



JUDGMENT OF THE COURT

30 October 2007

*(Widow's and widower's pension rights – Equal treatment of women and men –
Article 69 EEA – Directive 79/7/EEC – Directive 86/378/EEC)*

In Case E-2/07,

EFTA Surveillance Authority, represented by Niels Fenger, Director, Arne T. Andersen, Senior Officer, and Lorna Young, Officer, Legal & Executive Affairs, acting as Agents,

Applicant,

v

The Kingdom of Norway, represented by Karin Fløistad, advokat, Attorney General for Civil Affairs, Eyvin Sivertsen, advokat, Attorney General for Civil Affairs, and Guro Hansson Bull, Ministry of Foreign Affairs, acting as Agents,

Defendant,

APPLICATION for a declaration that by maintaining in force rules in *lov av 28. juli 1949 nr. 26 om Statens Pensjonskasse* (Public Service Pension Act) relating to pension rights accrued on the basis of periods of employment after 1 January 1994 pursuant to which the survivor's pension of a widower whose spouse became a member of the Public Service Pension Fund prior to 1 October 1976 is curtailed in relation to his other income whereas a widow in the same circumstances receives her survivor's pension without curtailment, the Kingdom of Norway has failed to fulfil its obligations under Article 69(1) EEA and Article 5 of the Act referred to at point 20 in Annex XVIII to the EEA Agreement (Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, as amended by Council Directive 96/97/EC of 20 December 1996), as adapted by Protocol 1 thereto.

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THE COURT,

composed of: Carl Baudenbacher, President (Judge-Rapporteur), Thorgeir Örlygsson and Henrik Bull, Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by Michel van Beek, Legal Adviser, acting as Agent,

having decided to dispense with the oral procedure pursuant to Article 41(2) of the Rules of Procedure,

gives the following

Judgment

I Facts and pre-litigation procedure

- 1 By a letter of 3 July 2001, the Applicant informed the Defendant of the receipt of a complaint alleging that certain provisions of the Norwegian Public Service Pension Act discriminated against widowers in relation to survivor's pensions granted to persons whose spouse had joined the Public Service Pension Fund prior to 1 October 1976. In such a situation, the survivor's pension of a widower would be subject to curtailment where he had other sources of income, whereas no such curtailment would have taken place had the survivor been the widow of a male employee.
- 2 In the following exchange of letters, the Applicant maintained that the relevant rules in the contested legislation appeared to infringe Articles 69 and 70 of the Agreement on the European Economic Area (hereinafter "EEA" or "the EEA Agreement") as well as Article 6(e) of Directive 86/378 of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, as amended by Council Directive 96/97/EC of 20 December 1996 (hereinafter "Directive 86/378"), which the Defendant subsequently contested. Concurring with the Applicant only as regards the applicability of Directive 86/378, the Defendant argued that the contested legislation was not contrary to its Article 6(e) or any general equal treatment principle under EEA law. Furthermore, the Defendant argued that EEA law does not have retroactive effect and that this should prevent rights established before the entry into force of the EEA Agreement being subject to EEA law. The Defendant further maintained that exempting widowers whose spouse had joined the Public Service Pension Fund prior to 1 October 1976 from the curtailment

rules in the same way as widows of male employees in the same situation would be financially too burdensome and would constitute an inappropriate shift in priority in light of the State's limited resources for pension and national insurance benefits.

- 3 On 18 September 2003, the Applicant sent the Defendant a letter of formal notice, maintaining that the contested legislation was contrary to Article 69 EEA and Directive 86/378. The Applicant also denied that transitional arrangements enjoy a special status under EEA law and argued that retroactivity was without significance for periods of employment after 1 January 1994 in light of the case law of the Court of Justice of the European Communities (hereinafter "the ECJ") and Article 2 of Directive 96/97/EC (hereinafter: "Directive 96/97"). In its reply by letter dated 15 December 2003, the Defendant contested the applicability of Article 69 EEA and Directive 86/378 to the case at hand, arguing that the difference in treatment was related to the financial situation of the surviving spouse rather than the work performed by the civil servant. Basing itself on case law from the ECJ, the Defendant claimed that the survivor's pension constituted "social security" rather than "pay" and consequently was governed exclusively by 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 (hereinafter: "Directive 79/7") which, in its Article 3(2), excludes survivors' benefits from the equal treatment obligations laid out therein.
- 4 The Applicant, in a supplementary letter of formal notice dated 14 July 2004, reiterated that, in its view, pensions paid under the Public Service Pension Fund must be considered as "pay" and, as such, fall within the scope of Article 69(1) EEA. Replying to this letter on 29 November 2004, the Defendant announced that it would comply with the Applicant's view and amend the contested legislation accordingly. To that end, an amendment to the Public Service Pension Act would be proposed so that those who become widowers after the amendment, and whose deceased spouses became members of the Public Service Pension Fund before 1 October 1976 will be given the same rights as widows enjoy.
- 5 By letter of 15 December 2004, the Applicant requested clarification of the meaning of the phrase "become widowers after the amendment". In its response of 3 February 2005, the Defendant confirmed that only persons becoming a widower after 1 January 2006 (the planned date of entry into force of the envisaged amendment) would benefit from the more favourable rules, but not widowers whose spouse had periods of employment after 1 January 1994 and died before 1 January 2006.
- 6 The Applicant delivered a reasoned opinion on 26 October 2005. The Defendant replied by a letter dated 8 March 2006, referring again to the envisaged amendment of the contested legislation. However, no amendment has been made to the contested legislation.

