

minimum subsistence income for beneficiaries who have a dependent spouse or children, by means of a supplement to the social security benefit which compensates for the greater burdens they bear in comparison with single persons.

2. Article 4 (1) of Directive 79/7/EEC is to be interpreted as meaning that legislation

under which the guarantee previously applicable to all workers suffering from an incapacity for work whose income was approximately equal to the statutory minimum wage that their (net) benefits would be at least equal to the (net) statutory minimum wage is restricted to persons having a dependent spouse or child or whose spouse has a very small income is compatible with that provision.

REPORT FOR THE HEARING delivered in Case 30/85 *

I — Legal framework

A — *National law*

In the Netherlands, benefits payable in respect of incapacity for work are governed in particular by the *Wet op de Arbeidsongeschiktheidsverzekering* (Law on Insurance against Incapacity for Work, hereinafter referred to as 'the Insurance Law') and the *Algemene Arbeidsongeschiktheidswet* (General Law on Incapacity for Work, hereinafter referred to as 'the General Law').

The Insurance Law came into effect on 1 July 1967. That law introduced insurance for employed persons against loss of salary due to incapacity for work caused by illness or accident. The idea underlying the Insurance Law is that of linking the benefit to the salary which the beneficiary would have earned if he had not suffered the incapacity for work (in fact, his last salary).

Article 14 of the Insurance Law, as subsequently amended, guaranteed that the net benefits awarded thereunder would be at least equal to the net amount of the statutory minimum wage established by the Law of 17 December 1968. That law grants entitlement irrespective of sex, civil status or family status.

The General Law came into effect on 1 October 1976. Like the Insurance Law, it provided for benefits in respect of incapacity for work. In principle, all residents of the Netherlands are insured under the General Law (except married women, under the version of the law in force until 1 October 1978), whereas under the Insurance Law only workers, as defined by that law, are insured.

Since its entry into force, the General Law has provided for a basic benefit to which the Insurance Law adds an additional benefit

* Language of the Case: Dutch.

for employed persons whose previous salary exceeds the basic amounts laid down under the General Law. Under that law, basic amounts were laid down for various categories of beneficiaries, irrespective of their previous income.

The 'general' basic amount entitles beneficiaries suffering from a total incapacity for work to a benefit equal to 70% of the net minimum wage.

The 'high' basic amount, which gives an increase equal to 15 or 30% of the net legal minimum wage respectively (Article 10 (4) of the General Law) applies exclusively to the following categories of persons:

- (a) A married person entitled to benefits, where the sum of the income earned from or in connection with work done in pursuit of a trade or occupation by that person and by his or her spouse on the date on which entitlement arises to benefits in respect of incapacity for work does not exceed 15% of the basic amount applicable on the aforementioned date, as provided at the beginning of this paragraph.
- (b) An unmarried person entitled to benefits with a child or an adopted child under 18 years of age who is a member of that person's household or is chiefly supported by that person, where the income earned from or in connection with work done in pursuit of a trade or occupation on the date on which entitlement arises to benefits in respect of incapacity for work does not exceed 15% of the basic amount applicable on the aforementioned date, as provided at the beginning of this paragraph.

The purpose of the amendment to the General Law made by the Law of 20

December 1979, which took effect from 1 October 1978, is to ensure equal rights to benefits for men and women in regard to incapacity for work (irrespective of sex, marital status or family situation) where the incapacity arose on or after 1 October 1978. Article VI of the transitional provisions applying during the introduction of the new rules under the General Law provided that a benefit under that law would also be paid to women suffering from an incapacity for work which arose on or after 1 October 1975.

As a result of the Law of 29 December 1982, the guarantee contained in Article 14 of the Insurance Law was withdrawn. That guarantee now applies only to those entitled to obtain a benefit under the General Law calculated on the basis of the 'high' basic amount provided for in Article 10 (4).

Article III of the Law of 29 December 1982 (as amended by the Laws of 30 December 1983, 28 June 1984 and 19 December 1984) lays down transitional rules. It provides for the entry into force in stages of the specific consequences for persons entitled to benefits under the Insurance Law who are receiving under that law a benefit which began to be paid before 1 January 1983 and is fixed at the level of the statutory minimum wage.

