

## RECENT DEVELOPMENTS

### EUROPEAN ECONOMIC COMMUNITY—ARTICLE 119— BRITISH EQUAL PAY ACT OF 1970—REFERRAL TO EUROPEAN COURT OF JUSTICE—APPLICABILITY TO BRITISH PENSION PLAN AND TO SUCCESSIVE EMPLOYMENT CASES.

Mrs. Susan Worringham and Miss Margaret Humphreys challenged a contributory pension scheme established by Lloyd's Bank Ltd. on the grounds that it violated the British Equal Pay Act of 1970.<sup>1</sup> The pension scheme is set forth in the employment contracts of all clerical workers at the bank and requires all who are engaged in like work to participate in the plan. The plan differentiates between men and women under the age of twenty-five. Men under twenty-five are required to contribute five percent of their salaries to the pension scheme; women under twenty-five are exempt from this requirement but have no equity in the pension fund if they leave the bank before age twenty-five. The required five per cent payment by the men is funded by the bank in the form of a five per cent addition to their annual pay. The women clerks applied to the Industrial Tribunal for an equality of pay ruling.<sup>2</sup> The tribunal did not uphold the claim, but held that this payment was related to death or retirement under the pension exclusion of the Equal Pay Act of 1970<sup>3</sup> and was therefore exempt from

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<sup>1</sup> British Equal Pay Act, 1970, C. 41, as originally enacted. (hereinafter cited as the Equal Pay Act) The pertinent provision states as follows:

1.—(1) The provisions of this section shall have effect with a view to securing that employers give equal treatment as regards terms and conditions of employment to men and to women, that is to say that (subject to the provisions of this section and of section 6 below)

—(a) for men and women employed on like work the terms and conditions of one sex are not in any respect less favourable than those of the other, and (b) for men and women employed on work rated as equivalent (within the meaning of subsection (5) below) the terms and conditions of one sex are not less favourable than those of the other in any respect in which the terms and conditions of both are determined by the rating of their work. . . .

<sup>2</sup> Mrs. Worringham and Miss Humphreys apparently brought this action as a test case. 14,000 female employees who contributed the amount of three million pounds are affected by the Lloyds' pension plan. *Worringham v. Lloyds' Bank, Ltd.* [1979] ICR 174, 1975 (EAT) (hereinafter cited as *Worringham*).

<sup>3</sup> The Equal Pay Act was originally enacted to exclude any provision relating to death or retirement.

"(1) . . . nor shall that requirement extend to requiring equal treatment as regards terms and conditions related to retirement, marriage or death or to any provision

the "equal pay for equal work" standard.<sup>4</sup> The women clerks appealed to the Employment Appeal Tribunal. *Held*, reversed. The payments cannot be deemed to relate to "death or retirement" under the pension exclusion, and the women clerks are entitled to equal pay.<sup>5</sup>

In a second case, Mrs. Wendy Smith brought an action under the Equal Pay Act involving the equal pay provisions of the Act.<sup>6</sup> Mrs. Smith worked for MacArthys, Ltd., a pharmaceutical products dealer, as a manager of the stockroom. She was hired to replace a Mr. McCullough, who had previously worked as manager of the stockroom, having left four and one-half months earlier. MacArthys, Ltd., paid Mrs. Smith fifty pounds a week compared to Mr. McCullough's salary of sixty pounds a week. While the duties of the two managers were slightly different, the Industrial Tribunal found that their work was of equal value. Having determined that the difference in pay was due solely to a difference in sex, the Industrial Tribunal held that Mrs. Smith was entitled to the same pay as Mr. McCullough under the Equal Pay

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made in connection with retirement, marriage or death; and the requirements of section 3(4) of this Act shall be subject to corresponding restrictions. (2) Any reference in this section to retirement includes retirement, whether voluntary or not, on grounds of age, length of service or incapacity."