7 By a letter registered at the Court on 19 February 2007, the Applicant filed the present application.

II Legal background

EEA law

8 Article 69 EEA reads:

1. Each Contracting Party shall ensure and maintain the application of the principle that men and women should receive equal pay for equal work.

For the purposes 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.

2. Annex XVIII contains specific provisions for the implementation of paragraph 1.

9 Article 70 EEA reads:

The Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII.

10 Article 3(1) of Directive 79/7 reads:

This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

- ...
- old age

11 Article 2(1) of Directive 86/378 reads:

'Occupational social security schemes' means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

12 Article 4(b) of Directive 86/378 reads:

This Directive shall apply to:

...

- (b) *occupational schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits are accorded to employed persons and thus constitute a consideration paid by the employer to the worker by reason of the latter's employment.*

13 Article 5(1) of Directive 86/378 reads:

Under the conditions laid down in the following provisions, the principle of equal treatment implies that there shall be no discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status, especially as regards:

...

- *the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.*

14 Article 6(1)(e) of Directive 86/378, as amended by Directive 96/97, reads:

Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:

...

- (e) *setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;*

...

15 Article 2(1) and (3) of Directive 96/97 read:

1. Any measure implementing this Directive, as regards paid workers, must cover all benefits derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures must apply retroactively to 8 April 1976 and must cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, that date shall be replaced by the date on which Article 119 of the Treaty became applicable on their territory.

...

3. For Member States whose accession took place after 17 May 1990 and who were on 1 January 1994 Contracting Parties to the Agreement on the European

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Economic Area, the date of 17 May 1990 in paragraph 1 and 2 of this Directive is replaced by 1 January 1994.

National legislation

- 16 The Norwegian Public Service Pension Fund was established in 1917 and its activities have been regulated by statute since that time. The Public Service Pension Act of 1949 provides that the Public Service Pension Fund is a state-guaranteed fund for the financing of pensions which, under the Public Service Pension Act or any other act, are payable from that fund. Employees working in the public service at least 14 hours per week are members of the fund. An employee who has been a member of the fund is entitled to an old age pension which is calculated on the basis of the regular income at the moment of leaving the respective employment relationship. As a main rule, the actual pension is 66% of the last income from the public service employment, reduced by one thirtieth for every year less than 30 years of service. When a member of the fund dies, a surviving spouse is entitled to a widow's/widower's pension amounting to 9% of the deceased spouse's pension.
- 17 Section 34 of the Act contains exceptions from the abovementioned rules. According to this provision, the survivor's pension for widows or widowers born prior to 1 July 1950 and whose spouse had become a member of the fund prior to 1 July 2000 amounts to up to 39.6% of the deceased spouse's pension, but is subject to curtailment depending on other income which the survivor receives. The rules for the curtailment of these pensions are provided for in Sections 35 and 36 of the Act.
- 18 Section 34, third paragraph, stipulates that the widow of a male employee who became a member of the fund prior to 1 October 1976 receives a survivor's pension without curtailment.
- 19 Historically, widows of members of the fund automatically received a survivor's pension, whereas widowers were only entitled to such a pension to the extent that they had been fully or partially supported by their now-deceased wife. From 1 October 1976, the Norwegian legislation was amended to equalise the treatment of widows and widowers. This was done by extending the unconditional entitlement to a survivor's pension to widowers. At the same time, curtailment rules, limiting the amount of the pension where the survivor had other sources of income, were introduced for both widows and widowers.
- 20 Concerns about the constitutional implications of depriving the wives of male employees who were, on 1 October 1976, already members of the fund, of their accrued rights led to the decision that this group of women should continue to benefit from the old rules under which their widow's pension was not subject to curtailment, which was consequently mirrored by the exemption in Section 34, third paragraph.