B — Directive 79/7/EEC

Directive 79/7/EEC of 19 December 1978 (Official Journal 1979, L 6, p. 24) contains the provisions referred to in Article 1 (2) of Directive 76/207/EEC 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), concerning the progressive implementation of the principle of equal treatment in matters of social security.

Article 10 of Directive 79/7 provides that the directive is addressed to the Member States; it is based on the EEC Treaty, in particular Article 235 thereof.

Article 1 of that directive provides that its purpose is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, thereafter referred to as 'the principle of equal treatment'. That principle is defined in Article 4 (1), which provides that: 'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly or indirectly by reference in particular to marital or family status, in particular as concerns:

- (i) the scope of the schemes and the conditions of access thereto,
- (ii) the obligation to contribute and the calculation of contributions,
- (iii) the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

For that purpose, Article 8 of the directive provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within six years of its notification, that is to say from 23 December 1978. Those measures were therefore to be adopted by 22 December 1984.

Article 5 provides that 'Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished'.

II — Facts and written procedure

The plaintiff in the main proceedings, who was born in 1928, worked without interruption for various employers from 1955 until September 1972, when she became incapable of working. From that date, she received benefits under the Insurance Law. Since the entry into force in 1975 of the provisions concerning the daily minimum wage, she has been entitled to a minimum benefit equal to the net amount of the statutory minimum wage.

By a letter of 18 June 1984, the defendant informed the plaintiff that as a result of the Law of 29 December 1982, her benefit under the Insurance Law would from 1 January 1984 be calculated not on the basis of the minimum daily wage under that law but on the basis of the wage which she earned before becoming incapacitated for work (which was lower): under the transitional measures, the reduction leading to the new level of benefit would take place in stages with reductions on 1 January and 1 July 1984.

However, another provision came into effect on 1 January 1984 (namely a new version of Article 97 of the General Law) which gave a right to benefits under the General Law to women receiving benefits under the Insurance Law in respect of an incapacity for work which had arisen before 1 October 1976 (the date on which the General Law came into force); they had previously been disqualified from receiving benefit under the General Law simply by virtue of being married. Consequently, with effect from 1 January 1984 Mrs Teuling became entitled to a minimum benefit under the General Law equal to 70% of the legal minimum wage once her benefit under the Insurance Law, calculated on the basis of the last salary which she earned before becoming incapacitated for work, was less than the benefit under the General Law.

As a result of all those amendments of Netherlands social security law, from 1 January 1984 Mrs Teuling was not able to obtain benefits equal to 100% of the statutory minimum wage. Her husband died in April 1984. The plaintiff in the main proceedings claims that during the period from 1 January to 1 April 1984 she was not able to obtain 'family support' supplements because account was taken of her husband's income. That constituted discrimination against her and is incompatible with Article 4 (1) of Council Directive 79/7 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 L 6, p. 24).

In accordance with Article 177 of the EEC Treaty, the Raad van Beroep, Amsterdam, referred the following questions to the Court by order of 4 February 1985:

1. Is a system of entitlement to benefits in respect of incapacity for work under which the amount of the benefit is determined in part by marital status and by the income earned from or in connection with work of the spouse, or by the existence of a dependent child, consistent with Article 4 (1) of Council Directive 79/7/EEC of 19 December 1978?
2. (a) Is the Law of 29 December 1982 (*Staatsblad* 737) abolishing the guarantee for all persons covered by the *Wet op de Arbeidsongeschiktheidsverzekering* [Law on Insurance against Incapacity for Work] that the (net) benefits are to be at least equal to the (net) statutory minimum wage, with the result that the guarantee now applies only to persons who satisfy the conditions of Article 10 (4) of the *Algemene Arbeidsongeschiktheids-wet* (General Law on Incapacity for Work), consistent with Article 4 (1) of the directive referred to in Question 1?
2. (b) Having regard to the period referred to in Article 8 of the directive and to the provisions of Article 5 thereof and Article 5 of the Treaty establishing the European Economic Community, is it relevant to the answer to be given to Question 2(a) that the said law was adopted on 29 December 1982 and entered into force partially on 1 January 1983, whilst provision is made for its material consequences to take effect in stages both before and after the expiry of the period referred to in Article 8 of the directive?
3. Are the provisions of Council Directive No 76/207/EEC of 9 February 1976 also relevant as regards the answers to the foregoing questions?
4. If Question 1 or Question 2(a), or both, are answered in the negative, does that mean that the relevant provision of Community law — which is thus deemed to have been infringed — may be relied upon directly by the persons concerned as against the national authorities?