With the enactment of the Sex Discrimination Act, 1975, C. 65, (hereinafter cited as the Sex Discrimination Act) the wording of the Equal Pay Act was amended to require "equal access" to pension schemes, while leaving the exemption for provisions relating to death and retirement intact.

"(1A) An equality clause and those provisions—(a) shall operate in relation to terms relating to membership of an occupational pension scheme (within the meaning of the Social Security Pensions Act 1975) so far as those terms relate to any matter in respect of which the scheme has to conform with the *equal access requirements* of Part IV of that Act; (b) by subject to this, shall not operate in relation to terms related to death or retirement, or to any provision made in connection with death or retirement."

<sup>4</sup> Worringham v. Lloyd's Bank, Ltd. (unpublished report of the Industrial Tribunal).

<sup>5</sup> Worringham, *supra* note 2.

<sup>6</sup> Equal Pay Act *supra* note 1, at § 1 (2) and (3).

§1(2) It shall be a term of the contract under which a woman is employed at an establishment in Great Britain that she shall be given equal treatment with men in the same employment, that is to say men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employments are observed either generally or for employees of the relevant classes.

§1(3) Where a woman is employed at an establishment in Great Britain otherwise than under a contract which includes (directly or by reference to a collective agreement or otherwise) a term satisfying subsection (2) above, the terms and conditions of her employment shall include an implied term giving effect to that subsection.

Act (1970).<sup>7</sup> The Employment Appeal Tribunal affirmed the decision,<sup>8</sup> and the employer appealed to the Court of Appeal. The majority of the court felt that the British Equal Pay Act could be interpreted to include only male and female employees who are working concurrently. However, the justices could not agree on the application of Article 119 of the Rome Treaty, which applies a straightforward requirement of equal pay for equal work in European Community nations.<sup>9</sup> *Held*, the case was stayed while questions on the interpretation of Article 119 were referred to the European Court of Justice.<sup>10</sup>

Both the claims in these cases were based on the British Equal Pay Act which was enacted together with the Sex Discrimination Act of 1975 to implement the equal pay for equal work standards of Article 119 of the Rome Treaty. The Equal Pay Act (1970) introduced the right to equal pay for women. The Sex Discrimination Act (1975) supplemented that right through its own new provisions and by amendments to the previous act.<sup>11</sup> Among other things, the Sex Discrimination Act established the Equal Opportunities Commission.<sup>12</sup> It amended the Equal Pay Act in two

<sup>7</sup> *Smith v. MacArthys Ltd.* (unpublished report of the Industrial Tribunal).

<sup>8</sup> *MacArthys Ltd. v. Smith* [1978] ICR 500 (EAT).

<sup>9</sup> Treaty Establishing the European Economic Community, March 25, 1957, No. 4300, 298 U.N.T.S. 3.

#### Article 119

##### [Equal Pay for Men and Women]

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 purpose 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.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

<sup>10</sup> *MacArthys v. Smith*, [1979] 1 W.L.R. 1189, C.A.

<sup>11</sup> Equal Pay Act, *supra* at note 1. Sex Discrimination Act, *supra* at note 3.

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53.—(1) There shall be a body of Commissioners named the Equal Opportunities Commission, consisting of at least eight but not more than fifteen individuals each appointed by the Secretary of State on a full-time or part-time basis, which shall have the following duties—

(a) to work towards the elimination of discrimination,

(b) to promote equality of opportunity between men and women generally, and

(c) to keep under review the working of this Act and the Equal Pay Act 1970 and, when they are so required by the Secretary of State or

significant ways. First, the Equal Pay Act provisions concerning the pension exclusions were amended.<sup>13</sup> Second, the Equal Pay Act now requires that an employment contract be deemed to include an equality clause if one is not expressly included.<sup>14</sup>

Numerous decisions by the Employment Appeals Tribunal have produced useful instruction on the subject of equal pay.<sup>15</sup> While this body of British law is attributable to Article 119 and its implementing legislation, there is a parallel body of law developing in the European Court of Justice on Article 119. However, the rulings of the two courts do not appear consistent in some areas, as underscored by the pension problem in the *Worringham* case.

otherwise think it necessary, draw up and submit to the Secretary of State proposals for amending them.

The Equal Opportunities Commission (EOC) is charged with working towards the elimination of discrimination and enforcement of both the Equal Pay Act and the Sex Discrimination Act. The Commission may conduct its own formal investigations as well as assist individuals in bringing their complaints.

Another committee, the Central Arbitration Committee, was established in 1975 by the Employment Protection Act, 1975, C. 71. with responsibilities similar to those of the EOC, except in relation to collective agreements. This Committee is to review collective agreements submitted to it by trade unions, employers, or the Secretary of State.

*Employment Protection Act, 1975, C.71*

3.—(1) Where a trade dispute exists or is apprehended the Service may, at the request of one or more parties to the dispute and with the consent of all the parties to the dispute, refer all or any of the matters to which the dispute relates for settlement to the arbitration of—

- (a) one or more persons appointed by the Service for that purpose (not being an officer or servant of the Service); or
- (b) the Central Arbitration Committee constituted under section 10 below.

10.—(1) There shall be a body to be known as the Central Arbitration Committee, in this Act referred to as the "Committee".

(2) Any reference in any enactment, statutory instrument or other document to the Industrial Arbitration Board (whether by that or any other name) shall be construed as a reference to the Committee.

(3) The provisions of Part II and (so far as applicable) Parts I and III of Schedule 1 to this Act shall have effect with respect to the Committee.

<sup>13</sup> See note 3.

<sup>14</sup> Equal Pay Act §1(1), as amended by §8 of the Sex Discrimination Act. "If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one."

<sup>15</sup> The procedure for bringing individual claims under the Act is to submit these claims initially to an Industrial Tribunal. The decisions of the Industrial Tribunal are not binding upon other courts. However, they may be appealed to the Employment Appeals Tribunal whose decisions do constitute a binding body of law. According to a report prepared for the EEC, 2493 individual claims regarding equal pay were received by the Industrial Tribunal during the first two years of its existence (December 29, 1975 to December 31, 1977), while 50 of those were appealed to the Employment Appeals Tribunal. *Report of the Commission to the Council on the Application as at 12 February 1978 (1) of the Principle of Equal Pay for Men and Women.*

Although the Equal Pay Act provides that an employment contract is deemed to have an equality clause, the area of pensions was originally exempted. This exemption reflected the desire to avoid disturbing previously existing contract provisions.<sup>16</sup> However, ongoing discrimination involving pensions resulted in the provision in the Sex Discrimination Act (1975) for "equal access" to pension schemes for men and women while leaving the prior pension exclusion in effect.<sup>17</sup> The British Employment Appeals Tribunal has broadly construed this exception. For example, in *Roberts v. Cleveland Area Health Authority*,<sup>18</sup> the tribunal was presented with the case of a female hospital worker whose employer imposed a policy requiring women to retire, generally, at age sixty while allowing men to work until age sixty-five. The complainant, who was dismissed when she turned sixty, brought a claim before the Industrial Tribunal of unlawful discrimination under the Sex Discrimination Act (1975). The complainant argued that the exemption in §6(4)<sup>19</sup> of the Act, providing for the exemption of provisions relating to retirement, included only retirement matters such as pension arrangements and allowances. The Industrial Tribunal rejected that argument, saying that a provision fixing the date of retirement is rightfully excluded from coverage of the Act by §6(4). The Employment Appeal Tribunal upheld that

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<sup>16</sup> Worringham, *supra* note 2, at 176.

<sup>17</sup> See note 3.

<sup>18</sup> *Roberts v. Cleveland Area Health Auth.*, [1978] ICR 370.

<sup>19</sup> Sex Discrimination Act, *supra* note 2, at §6(4).

