

## **Barber v. Guardian Royal Exchange Assurance Group, Case 262/ 88, [1990] IRLR 240**

### **1) Reference Details**

Jurisdiction: European Court of Justice

Date of Decision: 17 May 1990

Link to case:

<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61988J0262:EN:HTML>

### **2. Facts**

The applicant, Mr. Barber, was a member of the non-contributory and “contracted out” Guardian Royal Exchange (GRE) pension fund. The usual pensionable age for employees was 57 years for women and 62 years for men.

The employee’s contract of employment contained GRE’s severance terms. The severance terms, which formed part of Mr Barber’ s contract of employment, provided that, 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 . Staff who did not fulfil those conditions received certain cash benefits calculated on the basis of their years of service and a deferred pension payable at the normal pensionable age”.

On 31 December 1980, Mr. Barber was made redundant. He was 52 years old and therefore was not entitled to an immediate pension. Mr. Barber received a “terminal payment” of £18,597 and a deferred pension (from the age of 62).

Mr. Barber complained to an industrial tribunal that he had been discriminated against contrary to the Sex Discrimination Act 1975. The Industrial Tribunal held that the Act did not apply in Mr. Barber’s case as “it involved a provision in relation to retirement”.

The applicant appealed to the Court of Appeal. The Court of Appeal stayed proceedings in order to ask the European Court of Justice 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?

### **3) Law**

#### National Law

- Sex Discrimination Act 1975

#### Regional Law

- EEC Treaty, Article 119
- EEC Equal Pay Directive 75/ 117
- EEC Equal Treatment Directive 76/ 207
- EEC Social Security Directive 79/7
- EEC Social Security Directive 86/ 378

### **4) Legal Arguments**

#### *The applicant*

The applicant contended that he had been discriminated against contrary to EEC law and the Sex Discrimination Act 1975 on the grounds of sex.

#### *The respondents*

The respondents, Guardian Royal Exchange, argued that the principle of equal pay had not been infringed. They maintained that Article 119 was inapplicable because the discrimination related to a difference in the ages at which a pension becomes payable, not in the amount of the pension or the employee's pay. They also submitted that the conditions of dismissal are working conditions within the meaning of the Equal Treatment Directive and do not relate to pay. Similarly, they argued that the age difference derived from social security legislation and the different pensionable ages for men and women (and thus part of the pension benefits) were in substitution of State social security benefits.

#### *The Government of the United Kingdom submitted:*

*"[C]ontracted-out pension schemes are occupational social security schemes within the meaning of Directive 86/378 and not within the scope of Article 119...[I]t was 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 UK submitted that Article 5 of the Equal Treatment Directive, rather than Article 119 of the Treaty, was the relevant provision where the question was one of access to a retirement pension. However, a difference in treatment in those circumstances does not constitute discrimination of a prohibited kind since it is tied to the fixing of different pensionable ages...[therefore] a difference in treatment as regards entitlement to a retirement pension which stemmed from a difference in pensionable ages was not contrary to Community law."*

## **5) Decision**

The European Court of Justice held that benefits paid by an employer to a worker in connection with the latter's compulsory redundancy fall within the scope of Article 119 of the EEC Treaty, whether they are paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis. It was further held that compensation granted to a worker in connection with his redundancy constitutes a form of pay. It follows that such compensation falls within the concept of "pay" for the purposes of Article 119, which comprises any consideration, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.

The Court also stated that Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality. Accordingly, it is contrary to Article 119 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme.