OPINION OF ADVOCATE GENERAL ALBER
delivered on 17 June 2003 [1]

I — Introduction

1. This reference for a preliminary ruling concerns the safeguarding of employees' rights on early retirement in the event of a transfer of an undertaking. The first issue is whether the benefits provided for are 'old-age benefits' within the meaning of Article 3(3) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses ('Directive 77/187'). [2] If not, the question arises whether the applicant's rights to benefits are derived from obligations of the employer within the meaning of Article 3(2) which are thus transferred to the transferee in the event of the transfer of the undertaking. Finally, if those rights to benefits pass to the transferee on a transfer of the undertaking, the extent to which employees can waive their rights if appropriate must be considered.

1 — Original language: German.
2 — OJ 1977 L 61, p. 26.

II — Legal background

A — *Community legislation*

2. Directive 77/187

3. Article 1

'1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

...'

4. Article 3

'1. The transferor's rights and obligations arising from a contract of employment or

from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the provision that it shall not be less than one year.

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

...'

B — *Provisions of national law*

1. Legislative provisions

5. Directive 77/187 was implemented in national law in the United Kingdom by the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('TUPE').

6. Regulations 5, 6 and 7 of the TUPE provide on the relevant points:

'5. Effect of relevant transfer on contracts of employment etc.

(1)... a relevant transfer shall not operate so as to terminate the contract of employment

of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) above,... on completion of a relevant transfer

— all the transferor's rights, powers, duties and liabilities under or in connection with such a contract shall be transferred by virtue of this regulation to the transferee; and

— anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee...

6. Effect of relevant transfer on collective agreements

Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by Regulation 5(1) above, then:

(a) ... that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application as aforesaid, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee...

7. Exclusion of occupational pension schemes

(1) Regulation 5 and 6 above shall not apply:

(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the "Social

Security Pensions Act 1975" or the "Social Security Pensions (Northern Ireland) Order 1975"; or

(b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

(2) For the purposes of paragraph (1) above any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall be treated as not being part of the scheme.'

2. Provisions on collective agreements

7. The General Whitley Council conditions of service must be taken into account in addition to the statutory provisions in the present case. The contract of employment concluded between the applicants in the main proceedings and the National Health Service ('NHS') declared the General Whitley Council conditions of service ('the GWC conditions of service') to be applicable to that contract.

8. Section 45 of the GWC conditions of service provides for a lump sum redundancy payment to be made if an employee with a certain minimum length of service:

— is dismissed by reason of redundancy or

— takes premature retirement on organisational change.

According to Paragraph 12 of that section there is a (contractual) obligation on the employer to pay those benefits to his employees.

9. Section 46 of the GWC conditions of service provides for an immediate payment of enhanced retirement pension and compensation on an employee's ceasing work in three situations:

— on redundancy,

— in the interests of the efficiency of the service,

— on organisational change.

10. The expression 'organisational change' in Section 45 is defined in terms of voluntary early retirement to contribute to the avoidance of redundancy. It is essentially equivalent to voluntary retirement. Section 46 provides that the term 'organisational change' used in that Section has the same meaning as in Section 45.

11. The expression 'in the interests of the efficiency of the service' should be given its ordinary meaning. An example of the meaning of the expression is given in the NHS guidelines in 1995. Those guidelines state that NHS employers may seek the early retirement of individual members of staff in the interests of the efficiency of the service in a situation where the performance of that member of staff, although acceptable in the past, has consistently declined over a period of time to an unacceptable level and, after appropriate remedial action has been taken, the staff member's performance is considered unlikely to improve.

III — Facts

12. Prior to 1 November 1994, the applicants in the main proceedings, Ms Martin, Mr Daby and Mr Willis, were employed at the Redwood College of Health Studies as nursing lecturers under conditions of employment which stated: 'Your employment is governed by the conditions of the General and Nurses and Midwives Whitley Council'.

13. As part of an initiative by the Government to move nursing education into the higher education sector it was proposed that Redwood College would become part of the respondent, South Bank University.

14. On 27 October 1994, South Bank University wrote to the staff at Redwood College of Health Studies informing them that as from 1 November 1994 they would be employed by it. The letter went on to say that it would offer staff a contract of employment in November. There was no compulsion to accept the terms and conditions of employment of South Bank University. The letter also stated that the staff would not be able to continue in the National Health Service Pension Scheme and that they would have three options in respect of superannuation:

(i) Option one was to leave the NHS pension arrangement where it was and to start a new pension arrangement.

