

JUDGMENT OF THE COURT

26 February 1986 *

In Case 152/84

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

M. H. Marshall

and

Southampton and South-West Hampshire Area Health Authority (Teaching)

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. Loutherman, Administrator

after considering the observations submitted on behalf of

the appellant in the main proceedings, by S. Grosz, Solicitor, and M. Beloff, QC during the written procedure and by M. Beloff, QC, during the oral procedure,

the respondent, by C. H. Brown, Solicitor, Winchester, during the written procedure, and by A. Hillier, Barrister-at-law, during the oral procedure,

* Language of the Case: English.

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 Principal Legal Adviser, A. Toledano Laredo, and J. R. Currall, a member of its Legal Department, acting as Agents,

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, L 39, p. 40).
- 2 The questions were raised in the course of proceedings between Miss M. H. Marshall (hereinafter referred to as 'the appellant') and Southampton and South-West Hampshire Area Health Authority (Teaching) (hereinafter referred to as 'the respondent') 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, who was born on 4 February 1918, was employed by the respondent from June 1966 to 31 March 1980. From 23 May 1974 she worked under a contract of employment as Senior Dietician.

- 4 On 31 March 1980, that is to say approximately four weeks after she had attained the age of 62, the appellant was dismissed, notwithstanding that she had expressed her willingness to continue in the employment until she reached the age of 65, that is to say until 4 February 1983.
- 5 According to the order for reference, the sole reason for the dismissal was the fact that the appellant was a woman who had passed 'the retirement age' applied by the respondent to women.
- 6 In that respect it appears from the documents before the Court that the respondent has followed a general policy since 1975 that 'the normal retirement age will be the age at which social security pensions become payable'. The Court of Appeal states that, although that policy was not expressly mentioned in the appellant's contract of employment, it none the less constituted an implied term thereof.
- 7 Sections 27 (1) and 28 (1) of the Social Security Act 1975, the United Kingdom legislation governing pensions, provide that State pensions are to be granted to men from the age of 65 and to women from the age of 60. However, the legislation does not impose any obligation to retire at the age at which the State pension becomes payable. Where an employee continues in employment after that age, payment of the State pension or of the pension under an occupational pension scheme is deferred.
- 8 However, the respondent was prepared, in its absolute discretion, to waive its general retirement policy in respect of a particular individual in particular circumstances and it did in fact waive that policy in respect of the appellant by employing her for a further two years after she had attained the age of 60.
- 9 In view of the fact that she suffered financial loss consisting of the difference between her earnings as an employee of the respondent and her pension and since she had lost the satisfaction she derived from her work, the appellant instituted proceedings against the respondent before an Industrial Tribunal. She contended that her dismissal at the date and for the reason indicated by the respondent constituted discriminatory treatment by the respondent on the ground of sex and, accordingly, unlawful discrimination contrary to the Sex Discrimination Act and Community law.

- 10 The Industrial Tribunal dismissed the appellant's claim in so far as it was based on infringement of the Sex Discrimination Act, since section 6 (4) of that Act permits discrimination on the ground of sex where it arises out of 'provision in relation to retirement'; the Industrial Tribunal took the view that the respondent's general policy constituted such provision. However, the claim that the principle of equality of treatment laid down by Directive No 76/207 had been infringed was upheld by the Industrial Tribunal.
- 11 On appeal to the Employment Appeal Tribunal that decision was confirmed as regards the first point but was set aside as regards the second point on the ground that, although the dismissal violated the principle of equality of treatment laid down in the aforementioned directive, an individual could not rely upon such violation in proceedings before a United Kingdom court or tribunal.
- 12 The appellant appealed against that decision to the Court of Appeal. Observing that the respondent was constituted under section 8 (1) A (b) of the National Health Service Act 1977 and was therefore an 'emanation of the State', the Court of Appeal referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Whether the respondent's dismissal of the appellant after she had passed her 60th birthday pursuant to the policy [followed by the respondent] and on the grounds only that she was a woman who had passed the normal retiring age applicable to women was an act of discrimination prohibited by the Equal Treatment Directive.

(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 or tribunals notwithstanding the inconsistency (if any) between the directive and section 6 (4) of the Sex Discrimination Act.'

Relevant legal provisions

- 13 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".

14 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'.

15 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.'

Article 5 (2) thereof provides that:

'To this end, Member States shall take the measures necessary to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;
- (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.'

16 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.’

17 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 the 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).’

18 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’.

....

19 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.

- 20 Observations were submitted to the Court by the United Kingdom and the Commission, in addition to the appellant and the respondent.