The order for reference points out that the effect of the conditions for the award of benefits based on the 'high' basic amount is that considerably more (married) men than (married) women are entitled to benefits calculated in accordance with that basic amount. It also points out that unequal treatment of the kind resulting from the entry into force of the Law of 29 December 1982 also affects, proportionally, the group of people entitled to benefits under the Insurance Law who may fall within the scope of the provision concerning the minimum daily wage. Furthermore, it emphasizes that the Law of 29 December 1982 applies even beyond the period referred to in Article 8 of Directive 79/7/EEC and some of its substantive consequences are to take effect only after the expiry of that period.

The order for reference was received at the Court Registry on 6 February 1985.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted to the Court by the *Bedrijfsvereniging voor de Chemische Industrie*, the defendant in the main proceedings, represented by W. M. Levelt-Overmars, of the *Gemeenschappelijk Administratiekantoor*, by the Netherlands Government, represented by I. Verkade, Secretary-General at the Ministry of Foreign Affairs, and by the Commission of the European Communities, represented by J. Currall, a member of its Legal Department, acting as Agent, assisted by F. Herbert, of the Brussels Bar.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By order of 29 January 1986, adopted under Article 95 (1) and (2) of the Rules of Procedure, the Court assigned the case to the Sixth Chamber.

III — Written observations submitted to the Court

A — Questions 1 and 2(a)

1. The *Bedrijfsvereniging voor de Chemische Industrie*, the defendant in the main proceedings, proposes that the Court should reply to Questions 1 and 2(a) in the affirmative. In its view, the system of basic amounts laid down in Article 10 of the General Law is not as such incompatible with Article 4 of Directive 79/7/EEC. That system makes no distinction on the basis of sex because it guarantees the same supplement in respect of dependent spouses, regardless of their sex, and family members. None the less it points out that at the present time, when Dutch society is moving towards a situation in which men and

women will be able to enter and take part in the labour market under equal conditions, the rules on basic amounts laid down in Article 10 of the General Law may have a damaging effect inasmuch as women are placed at a disadvantage compared to men, although that inequality of treatment occurs in an entirely comparable situation. It relies in support of its view on the judgments of the Court of 12 July 1979 (Case 237/78 *Cram v Toia* [1979] ECR 2645 at pp. 2653 and 2654) and of 31 March 1981 (Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911 at pp. 925 and 926). In this case, it considers that there can be no inequality of treatment because Mrs Teuling is not treated differently from other insured persons, whether male or female, in regard to the calculation of the amount of her disability benefit.

It thus considers that the law abolishing the minimum daily wage laid down in the Insurance Law does not involve any discrimination, whether direct or indirect, within the meaning of Article 4 (1) of Directive 79/7/EEC. The Insurance Law uses as sole criterion the minimum wage applicable both to men and to women, and no increase in respect of a dependent spouse is provided for under that law.

It considers that the scheme laid down in Article 10 of the General Law may be regarded as objectively justified since its sole purpose is to provide for social security benefits ensuring a minimum subsistence income for single persons and families and since, at the same time, an increase in the benefit in respect of dependants is designed to compensate for the greater burdens borne by families than by single persons in circumstances in which there is practically no other income from work.

2. The *Netherlands Government* also claims that in this case there is no discrimination, either direct or indirect. It claims that even where reference to marital or family status in the contested provision produces different effects, in structural terms, for men and women, it does not constitute indirect

discrimination if that difference is justified on objective grounds.

In its view, the grant of an increased benefit or supplement to a spouse entitled to benefit for the purpose of preventing the family revenue from falling below a certain minimum must be regarded as objectively justified. That conclusion is not weakened by statistical indications that there is a difference between the numbers of male and female spouses entitled to benefit who are entitled to the increased benefit.