6.—(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman—

- (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
- (b) in the terms on which he offers her that employment, or
- (c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her—

- (a) in the way he affords her access to opportunities for promotion, or services, or by refusing or deliberately omitting to afford her access to them, or
- (b) by dismissing her, or subjecting her to any other detriment

(3) Except in relation to discrimination falling within section 4, subsections (1) and (2) do not apply to employment—

- (a) for the purposes of a private household, or
- (b) where the number of persons employed by the employer, added to the number employed by any associated employers of his, does not exceed five (disregarding any persons employed for the purposes of a private household).

(4) §§ (1)(b) and (2) do not apply to provision in relation to death or retirement.

decision, stating further that the language in §6(4) should be broadly construed.<sup>20</sup>

Another case involved a scheme which provided male employees of a subsidiary of the British Railways Board with travel privileges for both themselves and their families after retirement, while it restricted retired female employees to such privileges only for themselves.<sup>21</sup> A female employee complained of a violation of the Sex Discrimination Act (1975), and again the Industrial Tribunal held that her treatment was valid under the exclusion provided for in §6(4).<sup>22</sup> The Employment Appeals Tribunal, however, overturned the decision, stating that here the discrimination was a present one, even though the effects of the policy would not be felt until she retired.<sup>23</sup> Justice Phillips, who wrote the decision in both the *Cleveland* and *Garland* cases, restated his position from *Cleveland* that the language in §6(4) should be liberally construed. Justice Phillips then proceeded to further "refine" the definition given to §6(4) in the earlier case, stating that the §6(4) is directed to "... those arrangements made, and all those things which have been done, by employers in order to make provision for retirement, such as provision for pension." However, he continued, "There is a recognisable territory of things which are arranged or done, which do not sensibly come within that description, albeit the effects of them continue after employment has ceased."<sup>24</sup> The travel benefits fit into this latter territory.

While Article 119 of the Rome Treaty makes no express exclusion for pension schemes, the question of pensions has been considered by the European Court of Justice in three separate cases involving a female Belgian airline hostess.<sup>25</sup> The claimant, Miss Defrenne, worked as an airlines hostess for Sabena Airways. Her employment contract required female cabin crew members to

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<sup>20</sup> Roberts, *supra* note 18.

<sup>21</sup> *Garland v. British Rail Engineering*, [1978] ICR 495.

<sup>22</sup> *Garland v. British Rail Engineering* (unpublished report of the Industrial Tribunal).

<sup>23</sup> *Garland, supra* at note 21.

<sup>24</sup> *Id.* at 495.

<sup>25</sup> *Defrenne v. Belgian State*, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8137.

*Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena* [1976] E. Comm. Ct. J. Rep. 445; *Defrenne v. Société Belge de Navigation Aérienne Sabena* [1976] Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8346.

*Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1978] COMM. MKT. REP. (CCH) ¶ 8500.

retire at age forty. She brought her first suit in the Conseil d'Etat of Belgium for the annulment of a Royal Decree which permitted special application of pension provisions to flight personnel in civil aviation.<sup>26</sup> In support of her action, the employee argued that the Royal Decree was a violation of Article 119 of the Rome Treaty. The Belgian Court referred the case to the European Court of Justice on the question of whether the pension constituted "consideration" under Article 119 which requires equal pay "and other consideration" for men and women doing equal work. The European Court ruled that since Article 119 applied to payment and not to job conditions such as pensions, the Sabena pension scheme was not a violation of Article 119.<sup>27</sup> The European Court thus interpreted Article 119 to include a pension exemption.

