

Judgment of the Court (Fifth Chamber) of 30 January 1997

Livia Balestra v Istituto Nazionale della Previdenza Sociale (INPS).

Reference for a preliminary ruling: Pretura circondariale di Genova – Italy

Directives 76/207/EEC and 79/7/EEC - Equal treatment for men and women - Calculation of credit for supplemental retirement contributions

Case C-139/95.

In Case C-139/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale di Genova (Italy) for a preliminary ruling in the proceedings pending before that court between

Livia Balestra

and

Istituto Nazionale della Previdenza Sociale (INPS)

on the interpretation of 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) and of 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 (OJ 1979 L 6, p. 24),

THE COURT

(Fifth Chamber),

composed of: L. Sevón, President of the First Chamber, acting as President of the Fifth Chamber, D.A.O. Edward, J.-P. Puissochet, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: M.B. Elmer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the INPS, by Carlo de Angelis and Andrea Barbuto, of the Rome Bar;

- the Commission of the European Communities, by Enrico Traversa and Marie Wolfcarius, of its Legal Service, acting as Agents, assisted by Renzo Morresi, of the Bologna Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the INPS and the Commission at the hearing on 13 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 17 October 1996,

gives the following

Judgment

Grounds

1 By order of 19 April 1995, received at the Court on 2 May 1995, the Pretura Circondariale di Genova (District Magistrate's Court, Genoa) referred for a preliminary ruling under Article 177 of the EC Treaty two questions concerning the interpretation of 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) and of 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 (OJ 1979 L 6, p. 24).

2 Those questions have arisen in a dispute between Mrs Balestra, a former employee of an undertaking declared to be in critical difficulty, and the Istituto Nazionale della Previdenza Sociale (National Institute of Social Security, hereinafter 'the INPS') with regard to the calculation of credit for supplemental retirement contributions which the latter granted her pursuant to the statutory scheme for early retirement.

3 The scheme applicable in Italy at the relevant time was as follows. The provisions on pensionable age are derived from Article 9 of Law No 218 of 4 April 1952 (Ordinary Supplement to the Gazzetta Ufficiale della Repubblica Italiana (GURI) No 89 of 15 April 1952). Article 9 provides that male employees are entitled to retire at the age of 60, while female employees are so entitled at the age of 55, on condition, in each case, that they have paid contributions for at least 15 years and are credited with at least 180 monthly contributions or 780 weekly contributions.

4 Special provisions are applicable to employees of undertakings which, pursuant to Law No 675 of 12 August 1977 (GURI No 243), have been declared to be in critical difficulty by the Interministerial Committee for Industrial Policy Coordination (hereinafter 'the CIPI').

5 Law No 155 of 23 April 1981 (Ordinary Supplement to the GURI No 114, hereinafter 'Law No 155/1981') allows those employees to take early retirement at the age of 55, in the case of men, and at the age of 50, in the case of women. Article 16 of this Law provides that, for employees of undertakings declared by the CIPI to be in critical difficulty 'who have reached the age of 55, in the case of men, and 50, in the case of women, and who can show that they have paid 180 monthly contributions under general compulsory invalidity, old-age and survivors' insurance', the applicable pension is to be calculated on the basis of the actual duration of contributions, increased by a period equal to that between the date on which their contract of employment ended and the date of their 60th birthday, in the case of men, or of their 55th birthday, in the case of women (hereinafter 'credit for supplemental retirement contributions').

6 In addition to Law No 155/1981, as subsequently amended, there are, in the matter of early retirement, special schemes for employees in particular sectors. According to the documents in the case, the scheme covering employees in the iron and steel sector has been relied on in the main proceedings. Mrs Balestra has requested that rules similar to those applicable in that sector be applied to her.

7 For workers in the iron and steel sector, the original rule was that the early-retirement age for workers in undertakings declared to be in critical difficulty, as referred to in Article 16 of Law No 155/1981 (55 for men and 50 for women), was 50 for all workers, whether male or female (Article 1 of Law No 193 of 31 May 1984 (GURI No 153 of 5 June 1984)).

8 In its Judgment No 371 of 6 July 1989 (GURI, 1st Special Series No 28 of 12 July 1989), the Corte Costituzionale (Constitutional Court) held that Article 16 of Law No 155/1981 and Article 1 of Law No 193/1984 were unconstitutional in so far as they did not allow women employed in the iron and steel sector, if they took early retirement at the age of 50, to acquire, by being credited with supplemental retirement contributions, the same contribution record as a male worker, for whom the pensionable age is fixed at 60, as opposed to 55 for women. In that judgment, the Corte Costituzionale referred to the principle that, in Italy, the age limit for working was the same for women and men.