The first question

- 21 By the first question the Court of Appeal seeks to ascertain whether or not Article 5 (1) of Directive No 76/207 must be interpreted as meaning that a general policy concerning dismissal, followed by a State authority, involving the dismissal of a woman solely because she has attained or passed the qualifying age for a State pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to that directive.
- 22 The appellant and the Commission consider that the first question must be answered in the affirmative.
- 23 According to the appellant, the said age limit falls within the term 'working conditions' within the meaning of Articles 1 (1) and 5 (1) of Directive No 76/207. A wide interpretation of that term is, in her opinion, justified in view of the objective of the EEC Treaty to provide for 'the constant improving of the living and working conditions of [the Member States'] peoples' and in view of the wording of the prohibition of discrimination laid down in the above-mentioned articles of Directive No 76/206 and in Article 7 (1) of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).
- 24 The appellant argues furthermore, that the elimination of discrimination on grounds of sex forms part of the *corpus* of fundamental human rights and therefore of the general principles of Community law. In accordance with the case-law of

the European Court of Human Rights, those fundamental principles must be given a wide interpretation and, conversely, any exception thereto, such as the reservation provided for in Article 1 (2) of Directive No 76/207 with regard to social security, must be interpreted strictly.

- 25 In addition, the appellant considers that the exception provided for in Article 7 (1) of Directive No 79/7 with regard to the determination of pensionable age for the purposes of granting old-age and retirement pensions, is not relevant since, unlike Case 19/81 (*Burton v British Railways Board* [1982] ECR 555), this case does not relate to the determination of pensionable age. Moreover, in this case there is no link between the contractual retirement age and the qualifying age for a social security pension.
- 26 The Commission emphasizes that neither the respondent's employment policy nor the State social security scheme makes retirement compulsory upon a person's reaching pensionable age. On the contrary, the provisions of national legislation take into account the case of continued employment beyond the normal pensionable age. In those circumstances, it would be difficult to justify the dismissal of a woman for reasons based on her sex and age.
- 27 The Commission also refers to the fact that the Court has recognized that equality of treatment for men and women constitutes a fundamental principle of Community law.
- 28 The respondent maintains, in contrast, that account must be taken, in accordance with the *Burton* case, of the link which it claims exists between the retirement ages imposed by it in the context of its dismissal policy, on the one hand, and the ages at which retirement and old-age pensions become payable under the State social security scheme in the United Kingdom, on the other. The laying down of different ages for the compulsory termination of a contract of employment merely reflects the minimum ages fixed by that scheme, since a male employee is permitted to continue in employment until the age of 65 precisely because he is not protected by the provision of a State pension before that age, whereas a female employee benefits from such protection from the age of 60.

- 29 The respondent considers that the provision of a State pension constitutes an aspect of social security and therefore falls within the scope not of Directive No 76/207 but of Directive No 79/7, which reserves to the Member States the right to impose different ages for the purpose of determining entitlement to State pensions. Since the situation is therefore the same as that in the *Burton* case, the fixing by the contract of employment of different retirement ages linked to the different minimum pensionable ages for men and women under national legislation does not constitute unlawful discrimination contrary to Community law.
- 30 The United Kingdom, which also takes that view, maintains, however, that treatment is capable of being discriminatory even in respect of a period after retirement in so far as the treatment in question arises out of employment or employment continues after the normal contractual retirement age.
- 31 The United Kingdom maintains, however, that in the circumstances of this case there is no discrimination in working conditions since the difference of treatment derives from the normal retirement age, which in turn is linked to the different minimum ages at which a State pension is payable.
- 32 The Court observes in the first place that the question of interpretation which has been referred to it does not concern access to a statutory or occupational retirement scheme, that is to say the conditions for payment of an old-age or retirement pension, but the fixing of an age limit with regard to the termination of employment pursuant to a general policy concerning dismissal. The question therefore relates to the conditions governing dismissal and falls to be considered under Directive No 76/207.
- 33 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.
- 34 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 dismissal of workers pursuant to an

employer's general policy concerning retirement falls within the term 'dismissal' construed in that manner, even if the dismissal involves the grant of a retirement pension.

- 35 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 tied 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.
- 36 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 the possible consequences thereof for other benefits.
- 37 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.
- 38 Consequently, the answer to the first question referred to the Court by the Court of Appeal must be that Article 5 (1) of Directive No 76/207 must be interpreted as meaning that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a State pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to that directive.