III Arguments of the parties

- 21 The Applicant, supported by the Commission of the European Communities, is of the view that the rules contained in the Act concerning the calculation of the survivor's pension of a widower whose wife became a member of the Public Service Pension Fund before 1 October 1976 as compared with that of a widow in like circumstances constitute direct discrimination based on gender, as prohibited by Article 69(1) EEA and Directive 86/378. To support this, the Applicant argues that, in fulfilling the criteria set out in the ECJ's recent case law, the pensions granted under the Act constitute "pay" within the meaning of Article 69(1) EEA and are caught by the definition of "occupational social security scheme" in Directive 86/378. Accordingly, the scheme provided for under the Act is not a pension paid by a statutory social security scheme, and does not fall within the scope of Directive 79/7. Furthermore, the Applicant rebuts the arguments made by the Defendant in the pre-litigation procedure regarding the limited duration of the contested rules and the lack of retroactivity of EEA law. As regards alleged constitutional restraints when it comes to curtailing widows' pensions following the same rules as widower's pensions, the Applicant suggests that equality can also be achieved by granting the same favourable treatment to both genders. The financial consequences of that solution are, according to the Applicant, not an objective reason that would be able to justify difference in treatment such as the one at issue.
- 22 The Defendant, upon review of the case, has accepted the Applicant's view that a widow and a widower whose spouse became a member of the Public Service Pension Fund prior to 1 October 1976 must be treated equally with regard to survivor's pension rights accrued on the basis of periods of employment after 1 January 1994. The Defendant does no longer dispute that the survivor's pension scheme at hand falls within the scope of Article 69(1) EEA and Directive 86/378, as amended. Furthermore, the Defendant agrees that the contested legislation cannot – due to its scope and duration – be objectively justified on the grounds that it is of a transitional nature. As a consequence, the Defendant has requested the Court to declare the application to be founded.

IV Findings of the Court

- 23 By the present application, the Applicant challenges the discrimination inherent in the preferential treatment of widows whose deceased spouse became a member of the Public Service Pension Fund prior to 1 October 1976 as compared to widowers in the same situation with regard to the curtailment of survivor's pensions.
- 24 Both the Applicant and the Defendant submit that the survivor's pension scheme at issue falls within the scope of both Article 69(1) EEA and Directive 86/378. In this respect, they agree that the scheme must be considered "pay" within the meaning of Article 69(1) and not a statutory social security scheme falling under Directive 79/7. The Court must nevertheless make its own assessment.

- 25 Article 69(1) EEA establishes the principle of equal pay without discrimination based on gender and, for these purposes, provides a definition of the notion of “pay”. The provision mirrors ex-Article 119 EC which as of 1 May 1999 was replaced by Article 141 EC. Article 141(1) and (2) EC are essentially identical to ex-Article 119 EC (compare Case C-351/00 *Niemi* [2002] ECR I-7007, at paragraphs 3–5). Consequently, also the case law of the ECJ on Article 141(1) and (2) EC is relevant for the interpretation of Article 69(1) EEA, as provided for in Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.
- 26 The survivor’s pension scheme at issue is determined by statute. Although that indicates that the benefits are social security benefits, it is not in itself sufficient to exclude such a scheme from the scope of Article 69(1) EEA (see for comparison *Niemi*, cited above, at paragraph 41). In order to ascertain whether a pension constitutes “pay” within the meaning of Article 69(1) EEA, the decisive criterion is whether the pension is paid to the former worker by reason of the employment relationship between him and his former employer, that is to say the criterion of employment. See for comparison *Niemi*, cited above, at paragraph 44 and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, at paragraph 56.
- 27 In this regard, the ECJ has recognised that a pension scheme that fulfils the following three criteria constitutes pay within the meaning of Article 141 EC: first, the pension concerns only a particular category of workers, second, it is directly related to the period of service completed and, third, its amount is calculated by reference to the public servant's final salary. The pension paid by the public employer is in that case entirely comparable to that paid by a private employer to his former employees (see *Schönheit and Becker*, cited above, at paragraphs 57–58). Furthermore, the ECJ has recognised that a survivor’s pension provided by such a scheme constitutes “pay” within the meaning of Article 141 EC, as it is an advantage deriving from the deceased spouse’s membership in the scheme and is therefore paid by reason of the spouse’s employment (see Case C-117/01 *K.B.* [2004] ECR I-541, at paragraphs 26–27).
- 28 With regard to the first criterion, the Court notes that the employees benefiting from the Public Service Pension Fund are distinguished from employees grouped within an undertaking or group of undertakings, in a particular sector of the economy or in an occupational sector or group of sectors, only by reason of the specific features governing their employment relationship with the State. Thus, they must be regarded as constituting a particular category of workers, as set out in the case law of the ECJ (see *Schönheit and Becker*, cited above, at paragraph 60).
- 29 Secondly, with regard to the criterion that the pension must be directly related to the period of service completed, the Court notes that in order to receive a full pension, 30 years of membership in the Public Service Pension Fund is required. Thus, in essence the level of the pension is determined by reference to the duration of the employment.

