JUDGMENT OF THE COURT
9 February 1999 *

In Case C-167/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the House of Lords (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Regina

and

Secretary of State for Employment,

ex parte **Nicole Seymour-Smith and Laura Perez,**

on the interpretation of Article 119 of the EC Treaty and 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 (OJ 1976 L 39, p. 40),

* Language of the case: English.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, P. J. G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), G. F. Mancini (Rapporteur), J. C. Moitinho de Almeida, C. Gulmann, J. L. Murray, D. A. O. Edward, H. Ragnemalm, L. Sevón, M. Wathelet, R. Schintgen and K. M. Ioannou, Judges,

Advocate General: G. Cosmas,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Ms Seymour-Smith and Ms Perez, by Robin Allen QC and Peter Duffy QC, instructed by Gay Moon, Solicitor,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, with Patrick Elias QC and Nicholas Paines QC,

— the Commission of the European Communities, by Christopher Docksey and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Seymour-Smith and Ms Perez, represented by Robin Allen and Peter Duffy, instructed by Gay Moon, the United Kingdom Government, represented by Stephanie Ridley, of the Treasury Solicitor's Depart-

ment, acting as Agent, with Nicholas Paines, and the Commission, represented by Christopher Docksey and Marie Wolfcarius, at the hearing on 12 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 14 July 1998,

gives the following

Judgment

1 By order of 13 March 1997, received at the Court on 2 May 1997, the House of Lords referred to the Court for a preliminary ruling under Article 177 of the EC Treaty five questions on the interpretation of Article 119 of the EC Treaty and 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 (OJ 1976 L 39, p. 40).

2 Those questions were raised in an application by Ms Seymour-Smith and Ms Perez to the High Court of Justice for judicial review of the Unfair Dismissal (Variation of Qualifying Period) Order 1985, S. I. 1985 No 782, hereinafter 'the 1985 Order', which amended Section 54 of the Employment Protection (Consolidation) Act 1978 (hereinafter 'the 1978 Act').

The national legislation

3 Section 54 of the 1978 Act provides that an employee to whom that section applies has the right not to be unfairly dismissed by his employer. A similar provision appears in section 94 of the Employment Rights Act 1996 ('the 1996 Act'), which was not in force at the time material to the facts of the case.

4 Before the entry into force of the 1985 Order, employees enjoyed protection from unfair dismissal pursuant to section 54 of the 1978 Act if, at the effective date of termination of their employment, they had one or more years' continuous employment with an employer of 20 or more employees. Under section 64(1) of the 1978 Act, as amended by the 1985 Order, section 54 did not apply to the dismissal of an employee not continuously employed for a minimum period of two years ending at the effective date of dismissal (hereinafter 'the disputed rule'). Section 108(1) of the 1996 Act contains provisions similar to those of the disputed rule.

5 Under section 68(1) of the 1978 Act, where an Industrial Tribunal finds that the grounds of a complaint of unfair dismissal are well founded, it is to explain to the complainant what orders for reinstatement or re-engagement may be made and in what circumstances, and ask him whether he wishes the tribunal to make such an order.

6 Under section 68(2), if the Industrial Tribunal finds that the grounds of a complaint of unfair dismissal are well founded and no reinstatement or re-engagement order is made, it is to award compensation for unfair dismissal.

7 Compensation for unfair dismissal comprises two elements, namely a basic award and a compensatory award. The basic award reflects the employee's loss of remuneration as a result of his dismissal. Under section 74(1) of the 1978 Act, the compensatory award represents such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Section 74(2) provides that those losses are to be taken to include any expenses reasonably incurred by the complainant in consequence of the dismissal and the loss of any benefit which he might reasonably be expected to have had but for the dismissal.

Community legislation

8 The first paragraph of Article 1 of 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 (OJ 1975 L 45, p. 19) provides that the principle of equal pay for men and women outlined in Article 119 of the Treaty means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

9 According to Article 1 of Directive 76/207, its purpose is to put into effect in the Member States the principle of equal treatment for men and women as regards, *inter alia*, access to employment and working conditions.

10 Under Article 5(1) of Directive 76/207, 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.

The dispute in the main proceedings

11 Ms Seymour-Smith started work as a secretary with Christo & Co. on 1 February 1990, and was dismissed on 1 May 1991. On 26 July 1991 she complained to the Industrial Tribunal that she had been unfairly dismissed by her former employers.