9 A new special rule was subsequently introduced, under which women employed in the iron and steel sector could take early retirement from the age of 47 provided that they could show that they had paid 300 monthly contributions (fifth paragraph of Article 5 of Decree-Law No 536 of 30 December 1987 (GURI No 304 of 31 December 1987), converted into Law No 48 of 29 February 1988 (GURI No 50 of 1 March 1988)), the age laid down for men remaining at 50.

10 In Judgment No 503 of 30 December 1991 (GURI, 1st Special Series No 2 of 8 January 1992), the Corte Costituzionale held that this possibility for female workers in the iron and steel sector to take early retirement from the age of 47 had to be coupled with the right for those female workers to be credited with supplemental retirement contributions with effect from the termination of their contract of employment until they reached the age of 60 (the age up to which both women and men are entitled to work), but within the same maximum 10-year limit as that applicable to men. It should be noted that, if the rule contained in Article 16 of Law No 155/1981 had been applied to the iron and steel sector, the credit for contributions would have been a maximum of eight years for women from the termination of their contract of employment (possible with effect from the age of 47) until they reached pensionable age (55 for women), whereas it is a maximum of 10 years for men from the termination of their contract of employment (possible with effect from the age of 50) until they reach pensionable age (60 for men), the two-year difference in credit for contributions being attributable to the fact that the early-retirement age for women was only three years below that set for men.

11 Mrs Balestra was formerly employed in an undertaking which the CIPI declared to be in critical difficulty. She tendered her resignation and entered into retirement under the early-retirement scheme available to women aged between 50 and 55.

12 Since she was 54 years and seven months when she resigned, she received from the INPS, pursuant to Article 16 of Law No 155/1981, credit equal to five months of contributions, corresponding to the period by which she fell short of the age of 55, the age at which a female worker was entitled to retire in Italy.

13 On 13 April 1993, Mrs Balestra brought proceedings before the Pretura Circondariale di Genova for an order requiring the INPS to credit her with supplemental contributions up to the maximum provided for under Law No 155/1981, namely five years. She relied on the abovementioned case-law of the Corte Costituzionale concerning workers in the iron and steel sector.

14 The INPS opposed Mrs Balestra's claim on the ground that she had terminated her contract of employment by voluntarily tendering her resignation and that Article 16 of Law No 155/1981 provided for the crediting of equal contributions for men and women, the only difference being that attributable to the different ages at which men and women were entitled to retire. In the view of the INPS, supplemental years could, according to the above case-law of the Corte Costituzionale, have been granted to Mrs Balestra only if she had been employed in an undertaking in the iron and steel sector, to which special rules applied.

15 Mrs Balestra thereupon submitted that Article 16 of Law No 155/1981 was contrary to the principle of equal treatment for men and women laid down in Directives 76/207 and 79/7.

16 Article 1(1) of Directive 76/207 provides as follows:

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

17 Article 5(1) of Directive 76/207 provides that:

Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

18 Article 1(2) of the Directive provides that:

'With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.'

19 Pursuant to this latter provision, the Council adopted Directive 79/7, which, according to Article 1, has as its purpose the progressive implementation, in the field of social security and other elements of social protection, of the principle of equal treatment for men and women in matters of social security.

20 According to Article 3(1)(a), Directive 79/7 applies to:

'statutory schemes which provide protection against the following risks:

- sickness, - invalidity, - old age, - accidents at work and occupational diseases, - unemployment'.

21 The objective expressed in Article 1 of Directive 79/7 is given effect to by Article 4(1), which provides that:

'1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status, in particular as concerns:

- the scope of the schemes and the conditions of access thereto,

- the obligation to contribute and the calculation of contributions,

- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

22 According to Article 7(1), Directive 79/7

'... shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits ...'.

23 Since it took the view that resolution of the dispute before it called for an interpretation of those provisions, the national court decided to stay proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is it contrary to the abovementioned EEC directives (Articles 1, 2, 3, 4 and 5 of Council Directive 79/7/EEC and Articles 1, 2 and 5 of Council Directive 76/207/EEC) to establish different age limits for the working lives of men and women for the purposes of entitlement to early retirement pursuant to Article 16 of Law No 155/81, termination of the employment relationship and calculation of pension benefits in the event of early retirement?

(2) Does the different treatment, with respect to the employment relationship and social-security benefits, which results from the establishment of different age limits under a legal system, such as the Italian system, under which the retirement age - the only age limit of significance for the purposes of early retirement - is 60 years of age for men and women alike, infringe the abovementioned provisions of those directives?'

