REPORT FOR THE HEARING
delivered in Case 262/88 *

I — Facts and procedure

1. *Legislation*

According to Article 119 of the EEC Treaty:

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purposes of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

...'

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (Official Journal 1975, L 45, p. 19), is designed to 'ensure the application of [the principle of equal pay for men and women] by means of appropriate laws, regulations and administrative provisions' and to 'reinforce the basic laws by standards aimed at facilitating the practical application of the principle of equality ...' (second and fourth recitals in the preamble to the directive).

Article 3 of that directive provides as follows:

'Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.'

Similarly, Article 4 provides that:

'Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.'

Council Directive 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) has as its purpose

* Language of the case: English.

'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 . . . ' (Article 1(1)).

Article 5(1) of that directive is worded as follows:

'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.'

According to Article 1(2), the directive does not cover social security matters which are to form the subject-matter of other provisions to be adopted by the Council.

Those other provisions are set out in two subsequent directives.

Council Directive 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, by virtue of Article 8(1), was to be implemented by the Member States by 22 December 1984 at the latest, applies, in particular, to statutory schemes which provide protection against the risks of old age and unemployment (Article 3(1)(a)). It refers the implementation of the principle of equal treatment in occupational schemes to provisions to be adopted in the future (Article 3(3)).

Those matters were regulated by Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (Official Journal 1986, L 225, p. 40; corrigendum published in Official Journal 1986, L 283, p. 27) which applies to

'. . . schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional' (Article 2).

That directive applies, in particular, to occupational schemes which provide protection against the risks of old age, including early retirement, and unemployment (Article 4(a)).

Article 5 of the directive prohibits in general terms any discrimination on the basis of sex.

For guidance, Article 6 lists certain types of discriminatory provisions, including those based on sex, for:

'. . .

(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;

(f) fixing different retirement ages;

. . .'

The period for implementing Directive 86/378 expired on 30 July 1989. Both Article 7(1)(a) of Directive 79/7 and Article 9(a) of Directive 86/378 permit the Member States to defer compulsory application of the principle of equal treatment with regard to determination of pensionable age for the purposes of granting old-age pensions, and the possible implications for other benefits.

On 27 October 1987 the Commission submitted to the Council a Proposal for a directive completing the implementation of the principle of equal treatment for men and women in statutory and occupational social security schemes (COM(87) 494 final, Official Journal 1987, C 309, p. 10). Article 9(1) of that proposal provides that, without prejudice to certain transitional provisions,

'when the pensionable age is determined for the purpose of granting old-age and retirement pensions it shall be identical for both sexes'.

2. *Background to the dispute*

Mr Barber, the appellant in the main proceedings, was born on 29 September 1928. On 14 June 1948 he became an employee of the Car & General Insurance Corporation Limited (hereinafter referred to as 'C & G'). C & G subsequently became part of the Guardian Royal Exchange Assurance Group (hereinafter referred to as 'The Guardian'), the respondent in the main proceedings.

On 11 March 1953 Mr Barber applied to become a member of the C & G Group's pension fund. The application was granted. That fund was a non-contributory scheme, that is to say it was wholly financed by the employer.

After C & G was acquired by the Guardian, Mr Barber applied to become a member of the Guardian's pension fund on 2 April 1970. That application was granted and the value of his interest in C & G's pension fund was transferred to the Guardian's pension fund. The date on which Mr Barber became a member of that scheme was agreed to be 14 June 1948.

The Guardian's pension fund is also non-contributory and constitutes a private occupational pension scheme. It is a 'contracted-out' scheme by virtue of the Social Security Pensions Act 1975. This means that the scheme is a substitute for the earnings-related part of the State pension scheme. Persons covered by a scheme of that kind make reduced contributions to the State scheme, corresponding to the basic flat-rate pension payable under the State scheme to all workers regardless of their earnings. Furthermore, they are required to contribute to the occupational scheme, in accordance with the conditions which it lays down.

Under the Guardian's pension scheme, the normal retirement age was 65 for men and

60 for women. However, Mr Barber was covered by an exception provided for former members of pension funds which conferred different rights; according to that exception, the normal pension age was 62 for Mr Barber and 57 for a woman belonging to the same category. Under the rules of that scheme, Mr Barber was entitled to an immediate pension at the age of 62 or 'on being retired' by his employer 'at any time during the 10 years preceding normal pension date', that is to say at any time after his 52nd birthday.

That scheme also provides that a deferred pension is available as of right to all members of the fund who had attained the age of 40 and completed 10 years' employment with the Guardian and whose service was thereafter terminated (other than by reason of death, retirement, voluntary resignation or dismissal for serious misconduct).

The Guardian Royal Exchange Assurance Guide to Severance Terms (hereinafter referred to as 'the Severance Terms') is deemed to form part of Mr Barber's contract of employment. The Severance Terms, agreed between the Guardian and the appropriate trade union, apply to all staff whose contracts of employment are terminated on grounds of early retirement (other than on grounds of ill health) or redundancy and whose ages do not exceed 65 (for men) or 60 (for women).

