrial Tribunal before which the case came in the first instance, there were at that time at that factory 83 full-time workers, of which 34 were men and 49 were women. Their normal working week was 40 hours. There were also six part-time workers, of which five (including Mrs Jenkins) were women and one was a man, Mr A. Kreitzmann. He was regarded as an exceptional case. He had recently retired and had, unusually, been allowed to stay on beyond normal retiring age. He was a skilled craftsman capable of doing almost all jobs in the factory. The arrangement between him and the respondent was that, for a trial period, he should work 16 hours a week. We have not been told what happened at the end of the trial period.

Before November 1975 the respondent paid its male and female employees at different rates, but there was no difference in the hourly rates of pay of full-time and part-time workers, male or female. The British legislation about equal treatment of male and female employees (consisting essentially of the *Equal Pay Act 1970*, as amended, and of part of the *Sex Discrimination Act 1975*) entered into force on 29 December 1975. In that November, the respondent, after negotiations with its own staff association and with the relevant trade union, the National Union of Tailors

and Garment Workers, introduced new rates of pay, under which full-time workers of either sex were paid at the same hourly rate, as were part-time workers of either sex. Part-time workers — that is those working for fewer than 40 hours a week — were, however, under those rates, paid 10% less per hour than full-time workers. That lower hourly rate was also applicable to any employee who, although engaged as a full-time worker, persistently failed to work 40 hours a week. On Saturday mornings, "overtime" was available to both full-time and part-time workers at premium rates.

In the result, as from November 1975, all the respondent's employees, whether men or women, were paid at the same hourly rates, except that part-timers were paid 10% less per hour. That applied to Mrs Jenkins and to the other female part-timers at Harlow. It also applied to Mr Kreitzmann.

Ample material has been placed before us to show that, in the Community as a whole, about 90% of part-time workers are women, mostly married women with family responsibilities. That material consists, in the main, of an Opinion of the Economic and Social Committee dated 1 June 1978 on part-time employment and its effects (OJ C 269/56 of 13 November 1978), an article on "Part-time employment in the European Community" published by the International Labour Organization in the International Labour Review for May-June 1979 (Vol. 118, No 3, p. 299), an article on "Part-time working in Great Britain" published in the British Department of Employment Gazette for July 1979 (p. 671) and a Communication from the Commission to the Standing Committee on Employment dated 17 July 1980 entitled "Voluntary part-time work" (COM(80) 405 final). The proportion of women among part-time workers varies from Member State to Member State. If one takes, for example, the figures resulting from the 1977 "Labour force sample survey" (Table 3 annexed to the Commission's Communication) the proportion was highest in Germany and the United Kingdom (93%), about average in Denmark and Belgium (91% and 88%), lower in France and the Netherlands (81%) and lowest in Ireland and Italy (68% and 67%). There are no figures for Luxembourg. The low figures for Ireland and Italy appear to be connected with the fact that part-time work is less widespread in countries where the employment rate for women is low (see the Commission's Communication at pp. 3-4). The proportion varies also from one industry to another, being, it seems, lowest in agriculture and highest in the service industries. In general male part-time workers tend to be students, or elderly or partially disabled.

At the close of the written procedure the Court asked the Commission a question of which the purpose was to ascertain whether any Member State had legislation requiring the pay of part-time workers to be proportional to the pay of full-time workers. The Commission's answer, which was based on the replies to enquiries that it had made of governments, employers' organizations

and trade unions in the Member States, showed that no Member State had such legislation, though the French Government had, in September 1980, adopted a draft bill for it. The answer showed also, however, that in many Member States collective bargaining had in general achieved that result. In Italy it had even achieved, in certain cases, pay for part-time work proportionally higher than pay for full-time work. Only in the United Kingdom was it acknowledged that it was not uncommon for part-time work to be paid at lower hourly rates.

The present litigation was initiated by an application made by Mrs Jenkins to the Industrial Tribunal on 3 October 1978.

