Appeal No. UKEAT/0232/13/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 22 & 23 January 2014
Judgment handed down on 18 February 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

MR A HARRIS

MRS M V McARTHUR FCIPD

INNOSPEC LTD AND OTHERS — APPELLANTS

MR J WALKER — RESPONDENT

SECRETARY OF STATE FOR WORK AND PENSIONS — INTERESTED PARTY

JUDGMENT

AMENDED

APPEARANCES

For the Appellant	MR NICHOLAS RANDALL QC (of Counsel) Instructed by: Eversheds LLP Eversheds House 70 Great Bridgewater St Manchester M1 5ES
For the Respondent	MS MAYA LESTER & MR MAX SCHAEFER (of Counsel) Instructed by: Liberty Liberty House 26-30 Strutton Ground London SW1P 2HR
For the Interested Party	MR JASON COPPEL QC & MS HOLLY STOUT (of Counsel) Instructed by: Treasury Solicitors Employment Group Treasury Solicitors Department One Kemble Street LONDON WC2B 4TS

SUMMARY

SEXUAL ORIENTATION DISCRIMINATION/TRANSEXUALISM

The recipient of an occupational pension since 2003, under the terms of a pension scheme which provided survivor's benefits to spouses but not to those in a civil partnership, insofar as those benefits derived from service prior to the day the **Civil Partnership Act 2004** came into force (5 December 2005), succeeded in his claim to the Tribunal that he was thereby unlawfully discriminated against on the grounds of sexual orientation. It was accepted that provisions of the **Equality Act 2010** appeared to permit this, but the ET held those provisions incompatible with Directive 2000/78/EC, and that they could and should be interpreted to permit a Civil Partner to benefit from service at the time before it was unlawful to discriminate on grounds of sexual orientation.

Held

The ET was wrong to hold the provisions incompatible, but if it had not been, could not properly have interpreted the provisions as it did. Nor could those provisions have been disapplied.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Only a few decades ago women were paid less than men expressly because they were women: many jobs had "men's rates" and "women's rates". One of the fundamental principles of the European Union was that such discrimination should be eliminated. However, the introduction of the right to equal pay did not have the consequence that those women on "women's rates" could retrospectively issue a claim against their employers for the money they would have earned if only they had been paid "men's rates". The law had provided no remedy for discrimination in pay prior to the UK's accession to the European Union, though it clearly existed, and past discrimination could not give rise to a claim under the new right to equal pay unless (and only to the extent) that discrimination continued after its introduction.

2. If pension is truly deferred pay, to be earned today so that it may be paid when an appropriate tomorrow comes, it might follow that a scheme providing for such a pension would have been less generous to a woman on "women's rates" than a man with the same years of service because her rate of pay (including the rate of deferred pay) was less, and that during the time that such pay discrimination was not unlawful, she would have no legal right to claim a pension equal to the man's. She could not claim a remedy for that part of pay which was deferred any more than she could remedy the disparity in day-to-day payment whilst in work.

3. Where a survivor's pension is paid to a spouse of the opposite sex, but not to a partner of the same sex with whom the partner has registered a Civil Partnership, this discriminates between the spouse and partner – and between the pensioners - on the ground of sexual orientation. The fact that this is discriminatory does not mean that it has always been unlawful: until Section 1 of the **Civil Partnership Act 2004** came into force on 5th December 2005 it would not have been. But it now is. However, the **Equality Act 2010** provides by Schedule 9,

Paragraph 18 ("Paragraph 18") that it is not unlawful under the Act for there to be discrimination in respect of access to a benefit payable in respect of periods of service prior to 5th December 2005. This means, on the face of it, that discrimination on the ground of sexual orientation will no more found a claim in respect of deferred pay earned during those periods of service than it would in the cases of those formerly on "women's wages" with which this judgment began. Yet the current appeal concerns just such a claim, which was accepted by an Employment Tribunal in Manchester (EJ Russell, Ms Jammeh, Mr Williams). The Tribunal determined for reasons delivered on 13th November 2012 that this was discrimination, that the Act was to be construed such that this was to be held unlawful, and that, being direct discrimination, it was not open to the defence of justification.