According to Paragraph 3(1) of the Severance Terms, in the event of redundancy, members of the pension fund were entitled to an immediate pension subject to having attained the age of 55 (for men) or 50 (for women). Other staff were entitled to a number of cash benefits calculated on the basis of the years of service and a deferred pension payable at the normal retirement date. All staff also received an amount equal to the statutory redundancy payment, increased, where appropriate, so as to take account of the years of service notionally credited in the event of early retirement.

In 1979 the Guardian decided to reorganize some of its operations. That led to a reduction in the size of its staff in several offices, including the South Yorkshire Claims Bureau at Sheffield, of which Mr Barber had been Deputy Head since May 1970. The Guardian offered Mr Barber other positions, which he declined. He was therefore dismissed by reason of redundancy with effect from 31 December 1980. At the time of his dismissal, Mr Barber was aged 52.

The Guardian paid Mr Barber a sum consisting of the cash benefits provided for in the Severance Terms and an amount equal to the statutory redundancy payment. He thus received a gross cash payment of UKL 14 438 which, after deduction of income tax, has produced a net figure of UKL 11 378. In addition, an *ex gratia* tax-free payment of UKL 7 219 was made to him on 7 January 1981, making a total net sum of UKL 18 597. As he had not attained the age of 55 at the time of his dismissal, Mr Barber did not receive an immediate pension but was granted under the pension scheme a deferred pension payable as from 30 September 1990 and amounting to UKL 5 165 per annum.

It is not disputed that a woman aged 52 in the same position as Mr Barber would have been entitled to an immediate pension plus the statutory redundancy payment. It is also agreed that the value of such compensation would have been greater than the total payments received by Mr Barber.

Mr Barber complained to the Industrial Tribunal sitting at Sheffield, alleging that he had been discriminated against by the Guardian contrary to Section 1(i)(a) and Section 6(2)(a) and (b) of the Sex Discrimination Act 1975, Article 119 of the EEC Treaty, Directive 75/117 on equal pay and Directive 76/207 on equal treatment.

The Industrial Tribunal dismissed Mr Barber's claim, whereupon he appealed to the Employment Appeal Tribunal, which dismissed his appeal in its judgment of 30 March 1983. The Employment Appeal Tribunal held that, although there was discrimination, it was legal under national law since it was covered by the exception relating to 'provision in relation to death or retirement' referred to in Section 6(4) of the Sex Discrimination Act 1975. On the basis of the judgment of the Court of Justice of 16 February 1982 in Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555, the Employment Appeal Tribunal held that the question was one of access to pension benefits and fell to be decided not by principles relating to equal pay but by principles relating to equal treatment. Accordingly, Article 119 of the Treaty was not applicable in this case. As for Directive 76/207, it was not directly applicable in the United Kingdom in disputes between individuals.

Furthermore, it is not clear whether that directive prohibits the practice of fixing different retirement ages for men and women with regard to access to contracted-out pension schemes; hence it is impossible to rely on that directive for the purpose of interpreting the relevant provisions of English law.

The Employment Appeal Tribunal pointed out that, under the Guardian's pension scheme, Mr Barber would have been entitled to an immediate pension if he could be said to have 'retired' during the 10 years preceding the normal retirement date. In the event of dismissal by reason of redundancy, however, that benefit was granted only to men aged at least 55.

However, the Employment Appeal Tribunal considered that, if Mr Barber wished to argue that the termination of his contract of employment was equivalent to retirement, he should do so in proceedings against the pension fund trustees.

Mr Barber appealed against the judgment of the Employment Appeal Tribunal to the Court of Appeal (Queen's Bench Division). Taking the view that the dispute raised a question concerning the interpretation of several provisions of Community law, the Court of Appeal decided, by order of 12 May 1988, to stay the proceedings and to ask the Court of Justice in accordance with Article 177 of the EEC Treaty to give a preliminary ruling on the following questions:

'(1) When a group of employees are made compulsorily redundant by their employer in circumstances similar to those of this case and receive benefits in connection with that redundancy,

are all those benefits "pay" within the meaning of Article 119 of the EEC Treaty and the Equal Pay Directive (75/117/EEC), or do they fall within the Equal Treatment Directive (76/207/EEC), or neither?

(2) Is it material to the answer to Question 1 that one of the benefits in question is a pension paid in connection with a private occupational pension scheme operated by the employer ("a private pension")?

(3) Is the principle of equal pay referred to in Article 119 and the Equal Pay Directive infringed in the circumstances of the present case if:

(a) a man and a woman of the same age are made compulsorily redundant in the same circumstances and, in connection with that redundancy, the woman receives an immediate private pension but the man receives only a deferred private pension, or

(b) the total value of the benefits received by the woman is greater than the total value of the benefits received by the man?

(4) Are Article 119 and the Equal Pay Directive of direct effect in the circumstances of this case?

(5) Is it material to the answer to Question 3 that the woman's right to access to an immediate pension provided for by the Severance Terms could only be satisfied if she qualified for an immediate pension under the provisions of the private occupational scheme in that she was being treated as retired by the Guardian because she was made redundant within seven years of her normal pension date under the pension scheme?'