Community law does not appear to have been mentioned in the proceedings before that Tribunal. Mrs Jenkins rested her case there on the British legislation. She alleged that she was engaged on like work with a full-time male machinist of the same grade and that the failure to pay her the same basic hourly rate contravened that legislation. The respondent conceded that Mrs Jenkins was engaged on like work with the man. It relied for its defence on a provision in the British legislation, Section 1 (3) of the *Equal Pay Act 1970* as amended by the *Sex Discrimination Act 1975*, of which the effect is to exempt from the operation of that legislation "a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his". The respondent's case was that the reason why it paid part-time workers at a lower rate than full-time workers had nothing to do with their sex but was because it wished to discourage absenteeism in its factory and to encourage all its employees (including Mrs Jenkins) to work a full 40-hour week, so that its machinery should be used for as many hours every day as was possible.

The Industrial Tribunal, after hearing the evidence of a number of witnesses, found the respondent's case proved and accordingly upheld its defence. The Tribunal held that, since Mrs Jenkins was working only 75 % of the hours that the respondent wished her to work, there was a material difference, other than of sex, between her case and the man's, and that the different rate of pay was therefore justified. The Tribunal, however, remarked that, whilst that was its conclusion as a matter of law, if different rates of pay were legally payable to part-time workers and full-time workers, "this in itself smacks of inequality among the sexes because by the very nature of things the part-time workers are bound to be mostly women".

It is from that decision that Mrs Jenkins now appeals to the Employment Appeal Tribunal.

Before the Employment Appeal Tribunal Counsel for Mrs Jenkins conceded that, having regard to the findings of the Industrial Tribunal and to certain earlier decisions of the Employment Appeal

Tribunal itself, he could not succeed there on the basis of the British legislation alone. He advanced instead arguments based on Article 119 of the Treaty and Article 1 of the Equal Pay Directive.

Such are the circumstances in which the Employment Appeal Tribunal has referred to this Court the following questions:

"1. Does the principle of equal pay, contained in Article 119 of the EEC Treaty and Article 1 of the [Equal Pay Directive] require that pay for work at time rates shall be the same, irrespective:

(a) of the number of hours worked each week, or

(b) of whether it is of commercial benefit to the employer to encourage the doing of the maximum possible hours of work and consequently to pay a higher rate to workers doing 40 hours per week than to workers doing fewer than 40 hours per week?

2. If the answer to Question 1 (a) or (b) is in the negative, what criteria should be used in determining whether or not the principle of equal pay applies where there is a difference in the time rates of pay related to the total number of hours worked each week?

3. Would be answer to Question 1 (a) or (b) or 2 be different (and, if so, in what respects) if it were shown that a considerably smaller proportion of female workers than of male workers is able to perform the minimum number of hours each week required to quality for the full hourly rate of pay?

4. Are the relevant provisions of Article 119 of the EEC Treaty or of Article 1 of the said directive, as the case may be, directly applicable in Member States in the circumstances of the present case?"

We have not had the benefit of any argument on behalf of the respondent. Its reports and accounts for the period ended 30 November 1978 are before us, and they show it to be a comparatively small company, which is not in a strong financial position. It is probably typical of many businesses in the clothing trade. It took the view that, without legal aid, it could not afford to be represented before this Court. An application for legal aid made on its behalf was, however, turned down by the First Chamber.

Mrs Jenkins, on the other hand, has been supported throughout the proceedings by her trade union, the National Union of Tailors and Garment Workers, and by the Equal Opportunities Commission, which, as Your Lordships know, is a public body established in Great Britain by the *Sex Discrimination Act 1975*, with power, among other things, to provide assistance in legal proceedings having as their purpose the elimination of discrimi-

nation between men and women. Her case has, consequently, been very fully presented to us.

Otherwise we have had the benefit only of written observations from the Belgian and British Governments and of written and oral observations from the Commission. The observations of the Belgian Government were very short, and purely factual as to the legal position of part-time workers in Belgium. Those of the British Government broadly speaking supported the respondent, whilst those of the Commission supported Mrs Jenkins.

I propose to begin, as did Counsel in their arguments, by dealing with the Employment Appeal Tribunal's questions in so far as they relate to Article 119 of the Treaty, and to leave for consideration later the possible relevance of Article 1 of the Equal Pay Directive.