Miss Defrenne brought another action before the Tribunal du Travail in Brussels seeking (1) the difference in her salary and that of her male counterpart, and (2) the difference in the pensions and severance pay for male and female employees. The case was ultimately appealed to the Labor Court in Brussels, which referred the case to the European Court for a ruling on Article 119 and its applicability to the national law of the member states.<sup>28</sup> The Court ruled that Article 119 may create a cause of action in national courts regardless of the existence of enacting legislation there.<sup>29</sup>

In the third action before the Belgian Courts, Miss Defrenne sought to force Sabena to pay her an additional allowance on termination of her service as well as compensation for the damage suffered regarding her pension.<sup>30</sup> The case was appealed to the Belgian Court of Cassation, which ordered the case referred to the European Court of Justice to decide the preliminary question of whether Article 119 applied to conditions of work. Miss Defrenne argued that Sabena's policy of mandatory retirement had pecuniary consequences in the form of lesser pension payments

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<sup>26</sup> Royal Decree of November 3, 1969 set special rules for the application of the Royal Decree No. 50 of October 24, 1967, concerning pensions, to flight personnel in civil aviation (Moniteur Belge of December 10, 1969, pp. 11903-11911).

<sup>27</sup> Defrenne v. Belgian State, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8137. Rep. (CCH) paragraph 8137.

<sup>28</sup> For a more detailed discussion, see *EEC-Direct Application of Community Law-Article 119 of the Treaty of Rome Requiring Equal Pay for Equal Work Has Direct Effect Upon National Law of Member States*, 7 GA. J. INT'L & COMP. L. 195 (1977).

<sup>29</sup> Case No. 43/75, Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346.

<sup>30</sup> A mandatory retirement plan was also the subject of the Roberts case, where the British Court allowed the plan to stand under the Equal Pay Act §6(4) exclusion.

and therefore was in violation of Article 119. The European Court did not accept Miss Defrenne's contention, but rather maintained its previous position that Article 119 dealt exclusively with equal pay and not to conditions of work even where those conditions had pecuniary consequences.<sup>31</sup> The Court of Justice has thus consistently refused to include pension plans within the requirements of Article 119.<sup>32</sup>

The exclusion of pension plans from the coverage of Article 119 by the European Court of Justice, as well as the broad interpretation given to the pension exclusion by the British Courts in earlier cases, cast the *Worringham* case in the light of a forward reaching decision in the area of pensions. The employers in that case argued, as the European Court had decided in the Defrenne cases, that Article 119 applies directly, but that pension matters could be excluded from the coverage of Article 119 by national legislation. The Employment Appeal Tribunal refused to consider the case on those grounds, however, stating that it could be decided through application of British law alone. Through their interpretation of §6(1A)(b), the court concluded that the pension exclusion does not cover the activities of Lloyd's Bank.

The Employment Appeals Tribunal interpreted the Equal Pay Act in a materially different way than did the Industrial Tribunal. First, the Court chose to look at the five per cent pay variance from the standpoint of gross payment rather than to view it as relating to death and retirement which would have brought it within the pension exclusion. The court so held in spite of prior decisions that the pension exclusion should be "widely and generously applied".<sup>33</sup> Second, the Industrial Tribunal had decided that Lloyd's pension plan was allowable under the pension exclusion because the pay difference for men and women was directly connected to the different pension provisions.<sup>34</sup> The tribunal accepted Lloyd's argument that their scheme was intended to be in accordance with national policy, reflecting different treatment only where pensions were concerned. The Employment Appeals Tribunal flatly rejected that argument, however, stating that the

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<sup>31</sup> Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, [1978] E. Comm. Ct. J. Rep. 1365; Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena [1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8500.

<sup>32</sup> Much has been written of the Defrenne cases, see McCallum & Smith, *EEC Law and UK Occupational Pension Scheme*, 1977 EUROPEAN L. REV. 270. Crisham, Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aérienne Sabena, 14 COMM. MKT. L.R. 102.

<sup>33</sup> Worringham, *supra* note 2, at 180.

