

male employees represents discrimination based on difference of sex, the provisions of Article 119 of the Treaty apply directly to such a situation.

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A. Van Houtte

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Registrar

President of the First Chamber,
Acting as President

OPINION OF MR ADVOCATE GENERAL
VERLOREN VAN THEMAAT
DELIVERED ON 8 DECEMBER 1981 ¹

*Mr President,
Members of the Court,*

The background to Case 12/81, now before the Court, is the understandable desire of Mrs Garland to be able to continue to enjoy the same travel facilities as retired male employees of her employer, British Rail Engineering Limited, after she attains pensionable age. The travel facilities for retired male employees are also available to their wives and dependent children. It appears from a letter of 4 December 1975 which was sent by the British Railways Board to the trade unions and is contained in

the file on the case that since 1976 female employees have in this respect been treated in the same way as men during their employment. However, it appears from the same letter that after female employees retire facilities for the members of their families are withdrawn. Mrs Garland's dispute with her employer eventually reached the House of Lords. The House of Lords has put the following questions on the case to the Court:

- “1. Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after

¹ — Translated from the Dutch.

retirement which discriminate against former female employees in the manner described above, is this contrary to:

- (a) Article 119 of the EEC Treaty?
- (b) Article 1 of Council Directive 75/117/EEC?
- (c) Article 1 of Council Directive 76/207/EEC?

2. If the answer to Questions 1 (a), 1 (b) or 1 (c) is affirmative, is Article 119 or either of the said directives directly applicable in Member States so as to confer enforceable Community rights upon individuals in the above circumstances?"

Question 1

For a summary of the arguments put forward by Mrs Garland, the Commission, British Rail Engineering Limited and the Government of the United Kingdom in this case I refer as usual to the report for the hearing.

Like the applicant and the Commission I am of the opinion that the questions raised may be answered on the basis of the Court's previous decisions wholly in the context of Article 119 of the EEC Treaty.

I shall consider Question 1 first. To begin I would remind the Court that besides applying to the ordinary basic or minimum wage or salary the principle of equal pay enunciated in Article 119 also applies to any other consideration,

whether in cash or in kind, provided that two conditions are fulfilled:

- 1. It must be paid directly or indirectly by the employer to the employee;
- 2. The payment must be in respect of his employment.

In his opinion in the first *Defrenne* case (Case 80/70. [1971] ECR 454) Mr Advocate General Dutheillet de Lamothe explained in detail why in his opinion pensions (*inter alia*) paid directly by an employer to a former employee fall within the ambit of Article 119. I find his arguments convincing and believe that they also apply *mutatis mutandis* to facilities like those at issue here. I shall however return to that point later on in my opinion. The judgment in the first *Defrenne* case itself states at paragraph 6 that "the provision in the second paragraph of the article extends the concept of pay to 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". Therefore the assumption in that judgment too is that Article 119 also encompasses future consideration fulfilling the other conditions of Article 119 to which I have referred. Mr Advocate General Warner in his opinion in the *Worringham* case (Case 69/80 [1981] ECR 796) so far as is here material came to similar conclusions to those of Mr Dutheillet de Lamothe.

It is therefore clear in any event from the Court's previous decisions that Article 119 also covers future consideration. It is also clear from Form BR 7103/6, Concessions For Retired Staff, which has been produced, that the consideration in question is given to employees by the

employer directly in the United Kingdom and indirectly outside it. Thirdly, it follows from the wording of Article 119 that the principle of equal pay which it lays down is not restricted to contractually agreed consideration within the meaning of that article. During the oral procedure British Rail Engineering also admitted that during the course of an employment contract the travel facilities in question must be regarded as pay within the meaning of Article 119. The only difference of opinion remaining is therefore on the question whether the continuance of the travel facilities for an employee after his retirement may also be regarded as consideration "in respect of his employment", in which case, the connection with employment cannot be deduced from a contract otherwise than by virtue of company pension rules. Nevertheless in my opinion Mr Dutheillet de Lamothe's observation in Case 80/70 *Defrenne* [1971] ECR at p. 458 also applies to those travel facilities. He said: "It is moreover because of the post, which it is true he no longer occupies but which he had necessarily to occupy, that he may receive this benefit". There is nothing in the file on the case to indicate that the travel facilities are granted in any respect other than employment. On the contrary the relevant notice to staff expressly bears the title "*Information for railway staff at the time of their retirement*". I have underlined the first four words. The connection with the employment is therefore expressly recognized. It is still more clear from the letter of 4 December 1975 to the trade unions, to which I referred earlier and which was produced at the Court's request, that after retirement the facilities must be regarded as a continuation of the travel facilities granted at the time of employment. Otherwise it would not have been possible for the letter to refer to partial withdrawal of those facilities. As I have said, British Rail Engineering has already admitted during the oral procedure that

at the time of employment the facilities fall under Article 119. That must also be so in the case of the subsequent continuation of the facilities.

Therefore in my view the first question put to the Court by the House of Lords must be answered in the affirmative: the discrimination in question is contrary to Article 119 of the EEC Treaty.

Question 2

In its written observations the Government of the United Kingdom refers to paragraph 17 of the Court's judgment in Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911 at p. 926, and denies that if Question 1 (a) is answered in the affirmative Article 119 would in addition be directly applicable in this case. In paragraph 17, after referring to its previous decisions on Article 119 of the EEC Treaty, the Court held that it "applies directly to all forms of discrimination which may be identified solely with the aid of criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application". In the opinion of the Government of the

United Kingdom such national or Community measures would be necessary in this case in order to resolve the questions regarding the differing retiring age and life expectancy which directly affect the cost of the benefit to the employer and its value to the employee.

With regard to that argument I should first like to concur with the Commission's observation made during the oral procedure that, in contrast to the *Burton* case (Case 19/81), differing retiring ages are not in point here. The question raised concerns the travel facilities granted after retirement for the benefit of members of a former employee's family, irrespective of whether or not the retiring age of the employee himself is different. In my analysis those facilities fall within the ambit of Article 119. There is no indication in the wording of Article 119 that the application of the article in this case should depend on the answer to questions such as those mentioned by the

Government of the United Kingdom. The form of discrimination in question can on the contrary be identified as such merely with the aid of the criteria set forth in that article. Moreover I would add that in my view if the questions raised by the United Kingdom are in fact relevant further elaboration of its argument tends precisely to refute it. If it is true that the life expectancy of women is higher than that of men and it is possible to take that into account, then the grant of travel facilities to the husband of a female employee would entail not more, but less, cost than travel facilities granted to the wife of a male employee. So in that respect too the retiring age of the employee has no relevance at all in this case.

On the basis of the Court's dicta in paragraph 17 of its judgment in the *Jenkins v Kingsgate* case cited above I therefore come to the conclusion that the second question raised by the House of Lords should also be answered in the affirmative.

Summing-up

In my view the questions raised should accordingly be answered as follows:

1. If an employer continues to grant former employees and members of their family special travel facilities after they attain their retirement age those facilities constitute "pay" within the meaning of the second paragraph of Article 119 of the EEC Treaty and should comply with the principle of equal pay for equal work within the meaning of that article.

2. If discrimination in that respect is identifiable as such with the aid of the criteria of “equal work” and “equal pay” set forth in Article 119 of the EEC Treaty that article is directly applicable in the Member States so as to confer enforceable Community rights upon the former employees discriminated against.