The order of the Court of Appeal was lodged at the Court Registry on 23 September 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 21 December 1988 by the Commission of the European Communities, represented by Karen Banks and Julian Currall, members of its Legal Department, acting as Agents, on 23 December 1988 by the Guardian Royal Exchange Assurance Group, the respondent in the main proceedings, represented by David Vaughan QC and Timothy Wormington, instructed by Messrs Jacques and Lewis, solicitors, on 30 December 1988 by the United Kingdom, represented by J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Peter Goldsmith QC, and on 5 January 1989 by Douglas Harvey Barber, the appellant in the main proceedings, represented by Christopher Carr QC, instructed by Messrs Irwin Mitchell, solicitors.

On 26 May 1989, when the case was pending before the Court, Mr Barber died. By order of 16 August 1989, a copy of which was lodged at the Court, the Court of Appeal permitted his widow and

executrix, Mrs Pamela Barber, to continue the proceedings in her name, for and on behalf of Mr Barber's estate.

By decision of 6 July 1989, the Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. However, it requested the Guardian Royal Exchange Assurance Group to communicate to the Court the text of the Severance Terms applying at the time of Mr Barber's dismissal. It also requested the United Kingdom to furnish the Court with full particulars of the tax advantages enjoyed by contributions to contracted-out occupational pension schemes. The Guardian and the United Kingdom complied with those requests within the time-limit set by the Court.

II — Written observations submitted to the Court

Mr Barber, the appellant in the main proceedings, points out, with regard to the first question, that the Severance Terms formed part of the contractual arrangements operated by the Guardian for the benefit of its employees who were made redundant or retired early. In those circumstances, the benefits provided for by the Severance Terms constituted pay since they were available to employees in a defined class of event and, as a general proposition, any set of terms or benefits which an employer provides for employees in respect of their employment constitutes part of their pay.

It is immaterial that the employee receives the benefit in question after the termination of his employment or whether the benefit is contractual or non-contractual. Pay includes any benefits which could induce a person to seek employment or to continue his/her employment with an employer.

The fact that the occasion for granting the benefits provided for by the Severance Terms is redundancy or early retirement does not prevent the benefits from being pay. Admittedly, this necessarily means that the time at which the benefit is enjoyed is not contemporaneous with the time of employment, but the crucial point is that the employer has presented himself as being committed to provide the benefits in question. Furthermore, the occasions for granting of the benefit are immaterial provided they are specific occasions, stipulated in the terms of employment.

As the Employment Appeal Tribunal held in a recent decision, where a group of employees are made compulsorily redundant by their employer and receive benefits in connection therewith, those benefits constitute 'pay' within the meaning of Article 119 of the EEC Treaty and the directive on equal pay; however, the benefits in question do not fall within the directive on equal treatment. The criterion for distinguishing between equal treatment and equal pay may be expressed as follows: the first principle applies to the conditions of eligibility for a benefit, whilst the second applies to the benefit given to those who satisfy the qualifying conditions. The Court applied that criterion in its judgment of 16 February 1982 in Case 19/81 *Burton* v *British Railways Board*, cited above.

However, that logical basis falls short of being a complete account of the distinction

since it is frequently possible to describe the same system of employee benefits in different ways, so that a particular component of the system may in turn appear as a qualifying condition or as an aspect of the benefit itself. Thus, in its judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus* v *Weber von Hartz* [1987] ECR 1607, the Court held that the qualifying conditions for entitlement to a supplementary retirement pension financed by the employer raised an issue of equal pay rather than equal treatment. The reason is that pay cannot be 'atomized' into its component parts: however the various components of pay are 'packaged', there is only one integral concept of pay and the principle of equal pay requires that a comparison be made between all the components of pay.

Furthermore, in its aforesaid judgment of 13 May 1986 in Case 170/84, the Court points out that since pensions are an aspect of pay, the effect of giving a pension to one group, but not to another, is that, hour for hour, the remuneration of one group is greater than that of the other.

In the light of that analysis, there is nothing in the Court's judgment of 16 February 1982 in Case 19/81 to suggest that redundancy benefits are not pay. On the contrary, the Court held that the case raised an issue of equal treatment and not of equal pay, solely on the ground that Mr Burton was claiming to be admitted to the class of employees eligible for redundancy. To say that an employee is only eligible for redundancy at a certain age, which depends on his or her sex, is to impose a genuine qualifying condition which raises an issue of equal treatment rather than equal pay.

In order to ascertain whether a qualifying condition may be described as genuine, and therefore whether it raises an issue of equal treatment rather than equal pay, it is irrelevant whether the condition in itself distinguishes (either directly or indirectly) between employees on grounds of sex. Similarly, the fact that the benefit claimed by the employee constitutes pay is not sufficient to support the conclusion that the principle involved is that of equal pay. It is also necessary to consider whether, in addition to the question of the level of remuneration, the discrimination raises another aspect of the worker's employment, as is the case, for instance, where the highest salary is linked to promotion. If that is the case, the question raised is in any event one of equal treatment.

Accordingly, there is no simple or single distinguishing criterion, but the proper approach to the question is to distinguish between claims concerning access to a given status, which come within the scope of equal treatment, and claims relating to the incidents of that status, which raise an issue of equal pay.