(ii) Option two was to transfer benefits from the NHS pension scheme to one of the respondent's schemes.

(iii) Option three was to leave the NHS pension arrangement where it was but not to take out a new pension scheme.

15. By a letter dated 31 October 1994 to the applicants' union officer, South Bank University stated:

'In the event of permanent ill-health retirement, both the Teachers' Scheme and Local Government Scheme provide for individuals to receive the maximum enhancement to which they are entitled. Such enhancement is not discretionary, but is mandatory.

In the event of early retirement for any other reason, enhancement is discretionary.

However, as stated, in the event that any employee transferring from Redwood has a contractual entitlement to such provision and this is legally enforceable, then, again, as in all such matters, the University would honour its legal obligations.'

16. On 1 November 1994, Redwood College of Health Studies became part of South Bank University. Ms Martin, Mr Daby and Mr Willis became employees of South Bank University. They then ceased to be employed by the National Health Service.

17. Both Ms Martin and Mr Willis wrote letters in early November 1994 expressing concern that the conditions of service offered by South Bank University, in particular the pension arrangements, were less favourable than those of Redwood College and seeking to safeguard their existing entitlements.

18. On 24 November 1994, South Bank University wrote individually to Ms Martin, Mr Daby and Mr Willis, offering them a contract on its own terms and conditions. The letter enclosed the contract form which set out the various terms and conditions of employment.

19. None of the applicants accepted the terms and conditions of employment of South Bank University and accordingly remained on the terms and conditions specified in their contracts of employment as at the time of transfer. This was confirmed in the case of Ms Martin in a letter to her dated 21 February 1995.

20. Ms Martin, Mr Daby and Mr Willis joined the Teachers' Superannuation Scheme. They also applied to transfer their existing NHS pension benefits into the Teachers' Superannuation Scheme. However, only Mr Daby and Mr Willis were

able to transfer their NHS pension benefits. Ms Martin could not do so because she was over 60 at the time of the transfer of the undertaking.

21. On 22 October 1996, the Department for Education and Employment issued proposals which, if effected, would have resulted in some of the costs of early retirement being borne by South Bank University rather than the Teachers' Superannuation Scheme. In more detail the proposals were to amend the relevant Regulations so that from 1 April 1997 teachers granted premature retirement would receive a lower pension and the employer would be required to compensate such teachers. The Vice Chancellor of South Bank University wrote a memorandum dated 16 December 1996 to all academic staff aged over 50 to advise them that if the proposals were implemented South Bank University might be unable to offer early retirement after 31 March 1997.

22. By a further memorandum of 14 January 1997, the Vice Chancellor again wrote to all academic staff aged over 50 updating them concerning the proposals and offering early retirement under a choice of one of two arrangements. A timetable was set down for anyone who wished to be considered for such early retirement in order to ensure that such retirement could be effected by 31 March 1997.

23. By a letter dated 20 January 1997, Mr Daby expressed a wish to be considered for early retirement and Ms Martin wrote in similar terms on 17 January 1997.

24. By letters dated respectively 12 February 1997 and 3 March 1997, both Mr Daby and Ms Martin were given details of the terms for voluntary severance to be effected on 31 March 1997.

25. Mr Daby, by letter of 17 February 1997, stated that he wished to take early retirement in accordance with those provisions and Ms Martin wrote in similar terms on 7 March 1997. By letters dated respectively 5 and 7 March 1997, both Mr Daby and Ms Martin were made formal offers of voluntary severance and they were asked to sign confirming acceptance. Mr Daby signed confirming acceptance on 8 March 1997 and Ms Martin signed on 10 March 1997.

26. As a consequence, both Mr Daby and Ms Martin's employment terminated on 31 March 1997. The Tribunal finds that they took early retirement in the interests of the efficiency of the service under Section 46 of the GWC conditions of service.