The Employment Appeal Tribunal's first question reflects what I may perhaps describe as a two-limbed argument that was put in the forefront of Mrs Jenkins's case, and which was supported by the Commission. That argument was to the effect, firstly, that the very wording of Article 119 required that pay for work at time rates should be the same irrespective of the number of hours worked each week; and secondly that, under Article 119, any commercial benefit that an employer might derive from encouraging full-time work by paying higher rates for it was irrelevant.

The first limb of the argument was, as I understood it, based on the terms of the third paragraph of Article 119, which are:

"Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job."

The argument was based on the assumption that the phrase "the same job" in subparagraph (b) connoted that a "job" was the same whether it was part-time or full-time. To make that assumption seems to me, however, tantamount to treating the phrase "the same job" in that subparagraph as having the same meaning as the phrase "equal work" in the first paragraph of Article 119 and as the phrase "the same work" in subparagraph (a) of the third paragraph.

There is no doubt that Mrs Jenkins was doing "equal work" with the full-time employees in her grade. Indeed, if she was not, her case would not start. That being so, to say that, although they were employed full-time and she only part-time, their "jobs" were the same seems to me to imply that "equal work" and "the same job" are used in Article 119 as synonymous phrases.

No significance attaches, in my opinion, to the change from "equal work" in the first paragraph of Article 119 to "the

same work" in subparagraph (a) of the third paragraph, for that change occurs only in the English and Irish texts of the Treaty. But the change from "equal" (or "the same") "work" to "the same job" occurs in all the texts of the Treaty and appears to be deliberate. Your Lordships may find it helpful to see the equivalents in the other languages. They are:

— *Danish:* "samme arbejde" and "samme slags arbejde";

— *German:* "gleiche Arbeit" and "gleicher Arbeitsplatz";

— *Greek:* "omoia ergasia" and "omoia thesi";

— *French:* "même travail" and "même poste de travail";

— *Irish:* "obair chomhionann" and "ceann oibre céanna";

— *Italian:* "stesso lavoro" and "posto di lavoro uguale";

— *Dutch:* "gelijke arbeid" and "zelfde functie".

I do not therefore think it possible to hold that the wording of Article 119 compels the conclusion contended for on behalf of Mrs Jenkins and of the Commission. That wording is at least consistent with the view that a part-time worker and a full-time worker do not have "the same job", even though they may do "equal work".

The submissions put forward on behalf of Mrs Jenkins and on behalf of the Commission in support of the second limb of the argument differed.

Counsel for Mrs Jenkins relied on what he called the *"Clay Cross* approach", after the decision of the Court of Appeal of England and Wales in *Clay Cross (Quarry Services) Ltd* v *Fletcher* [1979] ICR 1. In that case a woman sales clerk claimed equality of pay with a man who had been recruited later than she to do like work. Indeed she had had to show him how to do his work. He was paid at a higher weekly rate than she was because, when the vacancy that he filled had arisen, he had been the only suitable applicant for it and had required to be paid the same wage as he had earned in his previous job. The employers had been indifferent whether they recruited a man or a woman and contended, under Section 1 (3) of the *Equal Pay Act 1970* as amended, that the difference between the woman's contract and the man's was due to a material difference, other than the difference of sex, between her case and his. The Court of Appeal rejected that contention on grounds the essence of which Lord Denning expressed as follows:

"The employer may not intend to discriminate against the woman by paying her less: but, if the result of his actions is that she is discriminated against, then his conduct is unlawful, whether he intended it or not.

...

An employer cannot avoid his obligations under the Act by saying: 'I paid him more because he asked for more,' or 'I paid her less because she was willing to come for less'. If any such excuse were permitted, the Act would be a dead letter. Those are the very reasons why there was unequal pay before the statute.

They are the very circumstances in which the statute was intended to operate."

Those considerations are, in my opinion, as applicable in the context of Article 119 of the Treaty as they are in the context of the British legislation with which Lord Denning was concerned. But I can find no support in the *Clay Cross* case for the wide proposition that Counsel for Mrs Jenkins sought to derive from it, that any commercial benefit that an employer may obtain from differentiating between categories of workers is irrelevant. To my mind the *Clay Cross* case, the judgments in which have to be read in the light of its facts, is not here in point. It would be otherwise if the inference were open that the real reason why the respondent paid its part-time workers was that the part-time workers were generally women whose bargaining position was weaker than that of men, or that that differentiation was a hangover from the days when the respondent paid all its female employees at lower rates than its male employees. Having regard, however, to the findings of the Industrial Tribunal, no such inference is open.