4. The claim was that of John Walker, who joined the Respondent company ("Innospec")'s pension scheme on 2nd January 1980. He retired 23 years later in 2003, receiving a pension which is currently around £85,000 per year. He had lived for some time before retirement with his male partner. They entered a civil partnership, for those of the same sex the equivalent then of marriage, which was registered under the **Civil Partnership Act 2004** in January 2006, at almost the first opportunity. If he had had a wife, she would be entitled to a two thirds pension. But because his service occurred entirely prior to coming into force of the law prohibiting discrimination on the ground of sexual orientation, the most his partner can hope for should he survive Mr Walker is around £500 per annum.

5. The question of law arising on this appeal is whether Paragraph 18 has the effect, as it appears to do, of excluding any entitlement to a greater pension, or whether to construe it as doing so would contravene directly effective European Union law and/or the European Convention on Human Rights and, if so, whether Paragraph 18 should be interpreted or disapplied so that Mr Walker's partner receives the same pension as he would have done if he

had been married to Mr Walker. The Tribunal held that the refusal to countenance a same-sex survivor's rights equal in value to those a spouse would have had was not only discriminatory (plainly it was) but unlawfully so, being both unlawful direct and indirect discrimination, and that Paragraph 18 should be interpreted so that where it apparently provided that, insofar as discrimination reflected service prior to the coming into force of the 2004 Act, it was not unlawful, it should instead be applied to the opposite effect.

6. Innospec appeals, represented by Mr Randall QC. The Secretary of State for Work and Pensions, represented by Jason Coppel QC, has been joined as an interested party and supports Innospec in its appeal.

The Submissions

7. The essence of the submissions for Mr Walker, represented by Maya Lester and Max Schaefer, is that **Directive 2000/78/EC (The Equal Treatment Directive)** ("the Directive") enshrines the principle of equal treatment on the grounds of sexual orientation in European law. Paragraph 18 contravenes that principle, because it permits direct discrimination on the ground of sexual orientation by denying Mr Walker's partner a pension equivalent to that he could have received had he been a different-sex spouse rather than a same-sex Civil Partner; this is direct discrimination, not indirect, so that it cannot be justified, but if it were indirect could not be justified; that the principle that domestic statutes should be interpreted so far as possible in the light of the wording and the purpose of the Directive, in order to achieve the result pursued by the Directive (the "Marleasing principle") applies; that as explained in **HMRC v IDT Card Services Ireland Ltd** [2006] EWCA Civ 29 this principle means that to interpret Section 18 so as to hold the treatment unlawfully discriminatory would involve no departure from a fundamental feature of the legislation. The words of Arden LJ in paragraph 90 in that case apply:

> **"…the relevant test remains whether the interpretation that would be required to make the statute in question Convention-compliant or in this case EU law-compliant would involve a departure from a fundamental feature of the legislation. As I see it, the latter cannot be the case, where the effect of the interpretation would be to bring the statute into conformity with the objectives of the Sixth Directive in the absence of clear statutory language to the effect that Parliament intended that there should not be such conformity."**

The Tribunal's decision to that effect should be upheld. In the alternative, if the Tribunal were wrong as to the interpretation which could be given, the statute should be disapplied, following the principle expressed in **Kücükdeveci v Swedex GmbH and Co KG** [2010] 2CMLR 33, as acknowledged by Lord Mance in the Supreme Court in **R (Chester) v Secretary of State for Justice** [2013] UKSC 63, paragraphs 61-62. This is within the limits of the Tribunal's jurisdiction (see **Benkharbouche v Sudan** [2013] IRLR 198, paragraph 52), and if that be wrong, the incompatibility of the provision with the European Convention on Human Rights should be recognised.