27. Mr Willis remains in the employment of South Bank University.

28. All three applicants in the main proceedings claim to be entitled to the benefit of Sections 45 and 46 of the GWC conditions of service during their employment with South Bank University. Mr Daby and Ms Martin complain specifically that they should have received the benefit of those sections at the time of their early retirement. Mr Willis seeks a declaration that Section 46 continues to apply to his contract of employment with South Bank University. The respondent concedes that the benefit of Section 45 did transfer with the applicants at the time of the transfer.

29. During their employment at Redwood College the applicants' terms and conditions of employment were regulated by the Secretary of State for Health in accordance with the National Health Service (Remuneration and Conditions of Service) Regulations 1991. Under those regulations salary increases were notified following salary review negotiations through the Whitley Council. The union to which the applicants belonged, the Royal College of Nursing, was represented on the Whitley Council and therefore took an active part in the salary review negotiations. However, the respondent, South Bank University, is not part of the National Health Service and does not have any involvement with salary review negotiations through the Whitley Council. The salary reviews for the staff of the respondent is by a separate negotiating procedure.

30. The referring court identifies the following 'issues', which are distinct from the questions referred for a preliminary ruling, arising in connection with the interpretation of the TUPE in the light of Community law:

(i) Whether the rights under Section 46 of the General Whitley Council transferred and applied to the applicants after 1 November 1994;

(ii) Whether the applicants had acquired rights under Section 46 whilst they were employed at Redwood College and, if so, whether such rights transferred with the applicants at the time of the transfer in November 1994, in particular, having regard to Regulations 7(1) and 7(2) of the TUPE;

(iii) Whether the applications by the applicants to join the Teachers' Superannuation Scheme or the transfer of accrued benefits had any effect on these issues;

(iv) The effect of the applicants' accepting premature retirement terms less than those provided for under Section 45 or 46 of the GWC conditions of service.

31. The referring court considered the answers to those issues were dependent upon the effect of the TUPE. The issues were further complicated by the effect of the applicants' having joined the Teachers' Superannuation Scheme and certain comments made to the applicants that early retirement opportunities might be restricted in the future as a result of changes in the funding of such opportunities.

32. Referring to the judgments of the Employment Appeal Tribunal in Frankling v BPS Public Sector Limited and of the High Court of Justice in Beckman v Dynamco Whicheloe Macfarlane Ltd, and the reference for a preliminary ruling in the *Beckman* case, [3] the referring court considers that it cannot, with complete confidence, decide the issues raised.

IV — Questions referred

33. Against that background the Employment Tribunal referred the following questions to the Court of Justice for a preliminary ruling:

'1. Do rights which are contingent upon either dismissal or premature retirement by agreement with the employer fall within the definition of "rights and obligations" within the meaning of Article 3(1) of the Directive?

2. Is the employees' entitlement to the payment of early superannuation benefits and lump sum compensation on redundancy/in the interests of the efficiency of the service/on organisational change, a right to an old-age, invalidity or survivors' benefit within the meaning of Article 3(3) of the Directive?

3. If and to the extent that the answer to question 2 is "no", is there an obligation on the transferor arising from the contract of employment, the employment relationship or the collective agreement within the meaning of Article 3(1) and/or 3(2) which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal?

4. If the answers to questions 2 and 3 are "no" and "yes" respectively, may the employee, none the less, agree to forego his/her entitlement to early payment of pension and retirement lump sum and/or the annual allowance and lump sum compensation in circum-

3 — Case C-164/00 *Beckman* [2002] ECR I-4893.

stances where the transferee's pension scheme does not entitle him or her to the same benefits and the same circumstances or at all, and he/she

(i) becomes a member of the transferee's pension scheme; makes contributions to it and/or has contributions made to it on his/her behalf by the transferee employer;

(ii) becomes a member of the transferee's pension scheme, makes contributions to it and has contributions made to it on his/her behalf by the transferee employer and successfully applies to transfer his/her accrued benefits from the transferor's pension scheme into the transferee's pension scheme?

5. If so, what are the criteria by which the national court should decide whether, in such circumstances, the employee has agreed?

6. Are Articles 3(1) and/or 3(2) of the Directive to be interpreted as precluding the transferee from offering transferred employees the option of taking early retirement on the basis of early retirement benefits that are less beneficial than those to which they are entitled as a consequence of the effect of the Directive?

7. Is the answer to the foregoing question affected if, when offering transferred employees the option of taking early retirement on terms less beneficial than those to which they are entitled under the Directive, the transferee states that no early retirement benefits will be available in future?