Admittedly, that distinction may be regarded as an exercise in terminology, but it has the advantage of pointing to the type of criterion which makes it possible to define the respective fields of operation of the two principles in question. It is necessary to raise the question whether the condition

which an employer attaches to a given benefit properly and legitimately serves to differentiate two groups of workers, in accordance with prevalent standards and practices. It is unnecessary to pursue this analysis any further, since the application of that criterion to this case raises no difficulty.

In contrast to the position in *Burton*, Mr Barber is not asking to be allowed to join a voluntary redundancy scheme, but was made redundant and his complaint is that unequal pay was paid to men and women on the occasion of that redundancy. Accordingly, his complaint is not that men and women were afforded different statuses but only that the incidents attaching to the common status of redundancy were unequal.

The decision given in the main proceedings by the Employment Appeal Tribunal is erroneous. The Tribunal correctly treated the benefits payable under a retirement scheme as pay but approached the question of equal pay as if it were possible to examine each individual component separately in the pay as a whole.

Instead of asking whether comparable male and female employees were receiving equal pay, the Tribunal considered the pension as a distinct component of pay. After observing that the employer had imposed a qualifying condition for access to the pension and that Mr Barber's complaint was that the condition in question was discriminatory, the Tribunal came to the conclusion that the issue was one of equal treatment rather than equal pay.

If the Tribunal's reasoning were correct, it would open the way for many forms of discriminatory 'packaging' of benefits, whether they be bonuses, other benefits or pensions. However, that reasoning is specifically inconsistent with the Court's judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus*, cited above.

With regard to the second question, Mr Barber submits that it is immaterial to the first question that one of the benefits paid by the employer consists of a private pension.

Private pensions created by employers constitute pay. The relevant legislation in force in the United Kingdom has as its sole aim to ensure that private pension schemes are properly managed and organized, but it does not have the effect of making them a part of the statutory social security system. Although it is true that there are tax benefits attaching to pension contributions, that is a reflection of the general policy of encouraging savings.

Even though they do not always originate in agreements concluded with a trade union, today private pension schemes form a very important part of collective bargaining between employers and trade unions. Pension schemes are taken into account in the overall settlement resulting from those negotiations, alongside pay increases or holiday arrangements, for example. Furthermore, they constitute a significant competitive factor in the operation of the

labour market, and it would therefore be quite artificial to exclude them from the concept of pay.

The only feature of the United Kingdom's system of private pensions which may raise doubts as to whether they are an aspect of pay is their character as substitutes: on certain conditions an employee covered by a private scheme may be exempted from having to pay part of the social security contributions which he would otherwise have to pay and, correspondingly, may forfeit entitlement to part of the State pension benefits which he would normally receive.

That substitution can be explained by the fact that if the State can be sure that a person has made satisfactory savings provisions which are secure and which cannot be spent or dealt with except on retirement, there is not the same need for the compulsory State savings scheme. However, if provision is made which removes the need for certain aspects of the social security system, this does not make such provision itself part of the system.

Furthermore, in the United Kingdom there are many private pension schemes in relation to which no contracting out has occurred, either because the employer has not sought exemption from the obligation to pay contributions to the State scheme for his employees or because such exemption has been refused. It would be artificial to state that contracted-out private pensions are not pay but non-contracted-out private pensions are pay.

The inclusion of private pension schemes in the concept of 'pay' would not create an imbalance in relation to the State scheme but would merely be the inevitable consequence of the application of the law, since not all pension schemes in a single Member State must necessarily be of one type only. Furthermore, it is wrong to suppose that it would deter contracting out since pension schemes and their various features and attributes are determined by the forces of collective bargaining and not by the possibility that one form of arrangement may attract the operation of Article 119 of the EEC Treaty and another form may not.

Once it is established that private pensions constitute pay, they should not involve any discrimination between male and female employees, even if paid in connection with their retirement. However, that is not the case here since this case is one in which the employer operated a set of Severance Terms in connection with redundancy or early retirement. One of the benefits of those Severance Terms was that, in defined circumstances, a pension would be payable.

Accordingly, even if the Court takes the view that pensions do not constitute pay, Mr Barber further submits that, in the circumstances of this case, he is in any event entitled to the same immediate pension as would have been paid if he were a woman. The form in which a particular benefit is conferred does not determine its character as pay; the decisive criterion, for those purposes, is whether it is a benefit conferred in respect of employment.

In this case Mr Barber claims the benefits provided for by the Severance Terms in connection with dismissal by reason of redundancy. It is purely coincidental that one of the benefits enjoyed by redundant employees happens to be a pension, since the occasion for granting it is not retirement but redundancy.

With regard to the third question, Mr Barber submits in the first place that even if it were correct to say that a claim to pension entitlement is a claim to access to a particular form of benefit and therefore raises an issue of equal treatment, the fact is that he was entitled to a pension, albeit a deferred pension, under the Severance Terms. Accordingly, his claim is that the pension benefit conferred upon him is not equal to that conferred upon comparable female employees; it therefore raises an issue of equal pay rather than equal treatment.