<sup>34</sup> Worringham, *supra* note 4.

law demanded equality in pay, and if there was in fact inequality in pay, then "extrinsic forces, explanations, good intentions all are of no avail."<sup>35</sup>

The Employment Appeals Tribunal did take an interest in the applicability of EEC law, stating that if the Equal Pay Act allowed an exception to the equal pay for equal work principle, such an exception was in conflict with Article 119. As for the employer's argument that the second *Defrenne* case allows individual nations to make exceptions to the equal pay principle, the Employment Appeals Tribunal noted a possible basis of distinction in the *Defrenne* finding raised by the employee's counsel. The *Defrenne* decision would limit permissible exclusions only to state insurance provisions translated into contractual arrangements, an arrangement definitely different from Lloyd's plan. Also, the British Court took considerable notice of an EEC Council Directive, issued on February 10, 1975, which requires elimination of sex discrimination with regard to all aspects and conditions of remuneration.<sup>36</sup> The Employment Appeals Tribunal felt that this Directive was inconsistent with the *Defrenne* ruling and would at least raise the question of the validity of the British pension exclusion under EEC law. However, the *Worringham* Court did not resolve the questions concerning Community law, because it believed that Lloyd's pension plan was invalid under British law alone.

This narrowing interpretation of the pension exclusion by the Employment Appeals Tribunal may be significant, especially when it is considered in conjunction with the referral of the *Smith* case to the European Court of Justice. The British Court has been quite hesitant to refer cases to the European Court of Justice. Indeed, the *Smith* case referral was the first time the Court of Appeal had referred a case to the European Court for an opinion on the construction and application of a Treaty article. In the *Smith* case, the majority of the Court of Appeal was willing to validate, under British law, McCarthys Ltd.'s action of paying Mrs. Smith less than her male predecessor. The same justices could not reach a decision on whether to permit MacArthys' action under Community law. European Community law is directly applicable and controlling in relation to British law.<sup>37</sup> Rather than take the

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<sup>35</sup> *Worringham*, *supra* note 2, at 179.

<sup>36</sup> EEC Council Directive 75/117, issued Feb. 10, 1975; 18 O.J. EUR. COMM. (No. L 45) 19 (1975).

<sup>37</sup> In *Defrenne v. Sabena*, *supra* at note 28, the European Court ruled that Article 119 was directly applicable to the Nation States. In *Shields v. Coombes*, [1978] 1 W.L.R. 1408, the British Court of Appeal ruled on the superiority of EEC law, particularly Article 119.

chance of making a decision on the interpretation of Article 119 that would be at odds with European Community law, the Justices in the *Smith* case referred the case to the European Court.

A concern for proper application of EEC law has been demonstrated in other interpretations of the Equal Pay Act by the British Courts. As was the case in the facts of *Smith*, many of the questions which come before the courts arise from instances of past discrimination. A common example is the practice of "red circling," a scheme designed for workers who were moved from higher to lower paying jobs to insure that they kept their prior salary. Typical of these cases was one involving some machine parts inspectors. Men and women working together here as inspectors were ultimately being paid different salaries, because most of the male inspectors had been moved from higher paying jobs in the same factory. Under the "red circling" scheme, these men were allowed to keep their prior salary, even though their female counterparts worked for less. The employer argued that the difference was valid under the Equal Pay Act which absolves the employer where the pay difference is due to a factor other than sex.<sup>38</sup> The Court, however, rejected that argument, reasoning that this was past discrimination taking a present form, and that to allow the employer to succeed in such an argument would be contrary to the spirit of the Act. In disallowing the "red circling" scheme, the Court emphasized that there must be harmony between the British and EEC laws.<sup>39</sup> This was also the concern in the Court of Appeals' referral of the *Smith* case to the European Court.

Two of the three members of the Court of Appeals believed that the British Equal Pay Act could not be read to require that Mrs. Smith receive pay equal to that of Mr. McCullough. Section

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<sup>38</sup> Equal Pay Act, *supra* note 1 at § 6.

(6) Where a woman ought to be or to have been given equal treatment with a man as required by her equal pay clause, and he enjoys or has enjoyed by comparison with her any greater remuneration or other advantage, then it shall be for the woman's employer to show that this advantage is not the result of his terms and conditions of employment being in any respect more favourable than hers, but is genuinely due to a material difference (other than the difference of sex) between her case and his.