8. Where the parties have agreed that the employee will take premature retirement on the terms offered by the employer, what criteria should the national court apply in determining whether the transfer of the undertaking is the reason for that agreement in accordance with the principle enunciated by the Court in Case 324/86 *Tellerup* v *Daddy's Dance Hall*? [4]

9. If the effect of Article 3 of the Directive is to preclude the transferee from offering transferred employees the option of taking early retirement on the basis of early retirement benefits that are less beneficial than those to which they are entitled under the effect

4 — Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739.

of the Directive, what are the consequences for employees who accept early retirement on the basis offered to them by the employer?'

V — Arguments of the parties

A — *Questions 1 to 3*

1. Applicants in the main proceedings and the United Kingdom

34. In the view of Ms Martin, Mr Daby and Mr Willis, and of the United Kingdom, the right to an annual payment and a lump-sum compensation payment under Section 46 falls within the scope of Regulation 5 of the TUPE. The entitlements arising under the GWC conditions of employment were covered by the contracts of employment of the applicants and transferred to the new employer under Regulation 5. The United Kingdom adds that the entitlements were transferred to the transferee even though they had not fallen due before the transfer of the undertaking.

35. As regards the effects of Regulation 7 of the TUPE, the entitlements under Section 46 are not covered by the exclusions in Regulation 7(2). Benefits under Section 46 could be excluded from classification as 'old-age benefits' on three grounds. First, the purpose of Section 46 is to provide a cushion against unemployment for a given period. Second, the rights are not triggered by reaching pensionable age but by premature departure from the employer's service on the grounds of redundancy, efficiency or organisational change. Finally, the entitlements are, by their nature, rights to compensation rather than to pension or old-age benefits.

36. Article 3(3) must, in their view, be interpreted narrowly and concerns only payments which are linked to old age and not to those linked only to age and length of service.

2. South Bank University

37. South Bank University, on the other hand, takes the view that, by referring to the statutory framework, Section 46 lays down both entitlements and obligations under the relevant pension system, but not those of the applicants' employer. Regulation 5 of TUPE covers the transfer of the

employer's obligations arising under or in connection with the contract of employment. As Section 46 imposed no obligations on the employer, no obligations were transferred to it.

38. It does not dispute that benefits paid on dismissal and early retirement transfer as a rule to the transferee under Article 3(1) of Directive 77/187. However, in the present case, there are no transferable rights, as the employees (the applicants in the main proceedings) had not acquired any entitlements at the time of the transfer. It was for their employer alone to decide whether to offer them early retirement or not, according to its own company requirements.

39. In any event, Section 46 of the GWC conditions of service, in so far as it relates to a company pension scheme, falls within the definition of a contract of employment or collective agreement and thus within Regulation 7(1) of the TUPE. Entitlements under or in connection with company pension schemes are not transferred. The benefits under Section 46 are paid in the event of early retirement with an enhanced pension and must therefore be classified as 'old-age benefits'.

40. South Bank University submits that any 'entitlements' which arose under Section 46 before 1 November 1994 were not transferred but lapsed when the applicants' membership of the NHS Pension Scheme ended and they joined the Teachers' Superannuation Scheme.

3. Commission

41. Like the applicants in the main proceedings and the United Kingdom, the Commission considers the benefits at issue to be 'rights and obligations' which pass to the transferee on the transfer of an undertaking within the meaning of Article 3(1) of Directive 77/187.

42. However, like South Bank University, it advocates a wide interpretation of Article 3(3) of Directive 77/187. The term 'old-age benefits' should also cover benefits with similar characteristics. The criterion should be *inter alia* whether the benefits derive from the employees' own contributions or whether they derive from a special fund created for that purpose.

43. However, the Commission takes the view that it is for the national courts to decide whether the benefits at issue fall within Article 3(3).

B — *Questions 4 to 9*

1. Applicants in the main proceedings, United Kingdom and Commission

44. Ms Martin, Mr Daby and Mr Willis explain the effect of Section 46 at the time they were employed by the NHS, that is to say, before 1 November 1994. Essentially, they had earned the right to twice the number of years of pensionable service, and thus a right to higher pension and lump-sum payments on early retirement under Section 46 of the GWC conditions of service.