Next, Mr Barber points out that the third question is also concerned with the nature and extent of his entitlement to relief, since he has already received certain cash payments from the Guardian which are greater in amount than cash payments made to comparable female employees who received an immediate pension. If Mr Barber were to obtain entitlement to an immediate pension, would he be required to repay the extra cash benefits which have been paid to him but which have not been paid to female employees?

On the basis of a recent judgment of the House of Lords, the appellant submits that it is not sufficient for the total value of the benefits granted to male and female workers to be the same; discrimination on grounds of sex should also be eliminated in respect of all aspects and conditions of remuneration.

That solution is not excessively harsh for the employer since, in the circumstances of this case, it would be too late for female employees to claim the extra cash benefits. Furthermore, if it is sufficient for the total value of the employment benefits to be equal, without regard to whether individual components of those benefits are equal, there are likely to be serious complications in practice in operating the principle of equal pay.

It will be necessary to impose some sort of valuation upon benefits, which take very different forms, and thus to compare, for example, the value of a period of extra holiday with the value of a particular bonus or the use of a car. That is likely to promote disagreement and litigation, which could be avoided by requiring that each component part of the employee benefits must be equal for comparable male and female employees.

With regard to the fourth question, Mr Barber refers to the Court's judgment of 31 March 1981 in Case 96/80 *Jenkins* v *Kingsgate Ltd* [1981] ECR 911 and to its previous decisions in support of the contention that, in the circumstances of the case, the principle of equal pay undoubtedly has direct effect.

According to Mr Barber, the point to which the fifth question seems to be directed is that entitlement to a pension in connection with redundancy was linked to entitlement

to a pension a given number of years from the normal retirement age. The question of the right to retire, which is one of equal treatment, has nothing to do with his complaint of inequality in pay amongst male and female employees, all of whom have been made redundant.

The Guardian Royal Exchange Assurance Group, the respondent in the main proceedings, points out in the first place that, according to the wording of the questions, in order to succeed in his claim Mr Barber must bring the facts of the case within Article 119 of Directive 75/117 on equal pay. It is now clear from the judgment of 26 February 1986 in Case 152/84 *Marshall* [1986] ECR 723 that the other directives may not be relied upon in proceedings between individuals.

Furthermore, Directive 76/207 on equal treatment does not apply to differences of treatment arising from national social security legislation or from a scheme tied to that legislation (judgment of 16 February 1982 in Case 19/81 *Burton* v *British Railways Board*, cited above). For their part, Directive 79/7 on social security and Directive 86/378 on occupational schemes specifically confirm, in Articles 7(1)(a) and 9(a) respectively, the right of Member States to defer the incorporation in their legislation of the principle of equal treatment with regard to the 'determination of pensionable age for the purposes of granting old-age or retirement pensions and the possible implications thereof for other benefits'. Finally, the provisions of Article 118 of the Treaty do not in themselves have direct effect, as the Court stated in its judgment of 15 June 1978 in Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365, paragraphs 19 and 23 of the decision.

Next, the Guardian submits that the discrimination alleged by Mr Barber relates to the terms governing his dismissal and does not give rise to any question of equal pay. In addition, the difference in question arises out of the different pensionable ages for men and women under the United Kingdom social security legislation and the benefits paid by occupational schemes are in substitution for benefits payable under the State social security scheme. Accordingly, Mr Barber's case falls within 'working conditions' or 'social security' within the meaning of Article 118 and not within the scope of Article 119.

The relevant measure is Directive 86/378 on occupational social security schemes and, in that connection, the difference of treatment at issue is not discriminatory. It is a consequence of the fixing of different pensionable ages for the grant of old-age and retirement pensions and is therefore covered by the exception in Article 9. The expression used in that provision ('possible implication') is deliberately wide and is intended to cover all the differences of treatment which are related to differences in pensionable age qualifications, even in the case of early retirement.

Alternatively, the respondent submits that the alleged discrimination against Mr Barber falls within the scope of Article 5(1) of Directive 76/207 on equal treatment; in those circumstances the difference at issue attaches to a scheme under national social security legislation and is therefore justifiable (judgments of 16 February 1982 in Case 19/81 *Burton*, cited above, and of

26 February 1986 in Case 151/84 *Roberts* v *Tate & Lyle* [1986] ECR 703).

The existence of an issue of equal treatment and, consequently, the applicability of Article 119 of the EEC Treaty, are excluded by virtue of the interpretation given by the Court in its judgments of 15 June 1978 in Case 149/77 *Defrenne*, cited above, and of 3 December 1987 in Case 192/85 *Newstead* v *Department of Transport and Her Majesty's Treasury* [1987] ECR 4753. The financial implications of an occupational pension scheme fall within Article 118 of the Treaty.