<sup>39</sup> In the words of Mr. Justice Phillips:

It is important to observe that Article 119 establishes a principle, with little or no detail of the way in which it is to be applied. It appears to us that the Sex Discrimination Act [1975], and the Equal Pay Act [1970], must be construed and applied subject to, and so as to give effect to, the principle." *Snoxell & Davies v. Vauxhall Motors*, [1977] ICR 700, 715.

1(2)(a)(i) of the Equal Pay Act (1970) requires equal pay for a woman who "is employed on work rated as equivalent with that of a man in the same employment."<sup>40</sup> Lord Justice Lawton and Lord Justice Cumming-Bruce construed this language, phrased in the present tense, to apply only to men and women working concurrently. On the other hand, Master of the Rolls, Lord Denning, read that present tense language in conjunction with §1(2)(b)(i) which requires equal pay "where the woman is employed on work rated as equivalent with that of a man in the same employment."<sup>41</sup> He reasoned that this sets a standard for equal pay based upon the value of the work done, regardless of whether the woman is employed simultaneously or in succession with her male counterpart. Also, in his construction of §1(2)(a)(i), Lord Denning referred to the Sex Discrimination Act (1975) §§1, 6(1), and (2).<sup>42</sup> Those sections

<sup>40</sup> Equal Pay Act, *supra* note 1 at § 1(2)(a)(i).

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that—

(a) where the woman is employed on like work with a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

<sup>41</sup> Equal Pay Act, *supra* note 1 at § 1(2)(b)(i).

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

<sup>42</sup> Sex Discrimination Act, *supra* note 3 at §§ 1 and 2.

1.—(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but—

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

(2) If a person treats or would treat a man differently according to the man's marital status, treatment of a woman is for the purposes of subsection (1)(a)

prohibit an employer from discriminating against a woman in granting benefits, even where a woman is replacing a man who has left his job. Lord Denning concluded that the Equal Pay Act required a parallel construction, and therefore could not be read to apply only to men and women working at the same time. This interpretation was not accepted by Justices Lawton and Cumming-Bruce for the majority, however, because they felt the language in §1(2)(a)(i) should be strictly construed without reference to other Acts of Parliament.

In considering this interpretation by the majority, the prior Employment Appeals Tribunal decision should be noted in which it was held that a woman hired at the same salary as her male co-worker in accordance with the Equal Pay Act (1970) does not lose her entitlement to that higher rate of pay simply because the man with whom she is compared leaves his job.<sup>43</sup> Thus, that Court was willing to impose the standards of the Equal Pay Act, even though the employment was not concurrent, where the Act had previously been applicable. Clearly, though, the majority of the Court of Appeals was not willing to extend this type of application of the Act to include the *Smith* situation. Lord Justice Cumming-Bruce demonstrated his reservations on extending the language of the Act beyond its present tense construction with an example of an employer who had to reduce wages, thereby causing a man to leave the job because he could not work for lower wages. Justice Cumming-Bruce felt it important that the employer be able to hire a woman at the new lower salary without the risk of a law suit. Similarly, Justice Lawton was concerned that a more expansive interpretation of the Equal Pay Act would reduce an employer's ability to respond to various economic pressures such as diminishing profits which in turn would necessitate a shift to lower salaries for workers in general. Such reservations led the majority of the Court to believe that Parliament intended for the Act to apply only to instances of concurrent employment.

The Justices considered at length whether the questions sent to the European Court should be phrased solely in terms of the facts

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to be compared to his treatment of a man having the like marital status.

2.—(1) Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.

(2) In the application of subsection (1), no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth.

<sup>43</sup> *Sorbie v. Trust Houses Forte Hotels Ltd.*, [1977] 2 ALL E.R. 155.

of the *Smith* case or in broader terms of the interpretation of Article 119. The Court noted that a request for a similar referral was scheduled to be made in the *Worringham v. Lloyd's Bank* case.<sup>44</sup> Although the Court left the matter of the actual phrasing of the questions open, it was generally agreed that the questions should be phrased for broader interpretation in order to prevent the necessity for repeated referrals to the European Court.