24 According to the documents before the Court, the applicant in the main proceedings is seeking a credit of five years' supplemental retirement contributions starting from the date on which she took early retirement, which is therefore to be calculated without account being taken of the limit which, pursuant to Article 16 of Law No 155/1981, is formed by the pensionable age for women (55), on the ground that, in Italy, women as well as men are entitled to work until the age of 60.

25 It thus appears that the national court is seeking to ascertain in substance whether it is compatible with the principle of equal treatment for men and women to take account, in the calculation of early-retirement benefits, of age limits which differ according to sex and, more specifically, whether, when a Member State has, pursuant to Article 7(1)(a) of Directive 79/7, fixed pensionable ages that differ according to sex, that provision also allows the Member State to provide that employees of an undertaking declared to be in critical difficulty are entitled to a maximum of five years' credit of supplemental retirement contributions calculated from the date on which they took early retirement until the date on which they reach the age entitling them to a retirement pension, that is to say 55 for women and 60 for men.

26 The Court has consistently held that social-security benefits governed by statute and applying compulsorily to general categories of workers do not come within the definition of 'pay' within the meaning of the second paragraph of Article 119 of the Treaty (Case 80/70 Defrenne v Belgium [1971] ECR 445, paragraphs 7 and 8; Case C-262/88 Barber v Guardian Royal Exchange Assurance Group [1990] ECR I-1889, paragraphs 22 and 23; Case C-173/91 Commission v Belgium [1993] ECR I-673, paragraph 14). On the other hand, statutory social-security benefits are covered by Directive 79/7.

27 In this case, however, the national court is asking whether, since Article 16 of Law No 155/1981 applies to employment relations within undertakings declared to be in critical difficulty, early retirement is less a choice than a sole course for a worker who might otherwise lose both his pension entitlement and his job.

28 The national court suggests that in such circumstances early retirement may be treated as constituting dismissal in a broad sense that includes the ending of the employment relationship even where it occurs under an early-retirement scheme. The applicable directive would then be Directive 76/207, Article 5(1) of which prohibits discrimination on grounds of sex with regard to the conditions governing dismissal.

29 That view cannot be accepted. Even if early retirement is the direct result of the critical situation facing the undertaking within which the worker in question was last employed, the early-retirement benefits granted are

none the less directly governed by statute and are compulsory for certain general categories of workers. Furthermore, those benefits are directly and effectively linked to protection against the risk of old age, as referred to in Article 3(1) of Directive 79/7, since their grant ensues from entry into early retirement (see, in this regard, Case 19/81 *Burton v British Railways Board* [1982] ECR 555, paragraphs 12 to 15).

30 In any event, it is clear from the documents before the Court (and this has not been contested by Mrs Balestra) that in the present case Mrs Balestra's employment came to an end not as a result of her dismissal but as a result of her voluntary resignation, just five months before she reached the age at which she would have been entitled to retire in any event.

31 It follows that Directive 79/7 is applicable.

32 With regard to that directive, sex discrimination, in the context of the progressive implementation of the principle of equal treatment between men and women, can be justified only temporarily and under Article 7(1)(a) (Case C-154/92 *Van Cant v Riksdienst voor Pensioenen* [1993] ECR I-3811, paragraph 12). In all other cases, discrimination would be contrary to Article 4(1) of Directive 79/7, which, according to the Court's case-law, is sufficiently precise and unconditional for individuals to rely upon it before the national courts in order to preclude the application of any national provision inconsistent with that article (Case 71/85 *Netherlands v Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 21, and Case 286/85 *McDermott and Cotter v Minister for Social Welfare and Attorney-General* [1987] ECR 1453, paragraph 14).

33 The Court has consistently held that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a), is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to the difference in pensionable age (see, in particular, Case C-328/91 *Secretary of State for Social Security v Thomas and Others* [1993] ECR I-1247, paragraph 20, and Case C-92/94 *Secretary of State for Social Security and Chief Adjudication Officer v Graham and Others* [1995] ECR I-2521, paragraph 11).

34 It is for that reason that where, pursuant to that provision, a Member State has set the pensionable age at 55 for women and at 60 for men, it is necessary to examine whether discrimination existing against men or women under a benefits scheme other than that of retirement is objectively and necessarily linked to the difference in retirement ages.

35 That will be the position where such forms of discrimination are objectively necessary in order to avoid disturbing the financial equilibrium of the social-security system or to ensure coherence between the retirement-pension scheme and other benefit schemes (*Thomas and Others*, cited above, paragraph 12, and *Graham and Others*, cited above, paragraph 12).