12 Ms Perez commenced employment with Matthew Stone Restoration Limited on 19 February 1990 and was dismissed on 25 May 1991. On 19 June 1991 she made a complaint of unfair dismissal by her former employers to the Industrial Tribunal. On 20 June 1991 she was informed by the Central Office of Industrial Tribunals that they would not register her complaint as she had not been employed for more than two years. However, on 12 August 1991, she complained again to the Industrial Tribunal, reiterating that she had been unfairly dismissed.

13 It appears from the file on the case that the Industrial Tribunal declined to entertain the complaints of unfair dismissal and claims for compensation submitted by the two applicants, on the ground that they did not fulfil the condition of two years' employment required by the disputed rule.

14 At the hearing before the Court, the applicants in the main proceedings explained that their cases had been suspended by the Industrial Tribunal in order to enable them to make a parallel application for judicial review of the legality of the disputed rule.

15 On 15 August 1991 they applied to the High Court of Justice for leave to move for judicial review of the disputed rule on the ground that it was contrary to Directive 76/207. Such leave was granted on 12 September 1991.

16 On 20 May 1994 the High Court dismissed the application for judicial review, holding that, although the disputed rule affected more women than men, the statistics did not prove that such an effect was disproportionate. If, however, that had been the case, it did not see any objective grounds capable of justifying such discrimination.

17 The applicants appealed against that decision to the Court of Appeal, which gave them leave to rely on both Article 119 of the Treaty and Directive 76/207.

18 On 31 July 1995, the Court of Appeal held that the disputed rule was indirectly discriminatory at the time when the applicants were dismissed and was not objectively justified. However, since it was not satisfied that it was *acte clair* that compensation for unfair dismissal was 'pay' within the meaning of Article 119 of the Treaty, the Court of Appeal confined itself to declaring that the requirement under the 1978 Act, as amended, of a qualifying period of two-years' employment, was incompatible with Directive 76/207 at the time when the applicants were dismissed.

Questions referred for a preliminary ruling

19 The Secretary of State and the applicants in the main proceedings appealed to the House of Lords, which discharged the declaration made by the Court of Appeal

and decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does an award of compensation for breach of the right not to be unfairly dismissed under national legislation such as the Employment Protection (Consolidation) Act 1978 constitute "pay" within the meaning of Article 119 of the EC Treaty?

2. If the answer to Question 1 is "yes", do the conditions determining whether a worker has the right not to be unfairly dismissed fall within the scope of Article 119 or that of Directive 76/207?

3. What is the legal test for establishing whether a measure adopted by a Member State has such a degree of disparate effect as between men and women as to amount to indirect discrimination for the purposes of Article 119 of the EC Treaty unless shown to be based upon objectively justified factors other than sex?

4. When must this legal test be applied to a measure adopted by a Member State? In particular at which of the following points in time, or at what other point in time, must it be applied to the measure:

(a) when the measure is adopted;

(b) when the measure is brought into force;

(c) when the employee is dismissed?

5. What are the legal conditions for establishing the objective justification, for the purposes of indirect discrimination under Article 119, of a measure adopted by a Member State in pursuance of its social policy? In particular, what material need the Member State adduce in support of its grounds for justification?'

Question 1

20 By its first question, the national court is asking whether a judicial award of compensation for breach of the right not to be unfairly dismissed constitutes pay within the meaning of Article 119 of the Treaty.

21 The applicants in the main proceedings and the Commission maintain that compensation awarded for unfair dismissal does constitute pay within the meaning of Article 119 of the Treaty. According to the Commission, it is compensation for loss of earnings in terms of salary and other benefits connected with the employment.

22 The United Kingdom Government, on the other hand, argues that this case concerns allegedly unequal working conditions within the meaning of Directive 76/207, as regards specifically the right not to be unfairly dismissed. The compensation which an Industrial Tribunal might award does not constitute remuneration for work carried out by the employee but compensation for the employer's breach of a working condition. Consequently, the principal feature of pay, namely that it constitutes remuneration for work done, is absent in this case.

23 According to settled case-law, the concept of pay, within the meaning of the second paragraph of Article 119, comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer (see, in particular, Case 12/81 *Garland* v *British Rail Engineering* [1982] ECR 359, paragraph 5, and Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 12).

24 The Court has also held that the fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being in the nature of pay, within the meaning of Article 119 of the Treaty (*Barber*, cited above, paragraph 12).