It is clear from the existence and the actual wording of Directive 86/378 on occupational social security schemes that the principles laid down in Articles 118 and 119 of the Treaty cannot be applied, at least not without further elaboration, to questions concerning differences in the terms of access to benefits provided under private occupational schemes. That approach was followed by the Court in its judgment of 26 February 1986 in Case 151/86 *Roberts*, cited above, where the reasoning is based exclusively on Directive 76/207 on equal treatment and is not contradicted by the judgments of 11 March 1981 in Case 69/80 *Worringham and Humphreys* v *Lloyds Bank* [1981] ECR 767 or of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus*, cited above. The former case was concerned with a difference in gross pay for the same work, whilst the latter was concerned not with entitlement to a pension but with the possibility of qualifying for a pension at all. Furthermore, in the latter case the pension scheme under consideration supplemented, and was not in any way in substitution for, the benefits provided under the State scheme. The Guardian also submits that the questions which arise in this case are essentially the same as those in *Burton*, although that was a case of voluntary redundancy and not of dismissal on grounds of redundancy. The Court has already stated that access to the benefit of an early retirement pension granted under a scheme which is partially in substitution for another scheme falls to be considered under Directive 76/207 on equal treatment and not under Article 119 of the Treaty.

Finally, Community law still allows Member States to defer the incorporation in their social security legislation of the principle of non-discrimination with regard to the fixing of the retirement age and its implications. It would be contrary to that policy to give an effect to Article 119 of the Treaty or Directive 75/117 on equal pay which rendered the Guardian's Severance Terms discriminatory.

With regard, more particularly, to the first two questions, the Guardian considers that Article 119 of the Treaty and Directive 75/117 on equal pay are inapplicable in this case for the following reasons:

(i) the discrimination relates to a difference in the ages at which a pension becomes payable, not in the amount of the pension or the employee's pay;

(ii) the conditions of dismissal are working conditions, within the meaning of Directive 76/207 on equal treatment, and do not relate to pay;

(iii) the age difference derives from the social security legislation and the

different pensionable ages thereunder for male and female employees;

(iv) part of the pension benefits are in substitution for the State social security benefits;

(v) the Severance Terms fall within Article 119 of the EEC Treaty and Directive 86/378 on occupational social security schemes.

With regard to the third and fifth questions, the Guardian emphasizes that it is insufficient, in order to come within Article 119, to establish the financial consequences of the difference of treatment in question. The determining factor is the interconnection between the Severance Terms and the State social security scheme. Furthermore, it is impossible to apply as such the limited and specific principle of equal pay for equal work to such complex situations involving differences of treatment.

The questions are framed in terms which invite the Court to analyse the situation solely at the time of redundancy. However, if the full temporal effect of the difference of treatment in question is looked at, it becomes apparent that it relates not to the amount of the benefit but to access thereto. That distinction is well established and is incorporated in the directives on equal treatment and occupational social security schemes. The Court followed it in its judgment of 16 February 1982 in Case 19/81 *Burton*, cited above, and it is consistent with the approach taken by the Court in its judgment of 26 February 1986 in Case 151/86 *Roberts*, cited above.

The fourth question, which relates to the direct effect of Article 119 and the directive on equal pay, does not arise since the discrimination which lies at the heart of the dispute is not covered by those provisions. Furthermore, in its judgment of 26 February 1986 in Case 152/84 *Marshall*, cited above, the Court made it clear that the provisions of Directive 76/207 on equal treatment may not be relied upon by individuals in proceedings before the national courts. That solution is applicable, by parity of reasoning, to Directive 86/378 on occupational social security schemes.

The Guardian therefore suggests that the questions referred to the Court of Justice by the Court of Appeal should be answered as follows:

'The principle of equal pay referred to in Article 119 and the Equal Pay Directive is not infringed in the circumstances of the present case, when a man and a woman of the same age (*in casu* 52 years old) are made compulsorily redundant in the same circumstances and, in connection with that redundancy, the woman receives an immediate private pension under the provisions of the private occupational scheme, being made redundant within seven years of her normal pension date (i.e. on attainment of 57 years) under the said scheme but the man, being made redundant more than seven years off his normal pension date (i.e. on attainment of 62 years) under the said scheme, receives only a deferred private pension (but an immediate pension when he attains 62 years).'

The respondent considers that, in the circumstances, it is unnecessary to answer Question 4.

The United Kingdom points out that the Court has already had occasion to consider certain 'contracted-out' schemes in its judgments of 11 March 1981 in Case 69/80 *Worringham and Humphreys*, cited above, and of 3 December 1987 in Case 192/85 *Newstead* v *Department of Transport and HM Treasury*, cited above. In the latter of those judgments, the Court recognized that such schemes constitute occupational social security schemes within the meaning of Directive 86/378. By virtue of Article 9(a) of that directive, which makes it possible to defer the application of the principle of equal treatment with regard to the determination of pensionable age for the purposes of granting old-age or retirement pensions, and the possible implications for other benefits, it remains compatible with Community law for an occupational scheme to provide that retirement pensions may become payable at different ages depending on the employee's sex. If the Court came to a different conclusion, it would offend the principle of legal certainty and cause enormous disruption and expense to many occupational schemes which have been funded on the basis of legislation providing for different pensionable ages for men and women.