8. The Secretary of State argues that just as in the example of "women's pay" and "men's pay" set out at paragraphs 1 and 2 above, where pay was provided unequally but not unlawfully at the time it was earned and that inequality is subsequently prohibited as unlawful discrimination, there is no room for a claim by the victim of the inequality to be repaid the shortfall, so it is with pay which is not paid as and when earned but as deferred pay, being pension. Thus the anti-discrimination provisions do not have retrospective effect in respect of service contributing to a pension subsequently paid to the extent that the service occurred prior to the introduction of a prohibition of the relevant form of discrimination - in this case on grounds of sexual orientation. There was thus no unlawful discrimination against Mr Walker which was open to remedy. Paragraph 18 reflects this. It coincides with principle. If, contrary to this, the Directive has retrospective effect, Paragraph 18 nonetheless cannot be interpreted to

provide for the opposite effect, since to do so would go directly contrary to both its wording and the purpose of that legislative provision.

9. Innospec adopts that and argues, together with the Secretary of State, that the discrimination (if it is indeed unlawful) should in any event be regarded as indirect discrimination and therefore open to the defence of justification, which would have real force here. Neither devoted much time to the argument as to disapplication: the Employment Tribunal itself did not regard it as necessary to spend any, given its finding as to interpretation.

10. Discrimination on the grounds of sexual orientation has only comparatively recently become unlawful. In European Union Law it was as recently as 1998 that the Court of Justice held in **Grant v South West Trains** that travel concessions could be withheld from same sex partners though granted to partners of the opposite sex ([1998] ICR 449), and in 2001 held in **D and Sweden v Council for the European Union** (Case-122/99) [2001] ECR I-4319 that homosexual partners whose relationship had been formally recognised as constituting a registered partnership could not complain that it was unlawful to deny them a household allowance paid to a married couple. In domestic law Section 28 of the **Local Government Act 1988** was repealed only in 2003. In European Law, **Council Directive 2000/78/EC** set out to establish a general framework for equal treatment in employment and occupation, on the grounds of "religion or belief, disability, age or sexual orientation". It was to be implemented by 2nd December 2003 at the latest: the **Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661)** effected this in domestic law so far as sexual orientation was concerned. These Regulations made it unlawful for the trustees or managers of an occupational pension scheme to discriminate against a member of the scheme in carrying out any of their functions in relation to it. But there was an express exception to that. That was in relation to

"rights accrued or benefits payable in respect of periods of service prior to the coming into force of these Regulations."

11. Though these Regulations were repealed upon the coming into force of the **Equality Act 2010**, that Act was exactly to the same effect. By Section 61 it enacted that an occupational pension scheme must include a non-discrimination rule, namely a provision which provided that any responsible person (a trustee or manager of the scheme, or an employer whose employees were members of it) must not discriminate against another person in carrying out their functions in relation to the scheme. Section 83 provides for exceptions to this provision, which are contained in Schedule 9. The material effect of Paragraph 18 is set out above, at paragraph 3. Its precise wording is: -

> **"(1) A person does not contravene this Part of this Act, so far as relating to sexual orientation, by doing anything which prevents or restricts a person who is not married from having access to a benefit, facility, or service –**
> **(a) the right to which accrued before 5 December 2005 (the day on which Section 1 of the Civil Partnership Act 2004 came into force) or**
> **(b) which is payable in respect of periods of service before that date."**

12. The first question for us is whether Paragraph 18 on a straight-forward domestic construction is incompatible with EU Law: for only if it is can Mr Walker's claim succeed.

Incompatibility

13. Where unequal treatment which in the past was not, but later is, made unlawful, the law might approach a remedy for it on one of two bases. One would be retrospectively to render it unlawful, so as to give rise to a current claim. The other would be to hold it unlawful only from the date the law changed. It is only if a Court could be satisfied that the former is required by European law that Paragraph 18 could be held incompatible, for (in effect) that provision enshrines the principle of non-retrospectivity.