The second question

- 39 Since the first question has been answered in the affirmative, it is necessary to consider whether Article 5 (1) of Directive No 76/207 may be relied upon by an individual before national courts and tribunals.
- 40 The appellant and the Commission consider that that question must be answered in the affirmative. They contend in particular, with regard to Articles 2 (1) and 5 (1) of Directive No 76/207, that those provisions are sufficiently clear to enable national courts to apply them without legislative intervention by the Member States, at least so far as overt discrimination is concerned.
- 41 In support of that view, the appellant points out that directives are capable of conferring rights on individuals which may be relied upon directly before the courts of the Member States; national courts are obliged by virtue of the binding nature of a directive, in conjunction with Article 5 of the EEC Treaty, to give effect to the provisions of directives where possible, in particular when construing or applying relevant provisions of national law (judgment of 10 April 1984 in Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891). Where there is any inconsistency between national law and Community law which cannot be removed by means of such a construction, the appellant submits that a national court is obliged to declare that the provision of national law which is inconsistent with the directive is inapplicable.
- 42 The Commission is of the opinion that the provisions of Article 5 (1) of Directive No 76/207 are sufficiently clear and unconditional to be relied upon before a national court. They may therefore be set up against section 6 (4) of the Sex Discrimination Act, which, according to the decisions of the Court of Appeal, has been extended to the question of compulsory retirement and has therefore become ineffective to prevent dismissals based upon the difference in retirement ages for men and for women.
- 43 The respondent and the United Kingdom propose, conversely, that the second question should be answered in the negative. They admit that a directive may, in certain specific circumstances, have direct effect as against a Member State in so

far as the latter may not rely on its failure to perform its obligations under the directive. However, they maintain that a directive can never impose obligations directly on individuals and that it can only have direct effect against a Member State *qua* public authority and not against a Member State *qua* employer. As an employer a State is no different from a private employer. It would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer.

- 44 With regard to the legal position of the respondent's employees the United Kingdom states that they are in the same position as the employees of a private employer. Although according to United Kingdom constitutional law the health authorities, created by the National Health Service Act 1977, as amended by the Health Services Act 1980 and other legislation, are Crown bodies and their employees are Crown servants, nevertheless the administration of the National Health Service by the health authorities is regarded as being separate from the Government's central administration and its employees are not regarded as civil servants.
- 45 Finally, both the respondent and the United Kingdom take the view that the provisions of Directive No 76/207 are neither unconditional nor sufficiently clear and precise to give rise to direct effect. The directive provides for a number of possible exceptions, the details of which are to be laid down by the Member States. Furthermore, the wording of Article 5 is quite imprecise and requires the adoption of measures for its implementation.
- 46 It is necessary to recall that, according to a long line of decisions of the Court (in particular its judgment of 19 January 1982 in Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.
- 47 That view is based on the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not

adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

- 48 With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.
- 49 In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.
- 50 It is for the national court to apply those considerations to the circumstances of each case; the Court of Appeal has, however, stated in the order for reference that the respondent, Southampton and South West Hampshire Area Health Authority (Teaching), is a public authority.
- 51 The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent *qua* organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive in national law.
- 52 Finally, with regard to the question whether the provision contained in Article 5 (1) of Directive No 76/207, which implements the principle of equality of treatment set out in Article 2 (1) of the directive, may be considered, as far as its

contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.

- 53 It is necessary to consider next whether the prohibition of discrimination laid down by the directive may be regarded as unconditional, in the light of the exceptions contained therein and of the fact that according to Article 5 (2) thereof the Member States are to take the measures necessary to ensure the application of the principle of equality of treatment in the context of national law.
- 54 With regard, in the first place, to the reservation contained in Article 1 (2) of Directive No 76/207 concerning the application of the principle of equality of treatment in matters of social security, it must be observed that, although the reservation limits the scope of the directive *ratione materiae*, it does not lay down any condition on the application of that principle in its field of operation and in particular in relation to Article 5 of the directive. Similarly, the exceptions to Directive No 76/207 provided for in Article 2 thereof are not relevant to this case.
- 55 It follows that Article 5 of Directive No 76/207 does not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of operation or to subject it to conditions and that that provision is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which does not conform to Article 5 (1).
- 56 Consequently, the answer to the second question must be that Article 5 (1) of Council Directive No 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5 (1).

Costs

- 57 The costs incurred by 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:

- (1) Article 5 (1) of Directive No 76/207 must be interpreted as meaning that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained or passed the qualifying age for a State pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to that directive.
- (2) Article 5 (1) of Council Directive No 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5 (1).

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