The United Kingdom further submits that contracted-out occupational pension schemes are not within the scope of Article 119. In its judgment of 3 December 1987 in Case 192/85 *Newstead*, cited above, the Court recognized the relationship between such schemes and the statutory social security scheme and considered that the contributions under such schemes fell within the scope of Article 118 of the Treaty. Furthermore, in its judgment of 25 May 1971 in Case 80/70 *Defrenne* v *Belgian State* [1971] ECR 445, the Court acknowledged that statutory social security schemes could not be brought within the concept of 'pay' in Article 119. The substitute scheme which lies at the heart of this case is more closely related to statutory schemes than to the purely contractual schemes considered in the Court's judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus*, cited above, which have no connection with the State social security system as a whole. Furthermore, if the precise and detailed provisions of Directive 86/378 on occupational social security schemes were to be overridden by the blunter and general principle in Article 119, it would lead to much difficulty and confusion. For the reasons given by the Court in *Newstead*, Directive 76/207 is also irrelevant to this case in view of the reference in Article 1(2) to further provisions on social security.

With regard to the first two questions, in particular, the United Kingdom submits that certain benefits paid in connection with redundancy may well be 'pay' within the meaning of Article 119 but only in certain circumstances. Where the question is one of access to a retirement pension, however, the relevant provision is Article 5 of Directive 76/207 on equal treatment; yet a difference of treatment in those circumstances does not constitute discrimination of a prohibited kind since it is tied to the fixing of different pensionable ages (judgment of 16 February 1982 in Case 19/81 *Burton*).

With regard to the third and fifth questions, it follows from the foregoing that the difference in treatment as regards entitlement to a retirement pension which stems from a difference in pensionable ages is not contrary to Community law.

The Commission considers that in order to answer the questions submitted it is necessary to ascertain whether an age difference between male and female employees for the purposes of the grant of compensation for compulsory redundancy is compatible with Community law; if not, it remains to be considered whether the incompatibility derives from Article 119 or from the application of Article 5(1) of Directive 76/207 on equal treatment. The importance of the second question lies in the fact that the Guardian is a private employer and that, by virtue of the Court's judgment of 26 March 1986 in Case 152/84 *Marshall*, cited above, Directive 76/207 cannot be relied upon as against that employer.

As a starting point for that investigation, the Commission takes the judgment of 16 February 1982 in Case 19/81 *Burton*, where the factual situation was similar to that in the present case except that in *Burton* the problem was access to voluntary redundancy arrangements, whereas here Mr Barber was made redundant and the point at issue is the amount and nature of the compensation. The Court held in that case that the issue came within the principle of equal treatment but that the age difference was not prohibited in relation to voluntary redundancy.

Having referred to the development of the Court's case-law (judgments of 26 February 1986 in Case 151/84 *Roberts*, and in Case 152/84 *Marshall*; of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus*, and of 3 December 1987 in Case 192/85 *Newstead)* and to legislative developments (adoption of the directive on occupational social security schemes) which have followed, the Commission states that, in the light of the Court's judgment in *Roberts*, the solution adopted in *Burton* should no longer be followed or should be limited to cases of voluntary redundancy. In *Roberts* the Court stated that the application of the derogation resulting from Article 7(1)(a) of Directive 76/207 is excluded in a case of compulsory redundancy, which is covered by Article 5(1) of that directive ('dismissal'). That provision requires the Member States to ensure that there is no discrimination on grounds of sex in the terms of access to compensation, even if the compensation consists of or includes immediate payment of a pension under a scheme in which normal retirement is at different ages for men and women. The same conclusion would follow if the matter were covered by Article 119, to which no exceptions are possible except in cases of indirect discrimination which, as the national court has found, is not in issue here.

However, the practical consequences for the main dispute differ greatly according to whether the matter is covered by Article 119, which has been recognized as having direct effect, or by Directive 76/207 on equal treatment, which cannot be relied upon in disputes between individuals. In order to resolve that issue, the Commission points out that the judgment of 26 February 1986 in *Roberts* merely interpreted the directives and left open the question of Article 119. However, in its judgment of 11 March 1981 in *Worringham* the Court acknowledged by implication that compensation paid in the event of redundancy, other than the immediate pension, is covered by Article 119; in the judgment of 13 May 1986 in *Bilka-Kaufhaus*, on the other hand, Article 119 was applied to an occupational retirement scheme.

Accordingly, two approaches are possible:

(i) a broad approach, based on the view that the judgment in *Bilka-Kaufhaus* has eliminated the distinction between the amount of the benefits and access thereto, with the result that Article 119 applies on the same conditions both to access to occupational retirement schemes and to the benefits which they provide;

(ii) a narrower approach which leads to a ruling that compensation for redundancy is covered by Article 119, so that the same compensation must be paid to men and women in the same situation, even if it includes immediate payments under an occupational scheme in which normal retirement is fixed at different ages for men and women.

The Commission submits that the wide approach is to be preferred. If it were otherwise, it might convey the impression of a retreat from the judgment of 13 May 1986 in *Bilka-Kaufhaus*, in which the Court specifically held that occupational social security benefits are covered by Article 119. In addition, Directive 86/378, which was adopted two and a half months after that judgment, might be understood as having modified Article 119.