45. In their view, which is shared by the United Kingdom and the Commission, they have not waived their contractual rights under Section 46 by joining the Teachers' Superannuation Scheme. It was not possible for them to remain in the NHS scheme after the transfer. The only options available to the applicants in practice from then on were either to join the teachers' scheme, so that their new employer made contributions to their pension, or to belong to no pension scheme at all.

46. Moreover the answers to the questions put by staff on 9 October 1994 and the lengthy correspondence at the time of the transfer all indicate that the staff who continued to be employed under the GWC conditions of service, regardless of whether they had joined the Teachers' Superannuation Scheme, retained all their rights.

47. In determining what rights Ms Martin and Mr Daby had on the termination of their employment relationship, they refer to the judgments in *Tellerup* v *Daddy's Dance Hall* [5] and *Watson Rask and Christensen.* [6] According to those judgments, employees are not entitled to waive the rights conferred on them by the directive and those rights cannot be restricted even with their consent. The same principle applies even in cases in which, although early retirement is offered, the offer does not extend to the rights protected by the Directive.

48. The changes to their employment contracts are in their view solely and exclusively the result of the transfer of the undertaking. Because of that transfer they had to choose another pension scheme. South Bank University did not put forward any other reason, such as economic, technical or organisational considerations, for the changes to the terms of employment.

5 — Cited in footnote 4.

6 — Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755.

49. They did not in fact waive their rights under Section 46 nor could they have done so in any event either on the transfer of the undertaking in November 1994 or on early retirement in March 1997. Even in March 1997, the changes derived solely from the transfer of the undertaking. South Bank University made its offers on the assumption that the applicants in the main proceedings had lost their rights on the transfer of the undertaking.

50. Ms Martin, Mr Daby and Mr Willis accept that, according to the case-law, changes in their conditions of employment are permissible to the extent that they were possible for their previous employer, Redwood College, and provided that the transfer of the undertaking as such was not the reason for the change. Directive 77/187 is intended to protect workers from changes which are detrimental to them on the transfer of an undertaking. The new employer can of course vary the terms of employment in accordance with national law. However the purpose of the Directive may not thereby be circumvented. The effect of Article 3 of the Directive would be undermined, if changes caused by the transfer of the undertaking were allowed.

51. In the present case the changes in the terms of employment result solely from the transfer of the undertaking, in the view of the three applicants in the main proceedings, which the United Kingdom shares. South Bank University was not prepared or was unable to offer comparable conditions to those offered by the NHS. If the applicants in the main proceedings had continued to be employed by the NHS there would have been no changes. Ms Martin, Mr Daby and Mr Willis would, in the absence of a transfer, have had no reason to accept a deterioration in their conditions of employment as regards benefits payable on early retirement.

52. They therefore propose that the answer to Questions 4 to 9 should be that rights guaranteed by the Directive may not be altered even with the consent of the employees, where those alterations are the result of the transfer of the undertaking.

2. South Bank University

53. South Bank University, on the other hand, takes the view that Ms Martin, Mr Daby and Mr Willis had agreed that the rules of the NHS Pension Scheme were no longer applicable to them. They therefore took early retirement under the rules of the Teachers' Superannuation Scheme. Under national law it was open to them to agree to vary the rules, which is what they did.

54. That agreement was given after the transfer of the undertaking. It constituted a change in the employment relationship for which the transfer of the undertaking was not the reason. According to the judgment in *Tellerup* v *Daddy's Dance Hall*, the

safeguarding of the rights of employees on the transfer of an undertaking, which cannot be excluded, even with the consent of the employees, must be distinguished from a variation of the employment relationship by mutual agreement between the employees and the new employer. The lawfulness of such a variation is a matter for national law alone. The Court of Justice can at most decide the criteria for determining when a change in the employment relationship is a result of the transfer of the undertaking.

55. South Bank University takes the view that it was entitled to offer terms for voluntary early retirement. If Ms Martin and Mr Daby had insisted on another set of rules, no early retirement would have been on offer. In that case their employment relationship would have continued until the usual retirement age. However, they did accept the terms it offered, so that they cannot now argue that other terms applied to the agreements.

56. It was also for South Bank University to decide the terms under which it offered early retirement. Ms Martin and Mr Daby could choose whether to accept or reject that offer.