- 30 Finally, with regard to the third criterion, it follows from the Public Service Pension Act that the amount of pension is calculated by reference to the public servant's final salary.
- 31 In conclusion, the relevant criteria are fulfilled and the pensions and accordingly the survivor's pensions derived from the membership in the Public Service Pension Fund constitute "pay" within the meaning of Article 69(1) EEA. As a result, the principle of non-discrimination with regard to pay, as laid down in Article 69(1) EEA, is applicable to the survivor's pensions in question.
- 32 Since the pensions qualify as "pay" under Article 69(1) EEA, the Public Service Pension Fund falls outside the scope of Directive 79/7 (see *Niemi*, cited above, at paragraphs 38–47, *Schönheit and Becker*, cited above, at paragraphs 63–64).
- 33 For the same reason, the Public Service Pension Fund constitutes an occupational social security scheme falling under Directive 86/378, cf. Article 2(1) and Article 4(b) of that Directive.
- 34 Accordingly, the Court holds that the submissions concerning the applicability of Article 69(1) EEA and Directive 86/378 are correct. The Court then has to assess the Applicant's claim that the contested legislation is at odds with this part of EEA law.
- 35 According to Section 34, third paragraph, of the Public Service Pension Act, widows whose deceased husbands became a member of the Public Service Pension Fund prior to 1 October 1976 are entitled to a survivor's pension without curtailment, while the survivor's pensions of widowers in a like position are subject to curtailment if they have other sources of income. Thus, Section 34, third paragraph, of the Public Service Pension Act violates the principle of non-discrimination with regard to pay, as laid down in Article 69(1) EEA, and of the rule of non-discrimination with regard to the calculation of benefits, as established by Article 5(1) of Directive 86/378.
- 36 The Defendant has neither raised any argument for the justification of this discrimination before the Court, nor is it contesting the claim of the Applicant.
- 37 The obligations under Article 69(1) EEA and Article 5(1) of Directive 86/378 have remained the same since the entry into force of the EEA Agreement for Norway. The obligations thus apply with regard to all benefits derived from periods from 1 January 1994 onwards, cf. also Article 2 of Directive 96/97.
- 38 Based on the above, the Court holds that by maintaining in force rules in *lov av 28. juli 1949 nr. 26 om Statens Pensjonskasse* relating to pension rights accrued on the basis of periods of employment after 1 January 1994 pursuant to which the survivor's pension of a widower whose spouse became a member of the Public Service Pension Fund prior to 1 October 1976 is curtailed in relation to his other income whereas a widow in the same circumstances receives her survivor's pension without curtailment, the Kingdom of Norway has failed to fulfil its

obligations under Article 69(1) EEA and Article 5 of the Act referred to at point 20 in Annex XVIII to the EEA Agreement (Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, as amended by Council Directive 96/97/EC of 20 December 1996), as adapted by Protocol 1 thereto.

V Costs

- 39 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Applicant has asked that the Defendant be ordered to pay the costs. Since the Applicant has been successful in its application, the Defendant must be ordered to do so. The costs incurred by the Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

- 1. Declares that by maintaining in force rules in *lov av 28. juli 1949 nr. 26 om Statens Pensjonskasse* relating to pension rights accrued on the basis of periods of employment after 1 January 1994 pursuant to which the survivor's pension of a widower whose spouse became a member of the Public Service Pension Fund prior to 1 October 1976 is curtailed in relation to his other income whereas a widow in the same circumstances receives her survivor's pension without curtailment, the Kingdom of Norway has failed to fulfil its obligations under Article 69(1) EEA and Article 5 of the Act referred to at point 20 in Annex XVIII to the EEA Agreement (Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, as amended by Council Directive 96/97/EC of 20 December 1996), as adapted by Protocol 1 thereto.**

- 2. Orders the Kingdom of Norway to pay the costs of the proceedings.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 30 October 2007.

Skúli Magnússon
Registrar

Carl Baudenbacher
President