25 As regards, in particular, the compensation granted by an employer to an employee on termination of his employment, the Court has already stated that such compensation is a form of deferred pay to which the worker is entitled by reason of his employment but which is paid to him on termination of the employment relationship with a view to enabling him to adjust to the new circumstances arising from such termination (see *Barber*, cited above, paragraph 13, and Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 10).

26 In this case, the compensation awarded to an employee for unfair dismissal, which comprises a basic award and a compensatory award, is designed in particular to give the employee what he would have earned if the employer had not unlawfully terminated the employment relationship.

27 The basic award refers directly to the remuneration which the employee would have received had he not been dismissed. The compensatory award covers the loss sustained by him as a result of the dismissal, including any expenses reasonably incurred by him in consequence thereof and, subject to certain conditions, the loss of any benefit which he might reasonably be expected to have gained but for the dismissal.

28 It follows that compensation for unfair dismissal is paid to the employee by reason of his employment, which would have continued but for the unfair dismissal. That compensation therefore falls within the definition of pay for the purposes of Article 119 of the Treaty.

29 The fact that the compensation at issue in the main proceedings is a judicial award made on the basis of the applicable legislation cannot, of itself, invalidate that conclusion. As the Court has already stated in this connection, it is irrelevant that the right to compensation, rather than deriving from the contract of employment is, for instance, a statutory right (see, to that effect, *Barber*, cited above, paragraph 16).

30 In the light of the foregoing, the answer to the first question must be that a judicial award of compensation for breach of the right not to be unfairly dismissed constitutes pay within the meaning of Article 119 of the Treaty.

Question 2

31 By its second question the national court is asking, essentially, whether the conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain reinstatement or re-engagement, or else compensation, fall within the scope of Article 119 of the Treaty or that of Directive 76/207.

32 Since this case concerns pay falling within the scope of Article 119, the applicants claim that Directive 76/207, concerning equal treatment, is inapplicable. The law cannot prevent an employee who is entitled to compensation for unfair dismissal

as part of the right to equal pay under Article 119 from relying on that provision to ensure that his employer does not apply to him discriminatory conditions which, if applied, would result in a denial of the principle of equal pay.

33 The United Kingdom Government maintains that even if the compensation awarded for breach of the right not to be unfairly dismissed were to be regarded as pay within the meaning of Article 119, any alleged breach of the principle of equal treatment in the conditions determining enjoyment of the right, including financial compensation, must be governed by Directive 76/207 rather than by Article 119.

34 In support of that argument, it relies on Case 149/77 *Defrenne III* [1978] ECR 1365, in which the Court held, at paragraph 21, that the fact that the fixing of certain working conditions may have pecuniary consequences is not sufficient to bring such conditions within the scope of Article 119, which is based on the close connection which exists between the nature of the services provided and the amount of remuneration.

35 On that point it should be noted, as the Commission was right to point out, that where the claim is for compensation, the condition laid down by the disputed rule concerns access to a form of pay to which Article 119 and Directive 75/117 apply.

36 In this case, the proceedings brought by Ms Seymour-Smith and Ms Perez before the Industrial Tribunal do not relate to the possible consequences of a working condition, namely the right not to be unfairly dismissed, but seek compensation as such, which is a matter falling under Article 119 of the Treaty rather than Directive 76/207.

37 It would be otherwise if the dismissed employee were to seek reinstatement or re-engagement. In such a case, the conditions laid down by national law would concern working conditions or the right to take up employment and would therefore fall under Directive 76/207.

38 In the latter case, in the context of an application for judicial review of the variation of section 64(1) of the 1978 Act by the 1985 Order brought against the Secretary of State for Employment, the applicants in the main proceedings would be entitled to object to discrimination on grounds of sex in reliance on Directive 76/207 rather than Article 119 of the Treaty.

39 As the Court has consistently held, 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 individuals against the State (see, in particular, Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 16).

40 With regard to Article 5(1) of Directive 76/207, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, the Court has already held it to be sufficiently precise to be relied upon by an individual as against the State and applied by a national court in order to prevent the application of any national provision which is inconsistent with Article 5(1) (see Case 152/84 *Marshall I* [1986] ECR 723, paragraphs 52 and 56).

41 Accordingly, the answer to the second question must be that the conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain compensation fall within the scope of Article 119 of the Treaty. However, the conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain reinstatement or re-engagement fall within the scope of Directive 76/207.

Question 4

42 By its fourth question, which it is appropriate to answer at this stage, the national court asks essentially whether the legality of a rule of the kind at issue must be assessed as at the time of its adoption, the time when it entered into force or the time when the employee is dismissed.