57. Moreover, the applicants in the main proceedings never had a right to early retirement with higher pension payments. The terms offered were accepted without argument. Ms Martin and Mr Daby agreed to early retirement on the terms offered. Those agreements were not reached 'solely by reason of the transfer'.

58. In the view of South Bank University, the answer to Questions 4 to 9 should be that changes to a contract of employment are permissible, if they are permissible under national law. A waiver, solely because of the transfer, of the rights granted by the Directive is only possible in cases where an employee agrees to be taken on by the transferee without his existing conditions of employment.

VI — Assessment

59. The litigation concerns the legal classification of the benefits provided for in Section 46 of the GWC conditions of employment. The parties to the main proceedings are in dispute as to whether the payments provided for there are to be considered to be 'old-age benefits' within the meaning of Article 3(3) of Directive 77/187 so that the obligation to pay them does not pass to the transferee on a transfer. If the benefits at issue are not 'old-age benefits', the parties to the main proceedings are in dispute as to whether the

legal basis for the benefits derives from contracts of employment or employment relationships or a collective agreement and the obligation to pay them is therefore taken over by the transferee on the transfer of the undertaking pursuant to Article 3(1) or (2) of Directive 77/187 or whether they have a statutory basis and their transfer is thus ruled out. If the obligation does transfer to the transferee, they are in dispute as to whether the employee may waive his rights or whether and to what extent the transferee of an undertaking can vary the terms of employment.

A —*Questions 1 to 3*

60. The substance of Questions 2 and 3 is the same as the two questions referred in the *Beckman* [7] case. In its judgment in that case the Court of Justice held that Article 3(3) of Directive 77/187 should be interpreted narrowly, as it provides for an exception to the rule. The rights of employees do not transfer to the transferee of an undertaking only when they relate to one of the benefits listed exhaustively in that provision and the terms used in the legislation must be construed in a narrow sense.

61. It is only benefits paid from the time when an employee reaches the end of his normal working life as laid down by the general structure of the pension scheme in question that can be classified as 'old-age benefits' within the meaning of Article 3(3) of Directive 77/187. However, benefits paid in the event of dismissal for redundancy do not fall within that provision even if they are calculated by reference to the rules for calculating normal pension benefits. Therefore, early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of the Directive. [8]

62. Although the benefits under Section 46 of the GWC conditions of service at issue in the main proceedings are subject to a minimum age (50) and linked to a minimum length of pensionable service, the entitlement does not arise on the attainment of a certain age but by reason of dismissal.

63. Although the benefits are paid only to those who have reached a certain minimum age, the attainment of that age does not automatically trigger those benefits. Not everyone who reaches the age of 50 is entitled to the benefit, but only those who,

7 — Cited in footnote 3.

8 — *Beckman* (cited in footnote 3, paragraphs 29 to 32).

having reached that minimum age, cease to be employed for the specific reasons set out in Section 46 of the GWC conditions of service.

64. It was also held in the judgment in *Beckman*, in the light of the judgment in *Abels*, [9] that it is irrelevant whether rights and obligations which transfer to the transferee under Article 3(1) or (2) of the Directive derive from statutory instruments or what the practical arrangements for their implementation are. [10] It is thus irrelevant that the applicants' rights during their employment at Redwood College were governed by statute. [11] The obligations of the former employer derived from the employment relationship and the collective agreement and thus transferred to the transferee under Article 3(1) and (2) of Directive 77/187.

65. In the light of the case-law cited, the answer to Questions 2 and 3 in these proceedings should be as follows:

Question 2: Early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

Question 3: On a proper construction of Article 3 of Directive 77/187, the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.

66. The answer to the first question is clear from those answers. The benefits at issue in the main proceedings are the same as those at issue in the *Beckman* case. In those proceedings the Court of Justice saw no reason to consider that rights which had not yet been invoked at the time of the transfer could not be transferred. The protective purpose of the Directive, which

9 — Case 135/83 *Abels* [1985] ECR 469, paragraph 37.

10 — *Beckman*, cited in footnote 3, paragraph 37 et seq.