14. This is because pension is treated as deferred pay in European Law, just as it has been treated in domestic law as the product of past service (see cases such as **Parry v Cleaver** [1970] AC 1; **Smoker v London Fire and Civil Defence Authority** [1991] 2 AC 502). It is pay which is earned by an employee through service with his employer, in the same way and at the same time as salary is earned, though it does not come into payment until a later date, upon and after the employee's retirement. We consider this critical to the issues we have to determine (since if earned at a time in the past it will necessarily be subject, in amount, and as to any conditions attaching to its payment to the law relevant to such earnings at the time) but Ms Lester does not dispute it, and there is considerable authority in support, such as **Bilka-Kaufhaus** [1987] ICR 110, in which the European Court of Justice held that benefits under an occupational pension scheme "constitute consideration received by the worker from the employer in respect of his employment". It was the central point in **Barber v Guardian Royal Exchange Assurance Group** (Case C-262/88) [1990] ICR 616, ECJ, which held that pay for the purposes of the right to equal pay, conferred then by Article 119 of the EEC Treaty, comprised "any consideration, whether in cash or in kind or whether immediate or in the future, that was received by an employee directly or indirectly in respect of his employment with his employer." Thus a contracted-out private occupational pension scheme came within Article 119. In **Ten Oever** (Case C-109/91 [1995] ICR74) the Court held a survivor's pension, too, as being within the definition (Paragraph 12, Judgment).

15. The scheme in issue in the present proceedings is a defined benefit scheme. Advocate General van Gerven described in his opinion in **Ten Oever** how such a scheme was built up and run, a matter which he regarded as crucial (paragraph 17). I can do no better than quote his words:

> **"In practice, an employee accrues pension entitlements on the basis of his periods of service with the employer concerned. For that purpose, contributions (calculated on**

the basis of actuarial factors) are periodically paid to a particular pension fund by the employee and/or employer in respect of specific periods of service.

A distinction must be made in this regard between the so-called fixed-contribution schemes (frequently called "defined-contribution plans" or "money purchase schemes") and the so-called fixed-benefit schemes (also called "defined-benefit plans"). In the first-mentioned schemes the benefit consists of the capitalised sum of – and is accordingly dependent on – contributions periodically made in the past by the members. In schemes with fixed benefits, on the other hand, the level of the benefit is fixed in advance… on the basis of the number of years of service, either as a fixed amount or as a percentage of the employee's final salary……

From the legal point of view, this accruing nature of occupational pension schemes leads to a distinction between the coming into being of pension rights, namely as a result of the accrual of the pension on the basis of completed periods of service, and those rights becoming exercisable, namely when the pension falls to be paid for the first time.

In financial and economic terms, the balance of such occupational pension schemes is also based on a number of premises, including data concerning pension lifelines and the survival probabilities of men and women…

18. It seems to me that in Barber, too, the Court recognises, if only implicitly, the distinction between the accrual and the falling due of an occupational pension…from the point of view of article 119 of the E.E.C. Treaty, benefits paid under an occupational scheme are to be regarded as a form of "deferred" pay which the worker has accrued in respect of his service with one or more employers during a specific period of employment".

16. In **Barber** the Court ruled that the direct effect of Article 119 of the Treaty could not be relied upon to claim entitlement to a pension with effect from a date prior to the judgment (17th May 1990) except in the case of workers or those claiming under them who had before that date initiated legal proceedings or raised an equivalent claim under applicable national law. **Ten Oever** was one of a group of six cases heard together to clarify what that meant in practice: it was held of "enormous" practical importance to do so. In his opinion (paragraph 10) A-G Van Gerven set out four possible interpretations of the effect of the ruling:

"A first interpretation would be to apply the principle of equal treatment only to workers who became members of, and began to pay contributions to an occupational pension scheme as from 17 May 1990…

A second interpretation is that the principle of equal treatment should only be applied to benefits payable in respect of periods of service after 17 May 1990. Periods of service prior to that date would not be affected by the direct effect of Article 119.