43 The applicants in the main proceedings maintain that, where there is an intrinsic risk that a measure to be adopted and/or brought into force by a Member State will have a disparate effect on pay as between men and women, that Member State will act in breach of the EC Treaty if it proceeds with that measure, unless its introduction can be shown to be based upon objectively justified factors unrelated to sex. Moreover, the Treaty requires Member States periodically to monitor measures which affect employees' pay and to disapply a measure if they find that any of the obligations imposed in that respect by the Treaty have been infringed.

44 The United Kingdom Government, however, considers that the correct time at which to consider the impact of the measure is the date of the employee's dismissal. That is the date at which the disputed rule produces the effect complained of by the employees, namely preventing them from making a complaint of unfair dismissal. The discriminatory or non-discriminatory character of a measure is not 'fixed' at the time of the enactment or introduction of a measure, but depends on the circumstances prevailing at the time of the effect complained of.

45 It should be noted at the outset that the requirements of Community law must be complied with at all relevant times, whether that is the time when the measure is adopted, when it is implemented or when it is applied to the case in point.

46 However, the point in time at which the legality of a rule of the kind at issue in this case is to be assessed by the national court may depend on various circumstances, both legal and factual.

47 Thus, where the authority which adopted the act is alleged to have acted *ultra vires*, the legality of that act must, in principle, be assessed at the point in time at which it was adopted.

48 On the other hand, in circumstances involving the application to an individual situation of a national measure which was lawfully adopted, it may be appropriate to examine whether, at the time of its application, the measure is still in conformity with Community law.

49 With regard, in particular, to statistics, it may be appropriate to take into account not only the statistics available at the point in time at which the act was adopted, but also statistics compiled subsequently which are likely to provide an indication of its impact on men and on women.

50 Accordingly, the answer to the fourth question must be that it is for the national court, taking into account all the material legal and factual circumstances, to determine the point in time at which the legality of a rule of the kind at issue is to be assessed.

Question 3

51 By its third question, the national court seeks to ascertain the legal test for establishing whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 119 of the Treaty.

52 Article 119 of the Treaty sets out the principle that men and women should receive equal pay for equal work. That principle excludes not only the application of provisions leading to direct sex discrimination, but also the application of provisions which maintain different treatment between men and women at work as a result of the application of criteria not based on sex where those differences of treatment are not attributable to objective factors unrelated to sex discrimination (see Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig and Others* [1994] ECR I-5727, paragraph 20).

53 It is common ground that the disputed rule does not entail direct sex discrimination. It must therefore be considered whether the rule may constitute indirect discrimination incompatible with Article 119 of the Treaty.

54 The applicants in the main proceedings maintain that where there is an intrinsic risk that a measure adopted by a Member State will have a disparate effect on pay as between men and women, and/or such disparate effect is actually demonstrated by reliable and significant statistics, Article 119 of the EC Treaty is infringed unless that measure can be shown to be based upon objectively justified factors unrelated to sex.

55 In particular, they claim that where there are statistics which are significant, cover the entire workforce, and demonstrate long-term phenomena that cannot be explained as fortuitous, anything more than a minimal difference in impact would infringe the obligation to give effect to the principle of equal treatment.

56 According to the United Kingdom Government, the terms used by the Court in its case-law on indirect discrimination clearly show that it has in mind a markedly different impact.

57 For its part, the Commission proposes a 'statistically significant' test, whereby statistics must form an adequate basis of comparison and the national court must ensure that they are not distorted by factors specific to the case. The existence of statistically significant evidence is enough to establish disproportionate impact and pass the onus to the author of the allegedly discriminatory measure.

58 As regards the establishment of indirect discrimination, the first question is whether a measure such as the rule at issue has a more unfavourable impact on women than on men.

59 Next, as the United Kingdom Government was right to point out, the best approach to the comparison of statistics is to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years' employment under the disputed rule and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce. It is not sufficient to consider the number of persons affected, since that depends on the number of working people in the Member State as a whole as well as the percentages of men and women employed in that State.

60 As the Court has stated on several occasions, it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule. That situation would be evidence of apparent sex discrimination unless the disputed rule were justified by objective factors unrelated to any discrimination based on sex.

61 That could also be the case if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment. It would, however, be for the national court to determine the conclusions to be drawn from such statistics.