11 — In that connection, see also my comments in point 81 of my Opinion in *Beckman*, cited in footnote 3.

is to safeguard the rights of employees on the transfer of an undertaking lends support to the view that the rights deriving from a contract of employment or an employment relationship, which in the absence of early retirement have not yet been invoked are 'rights and obligations' within the meaning of Article 3(1) of Directive 77/187. Therefore, the answer to the first question referred should be:

Question 1: Rights which are contingent upon either dismissal or premature retirement by agreement with the employer fall within the definition of 'rights and obligations' within the meaning of Article 3(1) of Directive 77/187.

B — *Questions 4 to 9*

67. Questions 4 to 9 concern the possibility of an employee's waiving rights which generally transfer on the transfer of an undertaking under Directive 77/187. They also concern the distinction between such a waiver of rights and the general possibility of varying terms of employment by mutual consent.

68. The Court of Justice has already ruled on those issues too. In *Tellerup* v *Daddy's Dance Hall* it held that an employee cannot waive the rights conferred on him by the mandatory provisions of Directive 77/187 even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. Article 3 of Directive 77/187 is a mandatory provision and not in the discretion of the parties to a contract. The rights conferred on an employee by the Directive cannot be curtailed even with his consent. [12]

69. However, the Court pointed out in that judgment that Directive 77/187 is intended to achieve only partial harmonisation in the relevant field. It essentially extends the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. It is not intended to establish a uniform level of protection throughout the Community on the basis of common criteria. Thus, according to the case-law, the directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned.

12 — *Tellerup* v *Daddy's Dance Hall*, cited in footnote 4, paragraph 15.

70. On the basis of those findings, the Court of Justice has held that — in so far as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking — the possibility of alteration is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer. Since by virtue of Article 3(1) of the Directive the transferee is subrogated to the transferor's rights and obligations under the employment relationship, that relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment. [13] That case-law was confirmed in the judgments in *Watson Rask and Christensen* and *Collino and Chiappero*. [14]

71. In the light of the case-law cited, it must be concluded that Ms Martin, Mr Daby and Mr Willis could not at any time waive their rights under Sections 45 and 46 of the GWC conditions of employment. The transfer of those rights to South Bank University is required by binding law.

13 — *Tellerup* v *Daddy's Dance Hall*, cited in footnote 4, paragraph 16 et seq.

14 — *Watson Rask and Christensen*, cited in footnote 6, paragraph 27 et seq.); Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 52.

72. The answer to the fourth question should therefore be that an employee may not agree to forego his rights arising from a contract of employment or employment relationship.

73. There is no need to reply to the fifth question as it posits that such agreement is possible.

74. However, a distinction must be made between the fact that the possibility of waiving rights arising under a contract of employment or employment relationship is generally ruled out — whether or not there is a transfer — and the possibility of agreeing to vary terms of employment. Such agreement is permissible, as is clear from the case-law cited above, in so far as such an alteration is permitted by the national law applicable to the employment relationship. It must therefore be examined whether the changes made by South Bank University to the early retirement benefits could have been made by Redwood College. It is for the national court to answer that question in the light of the applicable national law.

75. Since a variation of the employment relationship is generally permissible under national law whether or not there is a transfer of the undertaking, according to

the case-law cited it is not ruled out solely because the undertaking has in the meantime been transferred and the agreement is therefore reached with South Bank University. The employment relationship can be varied as regards the transferee to the same extent that it could be as regards the transferor. As the Court of Justice pointed out in *Tellerup* v *Daddy's Dance Hall*, 'provided that the transfer of the undertaking itself may never constitute the reason for that amendment'. [15]

76. That statement prompts the eighth question by which the referring court seeks to ascertain the criteria to be applied to determine when a transfer of an undertaking is the reason for an alteration. In the three judgments cited in which the Court of Justice ruled to that effect, it did not indicate the criteria for determining when a transfer of an undertaking is the reason for an alteration.

77. It should be possible to answer that question on the basis of the circumstances of the individual case. For instance the fact that the alteration is made at the same time as the transfer of the undertaking may be an indication that the transfer is a reason for the change. The fact, too, that the conditions of employment are brought into line with those applicable to existing staff of the new owner, is a sign that the transfer is a reason for the change. On the other hand, the fact that the offer of early retirement results in a greater financial burden on the transferee because of prospective changes in the law, so that it becomes impossible for him, given his economic position, to offer his employees the possibility of early retirement in future, points to the likelihood that the transfer of the undertaking is not the reason for the variation of the terms of employment which is permissible in national law, but that the economic position of the new employer is. It does not appear possible to make an exhaustive list of the criteria. Rather, the question must be answered on the basis of an assessment of all the circumstances of the individual case.