According to a third interpretation, the principle of equal treatment must be applied to all pensions which are payable or paid for the first time after 17 May 1990, irrespective of the fact that all or some of the pension accrued during, and on the basis of, periods of service completed for contributions paid prior to that date. In other

> **words it is not the period of service (before or after the judgment in Barber) which is decisive, but the date on which the pension falls to be paid.**
>
> **A fourth interpretation would be to apply equal treatment to all pension payments made after 17 May 1990, including benefits or pensions which had already fallen due and here again, as in the previous interpretation, irrespective of the date of the periods of service during which the pension accrued."**

In crude terms, therefore, the choice was between focussing upon the time at which the pension accrued, or the date on which it came into payment.

17. Advocate Van Gerven chose the second interpretation (paragraph 21). He considered that that interpretation sat

> **"most easily with the good faith of employers and occupational pension schemes, since account must indeed be taken of their belief that conditions as to pensionable age varying according to sex were permissible…"**.

18. In its judgment the Court clearly endorsed the view of the Advocate General:

> **"In essence, the second question asks the Court to state the precise scope of the limitation of the effects in time of Barber…**
>
> **16. The precise context in which that limitation was imposed was that of benefits, in particular pensions, provided for by private occupational schemes which were treated as pay within the meaning of Article 119 of the EEC Treaty.**
>
> **17. The Court's ruling took account of the fact that it is a characteristic of that form of pay that there is a time-lag between the accrual of entitlement to the pension which occurs gradually throughout the employee's life, and its actual payment which is deferred until a particular age.**
>
> **18. The Court also took into consideration the way in which occupational pension funds are financed and thus of the accounting links existing in each individual case between the periodic contributions and the future amounts to be paid.**
>
> **19. Given the reasons explained in Barber… pre-limiting its effects in time, it must be made clear that *equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990*, the date of the judgment in Barber, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent under the applicable national law." (emphasis added).**

19. **Barber** and **Ten Oever** concerned sex discrimination in making pension payments. But there is no good reason to think that European Law would treat discrimination on the ground of sexual orientation as creating any wider rights. There is no reason in principle to think that if

the discrimination considered in those cases had been on the ground of sexual orientation the Advocate General and Court in **Ten Oever** would have selected option 3 or 4 rather than option 2. In short, **Ten Oever** demonstrates that where a pension accrues on a discriminatory basis at a time when that discrimination is not unlawful, but it is unlawful at the time the pension comes into payment, the payer is not obliged by law to remedy the past discrimination at the time of payment. Though it might through modern eyes seem unfair, the result can in principle be no different as between differing grounds for holding discrimination unlawful. Mr Coppel put it that the principles of European Law are demonstrated by **Barber** and **Ten Oever**: it does not in general have retrospective effect. The principle of legal certainty would support this. From the moment of the recognition of the right, a claim could be brought, to remedy unequal treatment as from that date but not earlier. Thus in **Vroege v NCIV** (C-57/93) [1995] ICR 635 a woman's right to join a pension scheme on equal terms to a man was given effect from the date of the judgment in **Defrenne v Sabena** (Case 43/75) [1976] ICR 547 in which the Court of Justice held for the first time that Article 119 had direct effect: but not from any earlier date.

20. In **Beune** (Case C-7/93) [1995] ECR I-4471 A-G Jacobs said (Paragraph 66):-

> **"Article 119 requires in my view that claims based on specific periods of employment should be limited in a way which corresponds to limitations on other claims to equal pay."**

We consider Mr Coppel right to argue that that contains an important truth: in a claim for equal pay in respect of "ordinary salary", an employer could not be liable for discrimination during periods of employment prior to the coming into force of the relevant EU instrument. The position can be no different where a case concerns occupational pension benefits, which are earned as part of salary at the time, even though they fall to be paid at a much later date.