62 It is also for the national court to assess whether the statistics concerning the situation of the workforce are valid and can be taken into account, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant (see Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 17). It is, in particular, for the national court to establish whether, given the answer to the fourth question, the 1985 statistics concerning the respective percentages of men and women fulfilling the requirement of two years' employment under the disputed rule are relevant and sufficient for the purposes of resolving the case before it.

63 In this case, it appears from the order for reference that in 1985, the year in which the requirement of two years' employment was introduced, 77.4% of men and 68.9% of women fulfilled that condition.

64 Such statistics do not appear, on the face of it, to show that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by the disputed rule.

65 Accordingly, the answer to the third question must be that in order to establish whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 119 of the Treaty, the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure. If that is the case, there is indirect sex discrimination, unless that measure is justified by objective factors unrelated to any discrimination based on sex.

Question 5

66 By its fifth question the national court seeks to ascertain the legal criteria for establishing the objective justification, for the purposes of indirect discrimination under Article 119 of the Treaty, of a measure adopted by a Member State in pursuance of its social policy.

67 In that respect, the first point to note is that it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision, which, though applying independently of the sex of the worker, actually affects a considerably higher percentage of women than men, is justified by objective reasons unrelated to any discrimination on grounds of sex (Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 15).

68 However, although in preliminary ruling proceedings it is for the national court to establish whether such objective factors exist in the particular case before it, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165, paragraph 24).

69 It is settled case-law that if a Member State is able to show that the measures chosen reflect a necessary aim of its social policy and are suitable and necessary for achieving that aim, the mere fact that the legislative provision affects far more women than men at work cannot be regarded as a breach of Article 119 of the Treaty (see, in particular, Case C-444/93 *Megner and Scheffel* v *Innungskrankenkasse Vorderpfalz* [1995] ECR I-4741, paragraph 24, and *Freers and Speckmann*, cited above, paragraph 28).

70 In this case, the United Kingdom Government contends that the risk that the exposure of employers to proceedings for unfair dismissal brought by employees who had only fairly recently been engaged is a deterrent to recruitment, so that extension of the qualifying period for protection against dismissal would stimulate recruitment.

71 It cannot be disputed that the encouragement of recruitment constitutes a legitimate aim of social policy.

72 It must also be ascertained, in the light of all the relevant factors and taking into account the possibility of achieving the social policy aim in question by other means, whether such an aim appears to be unrelated to any discrimination based on sex and whether the disputed rule, as a means to its achievement, is capable of advancing that aim.

73 In that connection, the United Kingdom Government maintains that a Member State should merely have to show that it was reasonably entitled to consider that the measure would advance a social policy aim. It relies to that end on Case C-317/93 *Nolte* [1995] ECR I-4625.

74 It is true that in paragraph 33 of the *Nolte* case the Court observed that, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion.

75 However, although social policy is essentially a matter for the Member States under Community law as it stands, the fact remains that the broad margin of discretion available to the Member States in that connection cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal pay for men and women.

76 Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim.

77 Accordingly, the answer to the fifth question must be that if a considerably smaller percentage of women than men is capable of fulfilling the requirement of two years' employment imposed by the disputed rule, it is for the Member State, as the author of the allegedly discriminatory rule, to show that the said rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim.

Costs

78 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the House of Lords by order of 13 March 1997, hereby rules:

1. A judicial award of compensation for breach of the right not to be unfairly dismissed constitutes pay within the meaning of Article 119 of the EC Treaty.

2. The conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain compensation fall within the scope of Article 119 of the Treaty. However, the conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain reinstatement or re-engagement fall within the scope of 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.

3. It is for the national court, taking into account all the material legal and factual circumstances, to determine the point in time at which the legality of a rule to the effect that protection against unfair dismissal applies only to employees who have been continuously employed for a minimum period of two years is to be assessed.

4. In order to establish whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 119 of the Treaty, the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure. If that is the case, there is indirect sex discrimination, unless that measure is justified by objective factors unrelated to any discrimination based on sex.

5. If a considerably smaller percentage of women than men is capable of fulfilling the requirement of two years' employment imposed by the rule described in paragraph 3 of the operative part of this judgment, it is for the Member State, as the author of the allegedly discriminatory rule, to show that the said rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim.

Rodríguez Iglesias Kapteyn Puissochet

Hirsch Jann Mancini

Moitinho de Almeida Gulmann Murray

Edward Ragnemalm Sevón

Wathelet Schintgen Ioannou

Delivered in open court in Luxembourg on 9 February 1999.

R. Grass G. C. Rodríguez Iglesias

Registrar President