78. There will seldom be only one reason for a variation of conditions of employment. As a rule there will be several reasons for varying the employment contracts or employment relationships of the workers transferred. In accordance with the purpose of protection pursued by Article 3 of the Directive the transfer of the undertaking should in such a case not be the key argument in the reasoning, and thus not the main reason for the change. On the other hand, there should be no cause for criticism where a change which is permissible under national law is dictated by other reasons, such as economic, technical or organisational considerations and is linked merely chronologically and not causally to the transfer of the undertaking.

15 — *Tellerup* v *Daddy's Dance Hall*, cited in footnote 4, paragraph 17. Upheld in *Watson Rask and Christensen*, cited in footnote 6, paragraph 17, and *Collino and Chiappero*, cited in footnote 14, paragraph 52.

79. In the light of the foregoing considerations, the answers to Questions 6 to 8 should be as follows:

Question 6: Articles 3(1) and/or 3(2) of the Directive preclude the transferee of an undertaking from offering transferred employees the option of taking early retirement on the basis of early retirement benefits that are less beneficial than those to which they are entitled under the Directive, if the transferor could not have made such a change and if it is a result of the transfer of the undertaking as such.

Question 7: The fact that the transferee states that he cannot offer early retirement benefits in future is to be taken into account, in the context of the assessment of all the circumstances of the individual case, in order to determine whether the transfer was a reason for the change.

Question 8: Whether the transfer of the undertaking is a reason for a change must be assessed in the light of all the circumstances of the individual case. Proximity of the change to the transfer of the undertaking, adaptation of conditions to bring them into line with the conditions of employment of the employees already employed before the transfer of the undertaking or proposed legal changes with implications for the distribution of the financial burden of early retirement rules can be indications which should be taken into account in assessing whether the transfer of an undertaking was the sole or main reason for a change.

80. The answer to the ninth question referred turns on whether the change in conditions of employment is permissible under national law. If so, and if the transfer of the undertaking is not the reason, or at least not the main reason, for the change, then nothing alters the validity of the agreement between the employee and the new employer. If not, the agreement must be considered invalid in the light of the case-law.

81. Therefore, the answer to the ninth question referred should be as follows:

Question 9: Provided that the change in conditions of employment is permissible under national law and the transfer of the undertaking is not the reason, or at least not the main reason, for the change, the agreement between employee and employer to vary conditions of employment is valid.

VII — Conclusion

82. In the light of the foregoing observations, I propose that there should be no answer to the fifth question referred and that the answers to the remaining questions should be as follows:

(1) Rights which are contingent upon either dismissal or premature retirement by agreement with the employer fall within the definition of 'rights and obligations' within the meaning of Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

(2) Early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of Directive 77/187.

(3) On a proper construction of Article 3 of Directive 77/187, the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.

(4) An employee may not agree to forego his rights arising from a contract of employment or employment relationship.

(5) Articles 3(1) and/or 3(2) of Directive 77/187 preclude the transferee of an undertaking from offering transferred employees the option of taking early retirement on the basis of early retirement benefits that are less beneficial than those to which they are entitled under the Directive, if the transferor could not have made such a change and if it is a result of the transfer of the undertaking as such.

(6) The fact that the transferee states that he cannot offer early retirement benefits in future is to be taken into account in the context of the assessment of all the circumstances of the individual case, in order to determine whether the transfer was a reason for the change.

(7) Whether the transfer of an undertaking is the reason for a change must be assessed in the light of all the circumstances of the individual case. Proximity of the change to the transfer of the undertaking, adaptation of conditions to bring them into line with the conditions of employment of the employees already employed before the transfer of the undertaking or proposed legal changes with implications for the distribution of the financial burden of early retirement rules can be indications which should be taken into account in assessing whether the transfer of an undertaking was the sole or main reason for a change.

(8) Provided that the change in conditions of employment is permissible under national law and the transfer of the undertaking is not the reason, or at least not the main reason, for the change, the agreement between employee and employer to vary conditions of employment is valid.