The Commission's submissions in support of the second limb of this argument I found unconvincing, partly because their content was political rather than legal, and partly because they seemed to be based on an assumption that discrimination between full-time and part-time workers must always be equated to discrimination between men and women, regardless of the circumstances of any particular case. One might, after all, get a case where, owing to the peculiarities of a particular industry, the part-time workers were predominantly or exclusively men and the same was true of the full-time workers. Any discrimination between them could hardly then be "based on sex".

In my opinion, what the whole argument put forward on behalf of Mrs Jenkins and of the Commission on the first question overlooked was that Article 119 is concerned, and concerned only, with discrimination "based on sex". It is not concerned with discrimination based on any other criterion. The fact is that the respondent, at the relevant time, had at its Harlow factory more full-time female employees than full-time male employees, and that the full-time employees of either sex were paid at the same rates. Moreover, the Industrial Tribunal found as a fact, on the basis of the evidence that it had heard, that the respondent had genuine reasons for paying its part-time employees at a lesser hourly rate than its full-time employees, regardless of their sex.

In Case 129/79 *Macarthys Ltd* v *Smith* [1980] ECR 1275 this Court said:

"It must be acknowledged, however, that... it cannot be ruled out that a difference in pay between two workers occupying the same post but at different periods in time may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex. That is a question of fact which it is for the court or tribunal to decide." (Paragraph 12 of the judgment.)

In my opinion the same is true of a difference in hourly rates of pay between two workers doing like work for a different number of hours each week.

I turn to the Employment Appeal Tribunal's second and third questions, which I find it convenient to deal with together.

Those questions, particularly the third, reflect an alternative argument that was put forward on behalf of Mrs Jenkins in case her primary argument should fail. This was to the effect that, if it were shown that a given condition of obtaining equal pay for equal work, such as the doing of a minimum number of hours each week, had a disproportionate adverse impact upon workers of one sex, the application of such a condition would be contrary to the principle of equal pay unless it were shown to be "manifestly related to the services in question". At the hearing Counsel for Mrs Jenkins explained that what that proposition meant "in plain language" was that if, as was clearly the case, women were less able to work 40 hours a week than men, because of their family responsibilities, the requirement that an employee should work 40 hours a week to earn the full hourly rate must obviously hit, in a disproportionate way, at women, compared with men. That did not necessarily mean that there was discrimination, but it did mean that there was prima-facie discrimination in effect, which required "some special justification from the employer". Counsel called this the "*Griggs* approach" after the decision of the Supreme Court of the United States in *Griggs* v *Duke Power Company* (1971) 401 US 424.

The Commission would have none of that approach, which it described as a "half-way house" and the adoption of which, it said, would lead to a system that "could well be difficult to monitor in practice".

None the less it is in my opinion the correct approach. It is the only approach that reconciles the need to prevent discrimination against women disguised as differentiation between full-time and part-time workers with the need to prevent injustice to an employer who differentiates between full-time and part-time workers for sound reasons unconnected with their sex. Nor am I impressed by the argument that that approach entails a system that would be difficult to monitor. It leaves the monitoring to the national courts, who are, so it seems to me, best qualified to be entrusted with it.

As has been observed more than once, the Supreme Court of the United States and this Court often find themselves confronted with similar problems. Although of course the provisions of the United States Civil Rights Act of 1964 that were in question in the *Griggs* case were worded differently from Article 119 of the Treaty, their essential purpose was the same, except in so far as the provision in question in the *Griggs* case

was about racial discrimination, not sex discrimination. Indeed in *Dothard* v *Rawlinson* (1977) 433 US 321 the Supreme Court applied similar reasoning to sex discrimination. I draw considerable comfort from finding that my conclusion accords with the conclusions of that court in those cases.