It claims that what is involved here is essentially an application of the principle of substantive equality, as defined by the Court in its judgment of 17 July 1963 (Case 13/63 *Italy v Commission* [1963] ECR 165). When, in the context of provisions guaranteeing a minimum level of resources through the award of a benefit, a person bearing financial burdens because of a dependent spouse or children is granted a higher amount than that granted to another person, those provisions are compatible with the principle of substantive equality.

With regard to Question 2(a), the Netherlands Government points out that the General Law provides for benefits which are not linked to salary and are intended to guarantee a minimum level of resources. Consequently, it must be concluded that the system of benefits provided for under the General Law is compatible with Article 4 (1) of Directive 79/7/EEC. Since that system of benefits is in itself compatible with the directive, the repeal of the rules concerning the minimum daily wage under the Insurance Law is also compatible with the directive. Although it is true that that amendment reduced the rights of certain persons entitled to benefits under the Insurance Law, it is none the less true that the amended rules meet the criteria laid down in the directive.

3. The *Commission* claims that a measure which, by applying a criterion of distinction which is in appearance neutral, concerns principally women, or affects women significantly more than men, constitutes indirect discrimination unless the application of that criterion is based on objective grounds which justify or explain the inequality of treatment.

It concludes from certain statistics received from the Netherlands authorities on the effect of the amendment of the rules on 1 January 1983 that the number of women entitled to benefits under the Insurance Law is nearly twice the number of men. In the Commission's view, those figures show that women have undoubtedly been placed at a disadvantage.

With regard to the existence of an objective justification, the Commission considers that the provisions of Article 10 (4) of the General Law may be objectively justified by the need to compensate for the greater burden borne by a person with a family than a person living alone, with a view to guaranteeing a minimum subsistence income, and taking account of the absence of any other income from work. However, that justification is acceptable only in regard to the provisions concerning the minimum subsistence level. The 'objective' nature of the justification relates not merely to the fact that the purpose of the measure in question must be to protect an interest regarded as having priority (the provisions concerning the minimum subsistence level) over the interest protected (equal treatment for men and women), but also to the fact that, having regard to the very nature of the principle of equal treatment, the measure must be limited to what is strictly necessary (principle of proportionality). In that regard, the Commission emphasizes that since additional payments in respect of family responsibilities are *a priori* discriminatory against women, they may not, for

example, lead to the result that a married person supporting a family always receives more per person than a person living alone (which would imply overcompensation for the additional burdens).

With regard to Question 2(a), the Commission feels obliged to make clear that Directive 79/7/EEC provides that men and women are to have the same rights in regard to social security in the context of the same legislation or rules. There is an infringement of Directive 79/7/EEC only in so far as the abolition of the minimum wage guarantee also discriminates against persons having no family responsibilities.

B — Question 2(b)

1. The defendant contends that the persons concerned may rely on the provisions of the directive only after the expiry of the time-limit for adaptation of national legislation laid down therein, because it is only then that all the Member States must have complied with their obligation to achieve the result sought by the directive and the question of the full effect of the rules of Community law arises. In support of its view, it relies on the judgments of the Court of 19 January 1982 (Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53), 15 June 1978 (Case 149/77 *Defrenne v Sabena* (III) [1978] ECR 1365), 4 February 1979 (Case 136/78 *Ministère public v Auer* (I) [1979] ECR 437), 22 September 1983 (Case 271/82 *Auer v Ministère public* (II) [1983] ECR 2727) and 23 September 1982 (Case 275/81 *Koks v Raad van Arbeid* [1982] ECR 3013).

It maintains that if Directive 79/7/EEC is considered in the light of the third paragraph of Article 189 of the EEC Treaty, it may be argued that a possible deterioration in the situation of a person receiving benefits under the Insurance Law

cannot be incompatible with Article 5 and the third indent of Article 4 (1) of the said directive before 22 December 1984 because its purpose is to ensure that from a given date, namely 22 December 1984, the principle of equal treatment is applied in the Community in regard to the calculation of benefits and, consequently, until that date has arrived the Member States remain free in that regard. It relies in support of its opinion on the judgment of the Court of 6 October 1970 (Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825).

In its view, only measures adopted by the *Bedrijfsvereniging* on or after 22 December 1984 may in principle be judged in the light of the directive, the latter being relevant to decisions adopted earlier only if they deal with rights to benefits arising on or after that date.