21. In **Rijksdienst voor Pensioenen v Elisabeth Brouwer** (C-577/78) [2010] EUECJ C-57708 (29 July 2010) what was in issue was the amount of a retirement pension, paid as part of

social security arrangements. When paid it was calculated on the basis of the pay which Ms Brouwer had received during service. From 1st January 1968 – 31st December 1994 that pay had been less than it would have been if she had been male. Article 4 of Directive 79/7 (which related to social security) sought to eliminate discrimination on the grounds of sex in respect of the calculation of benefits. It was to have been transposed into national law at the latest by 23 December 1984. The Court (Judgment, paragraph 28) drew a distinction between the period between 1 January 1968 and 22 December 1984, and that between 23 December 1984 and 31 December 1994. During the earlier period, the Directive was not in force. The claimant could receive no remedy for lower payment arising from and in respect of that period. As to the latter period, in respect of which the calculation was based on higher wages for men than women, the national legislation permitting this was precluded by the Directive. The Court did not approach the claim as if sex equality principles which applied in 2004 (when the claim was brought) should apply retrospectively across the whole period of employment.

22. Discrimination on the ground of sexual orientation was considered in the two cases central to the Employment Tribunal's reasoning. In the more recent of those two cases, **Römer v Frei und Hansestadt Hamburg** (European Commission, intervening), (Case C-147/08) [2013] 2 C.M.L.R. 11 what was in issue was a supplementary retirement pension. Those who were married received more money in respect of the same periods of service than those who had entered into a registered life partnership with someone of the same sex. This was because the rates to be paid were calculated following the impact of differential tax categories, which favoured those who were married. Mr Römer had forty years service (1950 – 1990). Since 1969 he had lived continuously with a man. In 2001 he entered into a registered life partnership with him. This was some two years prior to the latest date for transposition of Directive 2000/78, which required national laws to proscribe discrimination on the grounds of sexual orientation. By the time of the hearing, registered life partnerships had been equated by

German law with the status of marriage for all practical purposes. Although the Advocate General proposed (Paragraph HG153) that the national court should disapply any provision of national law contrary to the principles of the Directive even from the date before that for transposing the Directive, the Court specifically declined to do so. In answering the fifth question referred to it for preliminary ruling ("from which date should equal treatment be ensured?") the Court said at paragraph 58:-

> **"In that regard, it should be observed, first of all, that, if there were discrimination within the meaning of the Directive 2000/78, the Applicant in the main proceedings would not be entitled under that directive, before the expiry of the period allowed to Member States to transpose it, to the same rights as married pensioners in respect of the supplementary pension at issue in the main proceedings. …the period prescribed for the transposition of the provisions of the Directive 2000/78 concerning discrimination on the ground of sexual orientation expired, for the Federal Republic of Germany as for the other Member States, on 2 December 2003.**
>
> **59. Lastly, as regards the period between the registration of the life partnership of the applicant in the main proceedings of 15 October 2001, and the expiry of the period for transposition of Directive 2000/78 it should be recalled that the Council of the European Union adopted Directive 2000/78 on the basis of Art. 13 EC, and the Court has held that the Directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds (see Mangold [2006] 1C.M.L.R. 43 at [74] and Kücükdeveci v Swedex GmbH and Co KG (C-555/07) [2010] 2C.M.L.R. 33 at [20]) including sexual orientation.**
>
> **60. Nonetheless, for the principle of non-discrimination on the ground of sexual orientation to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of E.U. Law (see Kücükdeveci at [23])**
>
> **61. However, neither Art. 13 EC nor Directive 2000/78 enables a situation such as that at issue in the main proceedings to be brought within the scope of EU law in respect of the period prior to the time-limit for transposing that directive (see, by analogy, Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH (C-427/06) [2008] E.C.R. I-7245… at [16] and [18] and Kücükdeveci at [25].**
>
> **62. Article 13EC, which permitted the Council, within the limits of the powers conferred upon it by the ECD Treaty, to take appropriate action to combat discrimination based on sexual orientation, could not, as such, bring within the scope of EU law, for the purposes of prohibiting any discrimination of that nature, situations which, as in the main proceedings did not fall within the framework of measures adopted on the basis of that Article, specifically, as regards Directive 2000/78, before the time-limit prescribed therein for his transposition (see, by analogy Bartsch…**
>
> **63. Moreover, Para 10 (6) of the first RGG..." [**the domestic law concerned in those proceedings**] "…is not a measure implementing Directive 2000/78 or other provisions of EU law, with the result that it is only from the expiry of the period for transposition of the Directive that it had the effect of bringing within the scope of EU law the national legislation at issue in the main proceedings, which concerns a matter**