I draw similar comfort from the fact that that conclusion accords with a familiar line of authority in this Court, Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] 1 ECR 153, Case 61/77 *Commission* v *Ireland* [1978] ECR 417 and Case 237/78 *CRAM* v *Toia* [1979] ECR 2645. Those cases were of course about discrimination on grounds of nationality, not of sex. They establish that a rule which, on the face of it, differentiates between people on the basis of a criterion other than nationality none the less infringes a provision of Community law forbidding such discrimination if its application leads in fact to the same result, unless the differentiation is justifiable on "objective" grounds. I can see no reason for applying a different principle to sex discrimination.

On that footing, the Employment Appeal Tribunal's fourth question boils down to this: do the provisions of Article 119 of the Treaty have direct effect in the Member States in so far as an employer who pays different time rates to full-time workers and to part-time workers is required, by those provisions, to show that the differentiation does not originate in discrimination between men and women but is justified on objective grounds?

To my mind the answer to that question is obviously "Yes". I have already indicated that, in my view, the national courts are best qualified to apply the test in each case. Nor is any further Community legislation or national legislation needed to enable them to do so. The test is perfectly clear. Its application calls only for consideration of the facts of each case.

A difficulty as to that is, however, caused by certain dicta of the Court in Case 43/75 the *second Defrenne* case [1976] 1 ECR 455 and in *Macarthys Ltd* v *Smith* (already cited). I drew attention to the difficulty in my opinion in Case 69/80 *Worringham* v *Lloyds Bank Ltd*, which Your Lordships are still considering. Those dicta could be interpreted as meaning that the test for determining whether there is "covert" discrimination, in the sense meant in the *Sotgiu*, *Commission* v *Ireland* and *Toia* cases, is the same as the test for identifying the kind of discrimination as regards which Article 119 has no direct effect. In my opinion the two tests are not the same and I doubt if the Court can ever have intended to say that they were. Counsel for Mrs Jenkins told us at the hearing, in answer to a question of mine, that he thought the problem was one of terminology, and I suspect he was right. The confusion has mostly arisen from

the English texts of the relevant judgments of the Court, where in particular the terms "overt", on the one hand, and "disguised", on the other, are each used, in relation to discrimination, to connote what in my opinion are different notions. If one examines the French texts of those judgments, one sees that the Court has consistently used the terms "ostensibles" and "dissimulées" in expressing the dichotomy in the *Sotgiu*, *Commission* v *Ireland* and *Toia* cases, whilst in the *second Defrenne* case and in *Macarthys* v *Smith* it used the contrasting phrases "directes et ouvertes" and "indirectes et déguisés". None the less, it does not, with respect, seem to me that the latter phrase, however one renders it in English, is appropriate to describe those kinds of discrimination as regards which Article 119 does not have direct effect. Article 119 is, in my opinion, more accurately described as not having direct effect where a court cannot apply its provisions by reference to the simple criteria that those provisions themselves lay down and where, consequently, implementing legislation, either Community or national, is necessary to lay down the relevant criteria. It would, if I may respectfully say so, be helpful if, in the judgment in this case, or perhaps in the judgment in *Worringham* v *Lloyds Bank*, Your Lordships were to clarify that point.

Lastly I must deal with Article 1 of the Equal Pay Directive. I can do so shortly. The first paragraph of that article provides:

"The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called 'principle of equal pay', means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration."

It does not seem to me that that, for present purposes, adds anything to what is already in Article 119. The second paragraph is about job classification systems and is not in point in this case.

In the result I am of the opinion that, in answer to the questions referred to the Court by the Employment Appeal Tribunal, Your Lordships should rule as follows:

(1) Neither Article 119 of the EEC Treaty nor Article 1 of the Equal Pay Directive requires that pay for work at time rates shall be the same irrespective of the number of hours worked each week and of any benefit that the employer may derive from encouraging full-time work;

(2) Where there is a difference in time rates of pay related to the total number of hours worked each week, the provisions of Article 119 of the

Treaty require the employer to show that the difference is justified on objective grounds unconnected with any discrimination on the basis of sex;

(3) In so far as they import that requirement, the provisions of Article 119 have direct effect in Member States in the sense that they confer on individuals rights that national courts must uphold;

(4) Article 1 of the Equal Pay Directive does not affect the operation of Article 119 in those respects.