By referring the case to the European Court, the Justices open the possibility for an application of Article 119 which conflicts with their interpretation of the British Act. Lord Denning agreed with Justice Phillips from the Employment Appeals Tribunal that Article 119 established a principle of equal pay for equal work, and to effectuate that principle, Article 119 must be construed to prohibit discrimination against a woman upon succession to a job previously held by a man, as well as to men and women working simultaneously. However, both Justice Lawton and Justice Cumming-Bruce were unclear about the application and construction of Article 119. Justice Lawton did not feel that the words of Article 119 commanded applicability to successive employment, and Justice Cumming-Bruce felt that Article 119 states merely a general principle which could be compatible with his narrow interpretation of the Equal Pay Act (1970). All three of the Justices were in firm agreement on the superiority of Article 119 and EEC law over British law in the case of a conflict.<sup>45</sup> Thus, the interpretations by the European Court of Article 119 will control the disposition of the case.

### CONCLUSION

The European Court will base its ruling in *Smith* solely upon the applicability of Article 119 and whether it can be construed to apply to cases of successive employment.<sup>46</sup> Unlike the British Equal Pay Act, Article 119 is not phrased in the present tense. Equal pay is defined in Article 119 as "pay for work at time rates

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<sup>44</sup> Smith transcript, *supra* note 37 at 22.

The Court of Appeal has not decided the *Worringham* case, and apparently that Court is waiting to act until the European Court delivers the requested interpretation regarding the *Smith* case.

<sup>45</sup> Smith transcript, *supra* note 37.

<sup>46</sup> The question to be referred to the European Court was tentatively phrased at the *Smith* hearing as follows: "Whether the principle of equal pay for equal work contained in Article 119 of the EEC Treaty and Article 1 of the Directive is confined to men and women doing equal work at the same time or whether it applies to cases of successive employment where it is reasonable to make a comparison between the workers concerned."

shall be the same for the same job." Thus, a fairly narrow application of European Community law will entitle Mrs. Smith to pay equal to that of her male predecessor. Conceivably, the European Court of Justice will want to limit its extension of equal pay in these cases of successive employment. One way it could do this is to tie its ruling to the relatively short interval of four and one-half months between managers as in the *Smith* facts. Indeed, the Court may feel more comfortable with a narrow application of Article 119, in anticipation of problems such as those posed by Justice Cumming-Bruce in the *Smith* case.

The *Worringham* case will most likely not fare as well as the *Smith* case in the British Court of Appeal. If the Court of Appeal does not refer the case to the European Court, and it does not appear anxious to do so, it may well reverse the Employment Appeal Tribunal's ruling in the case. In the *Smith* proceedings, Lord Justice Lawton and Lord Justice Cumming-Bruce insisted upon an extremely narrow reading of the British Equal Pay Act. This same conservative approach leads to a broad application of the pension exclusion so as to allow Lloyds' pension scheme to stand as not being a violation of the Equal Pay Act. Anticipation of such an application of British law was voiced by the Counsel for the employees in *Worringham* in statements made after the *Smith* decision was rendered. He stated that it was because he did not believe that his clients could win under British law in the Court of Appeal that he was requesting a referral to the European Court of Justice.<sup>47</sup> Thus, unless the Court of Appeal decides the *Worringham* case on European Community law grounds or refers it to the Court of Justice, the British pension exclusion may continue to embrace plans such as that of Lloyd's Bank.

*Beverly Martin*

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<sup>47</sup> Mr. Lester: "Since I am going to concede to your Lordship that in the light of your Lordships' recent decision I am most unlikely to win under English law in this court, the only issue for your Lordships is whether to refer and, if so, which questions to refer. It will be a pure European Community law issue. We will try to agree the facts and we will try to agree the questions, but we will argue strenuously about whether it should be referred. We are endeavoring to get the transcript of today's judgement as it will shorten it considerably to have the benefit of this judgment." *Smith* transcript, *supra* note 37, at 25.