Whichever approach is preferred, however, there are sound reasons for treating the present case as one covered by Article 119. First of all, if part of the redundancy pay were covered by that article whilst another part, paid in the form of an early retirement pension, were covered by the directives, it would introduce considerable confusion and uncertainty; secondly, a private employer could unilaterally exclude the effect of Community law altogether by modifying the type of compensation offered; finally, employers might be encouraged to dismiss men of a certain age rather than women, on the grounds that it was cheaper to do so.

The suggested approach is anything but revolutionary and is not contrary to the principle of legal certainty. Even if such an approach were to cast doubt upon Directive 86/378 as to its usefulness in relation to occupational social security schemes, that measure would at least have the effect of facilitating the application of Article 119 and extending it to certain areas excluded from the concept of pay, such as the scope of the obligation to contribute to an occupational scheme (judgment of 3 December 1987 in *Newstead).* In any event, the fact that the Commission proposed a directive, and that the Council has adopted it, cannot determine the field of application of the Treaty, whose interpretation is a matter for the Court.

Moreover, there is no reason to regard the existence of Directive 86/378 as being inconsistent with a wide application of Article 119 to private occupational schemes. Furthermore, the compatibility of the exceptions provided for by that directive with Article 119 has already been called in question many times, at any rate where occupational schemes are financed wholly by the employer. If, however, the existence of Directive 86/378 has aroused expectations in individuals concerning the scope of Article 119, the solution is to limit the

effects of the judgment to existing claims and claims in respect of facts arising after the judgment, as the Court did, for instance, in its judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

As for the consequences of the judgment to be given in this case, if the Court were to reason in terms of the approach described as narrow it would at least put the following two propositions beyond doubt: severance pay (including compensation for redundancy) is covered by Article 119 and the exception in favour of different pensionable ages would apply only in the case of voluntary retirement.

The wider approach would also have the advantage of establishing that benefits under occupational social security schemes are directly governed by Article 119, regardless of the manner in which they are financed, and that the principle of non-discrimination governs both access to benefits (judgment of 13 May 1986 in *Bilka-Kaufhaus*) and the time when they are to be paid.

Finally, in the Commission's view, there is no need to consider whether Directive 75/117 on equal treatment has any independent role to play in this case since, in the light of the comparison made by the national courts, there is no obstacle to the direct effect of Article 119 of the Treaty in the present case.

The Commission therefore suggests that the questions submitted by the Court of Appeal should be answered as follows:

'(1) When a group of employees are made compulsorily redundant by their employer in circumstances similar to those of this case and receive benefits in connection with that redundancy, all those benefits are "pay" within the meaning of Article 119 of the EEC Treaty.

(2) It is not material to the answer to Question 1 that one of the benefits in question is a pension paid in connection with a private occupational pension scheme operated by the employer ("a private pension").

(3) The principle of equal pay referred to in Article 119 and the Equal Pay Directive is infringed in the circumstances of the present case if either:

(a) a man and a woman of the same age are made compulsorily redundant in the same circumstances and, in connection with that redundancy, the woman receives an immediate private pension but the man receives only a deferred private pension (unless it can be shown that this arrangement involves no permanent loss to the employee), or

(b) the total value of the benefits received by the woman is greater than the total value of the benefits received by the man.

(4) Article 119 is of direct effect in the circumstances of this case.

(5) It is not material to the answer to Question 3 that the woman's right to access to an immediate pension provided for by the Severance Terms could only be satisfied if she qualified for an immediate pension under the provisions of the private occupational scheme in that she was being treated as retired by the Guardian because she was made redundant within seven years of her normal pension date under the pension scheme. Differences in normal pension age cannot be taken into account in the circumstances of the present case.'

III — Reply to a question from the Court

In reply to the Court's question, the United Kingdom explained that there are no special tax advantages peculiar to contracted-out occupational pension schemes. The tax advantages to occupational pension schemes under Chapter 1 of Part XIV of the Income and Corporation Taxes Act 1988 apply to all exempt approved schemes irrespective of whether or not they are used for contracting out of the State earnings-related pension schemes under Part III of the Social Security Pension Act 1975.

Broadly (and subject to the Inland Revenue's discretionary powers), the main requirements for exempt approval are that:

(a) the scheme is established under trust for the sole purpose of providing retirement or death benefits in respect of service as an employee;

(b) the employer contributes;

(c) the benefits do not exceed certain limits related to the length of service and final remuneration of the employee.

Broadly, the tax consequences of exempt approval are that:

(a) the employer's contributions will not be treated as the income of the employee;

(b) the employee's contributions will qualify for relief at his marginal rate of tax;

(c) the employer's contributions will be allowed as a deduction in computing his Schedule D liability;

(d) the return on the fund's investments will be exempt from income tax and capital gains tax;

(e) to the extent that payment of lump sum retirement benefits is permitted, they will not incur any tax liability.

The United Kingdom also supplied further details of the advantages arising from a contracted-out occupational pension scheme for the purposes of national insurance contributions. It stated, in particular, that as from 1 October 1989, employees' contributions under the State scheme would be amended as a result of the Social Security Act 1989. However, employees affiliated to a contracted-out private pension scheme would continue to pay reduced contributions in respect of earnings above a minimum threshold.

G. F. Mancini
Judge-Rapporteur