> **governed by that directive, namely the conditions of pay within the meaning of Art.157 TFEU…**
>
> **64. In view of the foregoing considerations, the answer to the Question 5 is that should para.10 (6) of the First RGG constitute discrimination in the meaning of Art.2, Directive 2000/78, *the right to equal treatment could be claimed by an individual such as the applicant in the main proceedings at the earliest after the expiry of the period for transposing the Directive*, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with EU law by the national legislature." (emphasis added).**

23. The Court here was recognising that the enforcement of equal treatment of the Claimant, so far as payment of his pension was concerned, was not to run from the date of his contracting a registered partnership, but from the date that the law recognised that the relevant discrimination was unlawful. In short, legislating that such treatment was unlawful did not have the retrospective effect of rendering unlawful payments which would not have been recognised as such at the time that they were made.

24. The Employment Tribunal in the case before us do not record having been referred, as we were, to **Ten Oever**, **Vroege**, **Beune**, and **Brouwer**, and may not have had the benefit of the argument they give rise to, as Mr Coppel developed it: the Secretary of State did not intervene below. **Römer** was however, cited to it, and in its answer to the fifth question also supports a principle that EU law in this area does not in general operate to retrospective effect.

25. **Römer** was however relied on by the Tribunal to the opposite effect, as was the earlier case of **Maruko (Tadao) v Versorgungsanstalt der deutschen Bühnen** [2008] All ER (EC) 977, another case which related to discrimination on the ground of sexual orientation in respect of the payment of pension. Maruko was in receipt of a survivor's pension. His partner had been a member of the pension fund for theatrical professionals in Germany who made compulsory contributions to the scheme from 1959 until 1975, and thereafter voluntarily till September 1991. He entered into a registered life partnership with Mr Maruko on 8th November 2001. A little over three years later he died, and Mr Maruko applied for a widower's pension. The

pension fund refused to grant a pension to him, on the basis that the regulations governing the pension scheme made no provision for such survivors' benefits to be paid to registered partners (as they did to married spouses).

26. The scheme was not one in which the benefits were defined by the rules on the basis of years of service, but as explained in paragraph 71 of the Advocate General's opinion were broadly analogous to a defined contribution scheme: a separate fund was set up for each insured person, from which the principal and interest was used after the period of employment had ceased, the amount of pension being calculated on the basis of the amount of the contributions by applying a readjustment factor. The way in which benefits related to service appears otherwise to have been unclear (see the Advocate General's opinion in Paragraphs 71-72, and footnote 75).

27. The Court recognised that German law had been amended to place persons of the same sex who had entered into a life partnership in a situation comparable to that of a spouse so far as concerned survivor's benefit. It appears that the national law did not contain any provision other than that those who were registered as life partners would enjoy the same benefits at the point of payment as did those who were married: there is nothing to suggest a provision comparable to Paragraph 18. It was therefore on that basis that the Court answered (Paragraph 73) that – assuming that surviving spouses and surviving life-partners were in a comparable situation – regulations governing the scheme which provided that a surviving partner did not receive a survivor's benefit equivalent to that granted to a surviving spouse were precluded by the Directive.

28. Mr Coppel points out that the German law did not provide for different treatment of benefits by reference to the periods of service which had given rise to them, as does Paragraph

18. He argues that there was nothing in this decision contrary to the principles otherwise demonstrated by the several authorities mentioned above, including that in **Römer** which dealt with discrimination on the ground of sexual orientation and in which **Maruko** was mentioned.