The defendant considers that a standstill rule cannot be deduced from Article 119 in regard to this case. It may, however, be possible to deduce such a standstill rule from Article 5 and the third indent of Article 4 (1) of the directive combined with Article 5 of the Treaty.

2. The reply of the *Netherlands Government* to Question 2(b) is also in the negative because it maintains that the Law of 29 December 1982 has not given rise to unequal treatment within the meaning of Directive 79/7/EEC.

3. The *Commission* considers that the reply to Question 2(b) should be that during the period of adjustment laid down in Directive 79/7/EEC, the Member States have an obligation to cooperate under Article 5 of the EEC Treaty which prohibits them from adopting measures which are contrary to the directive and, consequently, likely to compromise the attainment of the objective of the directive within the prescribed periods. In its view, a failure to comply with

the standstill obligation during the transposition period may justify the initiation of proceedings under Article 169 of the EEC Treaty on the ground of an infringement of Article 5 thereof. None the less, the fact remains that an infringement of the standstill obligation, having regard exclusively to the content of the directive, can be held to exist only after the expiry of the time-limit for transposition. It is only from that date that the result must be achieved.

C — Question 3

1. The *defendant* proposes that the reply to the third question should be in the negative. It considers that Directive 76/207/EEC does not itself contain provisions laying down the precise content and scope of the principle of equal treatment for men and women in matters of social security and detailed rules for the implementation thereof, and therefore the provisions of that directive cannot be considered relevant to the reply to the preceding questions. In its view, increased benefits for family responsibilities can discourage a married woman from entering or remaining on the labour market. However, that applies only to the spouse of a person whose benefit under the Insurance Law is less than the benefit under the General Law calculated on the basis of the higher basic amount or who is not entitled to any benefit under the Insurance Law. In this case, the interest in ensuring a minimum income for persons with family responsibilities must take precedence over the interest of a relatively small group among the total number of women who wish to enter the labour market.

2. The *Netherlands Government* also argues that in regard to social security Directive 76/207/EEC is irrelevant and that the rules at issue may be considered only in the light of Directive 79/7/EEC.

3. On the other hand, the *Commission* is of the opinion that Directive 79/7/EEC is concerned solely with equal treatment in respect of rights arising under social security schemes. It considers that the possible effects of the national measures concerned on vocational promotion and access to employment must be considered in the light of Directive 76/207/EEC. In that regard, the *Commission* argues that Directive 76/207/EEC should be interpreted as meaning that the concept of indirect discrimination in Article 2 includes measures the purpose or effect of which, by virtue of their referring without objective justification to marital or family status, is to encourage or discourage the entry to the labour market mainly of women, or of significantly more women than men.

D — Question 4

1. With regard to the *fourth question*, the *defendant* considers that in this case it must be inferred from the judgment of the Court of 6 October 1970 (Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825), the judgment of 17 December 1970 (Case 33/70 *SACE v Italian Ministry of Finance* [1970] ECR 1213), the judgment of 4 December 1974 (Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337) and the judgment of 1 February 1977 (Case 51/76 *VNO v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113) that Article 4 (1) of Directive 79/7/EEC is, in its nature, structure and terms, sufficiently clear to give rise to direct effect in the legal relations between the Member State concerned and Mrs Teuling. It contends that the effectiveness of the directive would be considerably weakened if the persons subject to it could not rely on its provisions before a national court in order to permit that court to assess whether, in the exercise of their right to choose the form and methods by which the directive is to be implemented, the competent national auth-

orities have remained within the limits of the discretion granted to them by the directive.

2. On the other hand, the *Netherlands Government* argues that Directive 79/7/EEC cannot have direct effect. That directive does not lay down the way in which the Member States are to organize their social security system. The multitude of alternative means of achieving equal treatment constitutes, in the view of the Netherlands Government, an obstacle to direct applicability.

3. The *Commission* argues that no objection can be made to the application of inconsistent legislation until the expiry of the time-limit for transposition laid down in Directive 79/7/EEC. In support of that view, it relies on the judgment of the Court of 5 April 1979 (Case 148/78 *Ratti* [1979] ECR 1629) and the judgment of 19 January 1982 (Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53).

T. F. O'Higgins
Judge-Rapporteur