36 A statutory early-retirement scheme such as that under consideration here discriminates against women in the manner in which their early-retirement benefits are calculated and, consequently, in the amount of their retirement pension.

37 The discrimination lies in the fact that, because conditions as to pensionable ages which differ according to sex are taken into account in calculating the supplemental retirement contributions, the retirement pension received by a woman may, in some cases, be lower than that received by a man where the contributions actually paid are the same.

38 A woman who retires at the age of 55 is not entitled to be credited with any contributions. Consequently, where a man and a woman, both aged 55, have actually paid the same contributions, the benefit which will be paid to the man taking early retirement will be higher than that granted to the woman who is retiring. In other words, if the contributions actually paid are the same, the woman will have to work some five extra years (until the age of 60) in order to be entitled to a pension whose amount equals that of the man taking early retirement at the age of 55.

39 The reply to the question whether this discrimination is objectively and necessarily linked to the setting of pensionable ages which differ according to sex is a matter falling within the competence of the national court. However, it follows from the judgment in *Thomas and Others*, paragraph 13, that the Court, which is called upon to provide the national court with helpful answers, has jurisdiction to give the national court guidance enabling it to give judgment.

40 With regard to the discrimination at issue in the main proceedings, it is objectively linked to the setting of pensionable ages which differ for women and men in so far as it ensues directly from the fact that those pensionable ages are set at 55 for women and at 60 for men. The rule applicable to both men and women is that they may rely on their right to early retirement no more than five years before the date on which they reach the age at which they become entitled to a retirement pension and that they are entitled to credit for retirement contributions in respect of the period between their entry into retirement and the date on which they reach that age.

41 With regard to the question whether this discrimination is also necessarily linked to this difference in pensionable ages for men and women, it must be noted first of all that the main feature of the early-retirement scheme established by Article 16 of Law No 155/1981 is the grant to the worker, before the worker reaches retirement age, of a benefit calculated on the basis of contributions actually paid and of a notional increase of the contributions period in respect of the period by which the worker falls short of reaching the pensionable age. The purpose of the early-retirement benefit is thus to guarantee an income to a person who leaves the employment market before reaching the age entitling him to a retirement pension. There is therefore a linkage between the retirement-pensions scheme and the early-retirement scheme in question.

42 The next question to be considered is whether the denial to women, who are entitled to work until the age of 60, of the right to be credited with contributions for the period after the date on which they reach the age of 55, when they may claim a retirement pension, is necessary in order to preserve this linkage.

43 If women taking early retirement at an age between 50 and 55 were credited with five years' contributions, without account being taken of the ordinary retirement age, the closer their entry into early retirement was to the ordinary pensionable age, the clearer it would become that those women would be receiving a definitive pension higher than that of women who had paid contributions until they reached the age of 55 and then retired, without being able to claim a credit of contributions.

44 Second, such a scheme is also liable to give rise to discrimination against men. Whereas a man taking early retirement at an age between 55 and 60 is only entitled to a credit of contributions covering the period from the date on which he takes early retirement until he reaches the ordinary pensionable age, a woman who also takes early retirement during the five years prior to the date on which she qualifies for a retirement pension would, as a matter of course, be entitled to a credit of five years' contributions.

45 Consequently, even though women are entitled to work until they reach the age of 60, denying them a credit of contributions in respect of the period after the date on which they reach the age of 55, the age at which they are entitled to a retirement pension, is necessary in order to preserve the coherence between the retirement-pensions scheme and the early-retirement scheme in question.

46 The reply to the national court must therefore be that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State has set pensionable ages which differ according to sex, that provision also allows it to provide that employees of an undertaking declared to be in critical difficulty may be credited with a maximum of five years' supplemental retirement contributions starting from their entry into early retirement until the date on which they reach the age at which they are entitled to a retirement pension, that is to say 55 years in the case of women and 60 years in the case of men, since the difference relating to sex in the method of calculating early-retirement benefits is objectively and necessarily linked to the setting of pensionable ages which differ for men and women.

Decision on costs

Costs

47 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Pretura Circondariale di Genova, by order of 19 April 1995, hereby rules:

Where, pursuant to Article 7(1)(a) of 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, a Member State has set pensionable ages which differ according to sex, that provision also allows it to provide that employees of an undertaking declared to be in critical difficulty may be credited with a maximum of five years' supplemental retirement contributions starting from their entry into early retirement until the date on which they reach the age at which they are entitled to a retirement pension, that is to say 55 years in the case of women and 60 years in the case of men, since the difference relating to sex in the method of calculating early-retirement benefits is objectively and necessarily linked to the setting of pensionable ages which differ for men and women.