29. The Court was however asked (in a fifth question) whether entitlement to the survivor's benefit must be restricted in time and in particular to periods subsequent to 17 May 1990 on the basis of **Barber**. The reply was as follows:

> **"77. It is clear from the case law that the court may, exceptionally, taking account of the serious difficulties which its judgment may create as regards events in the past, be moved to restrict the possibility for all persons concerned of relying on the interpretation which the court gives to a provision in response to a reference for a preliminary ruling. A restriction of that kind may be permitted only by the court, the actual judgment ruling upon the interpretation sought…**
>
> **78. There is nothing in the documents before the court to suggest the financial balance of the scheme managed by VddB is likely to be retroactively disturbed if the effects of this judgment are not restricted in time.**
>
> **79. It follows from the foregoing that the answer to the fifth question must be that there is no need to restrict the effects of this judgment in time."**

30. It is not clear to us why the question arose of a temporal restriction in line with the **Barber** judgment. The discrimination involved was not that of equal treatment between the sexes in relation to pay, but much more recently proscribed. The date of the **Barber** judgment was the date on which it was recognised, as something of a revelation to pension fund managers, that pensions were to be treated as pay and hence subject to the right to equal pay: but the right to equal pay had been part of EU law since **Defrenne v Sabena** nearly 20 years earlier. None of the advocates was clear precisely how the question arose. Yet it is critical for Ms Lester's argument to succeed that she should establish that the Court was holding that the effect of the judgment was that the right for those of same-sex orientation to be treated in the same way as heterosexuals preceded the coming into force of the Directive. If that is what the Directive provides, then the UK provision would be incompatible with it. If, to the contrary, it

provides that the right to equal treatment began when the Directive was implemented, and did not oblige national legislation to provide for it to have retrospective approach (though it would be open for it to do so) there would be no incompatibility. The Tribunal thought the former. Mr Coppel and Mr Randall argue that all the other case law supports the latter conclusion, including **Römer** which post-dates, and considered, **Maruko**, and that the actual conclusion in **Maruko** was unsurprising given that a national provision could, without offence to the Directive, simply provide for equality at the point of payment as was the case (they submitted) with the German provision in question. The question is not whether retrospective effect was contrary to the Directive, but whether it was mandated by it.

31. The Directive does not itself say it has retrospective effect. It has never, so far as we know, been suggested that a provision making particular forms of discrimination unlawful in European Law has a retrospective effect so as to render unlawful acts which at the time when they were done would not have fallen foul of the law, however reprehensible in social terms the act might otherwise have been. The question was not asked of the Court in **Maruko**, as it was in **Römer**, as to the date from which equal treatment should be ensured. The answer to that question was given in **Römer**: an answer with which domestic legislation is fully compatible. If, however, as was the case in **Maruko,** no distinction was made by the applicable domestic legislation by reference to the date at which the pension of a homosexual accrued, but once life partnership was equated with marriage no distinction was drawn the conclusion is fully understandable: and there being no evidence that the pension fund had genuinely thought that those in a registered life partnership were not to be equated with those who were married, coupled with evidence as to the financial difficulties a fund might face in equating survivors benefits on that basis, led to the conclusion being as it was.

32. In **Römer** the sixth question posed to the CJEU by the national court asked whether if the fifth question was answered in the affirmative:

> **"…is that subject to the qualification – in accordance with the grounds of the judgment in [Barber] – that in the calculation of [supplementary] pension entitlement the principle of equal treatment is to be applied only in respect of that proportion of pension entitlement earned by the pensioner for the period from 17 May 1990?"**

33. The fifth question contains two parts: the second part ("does the entitlement apply even before the expiry of the transposition period?") was answered at paragraph 64 of the Court's judgment, quoted above. However, Ms Lester points to the observation in **Römer** Paragraph 66 in relation to this sixth question:

> **"As regards question 6, it is sufficient to state that the dispute in the main proceedings relates to entitlement to a supplementary retirement pension paid from 1 November 2001, on which the limitation of the effects in time of the judgment in Barber… to the period after 17 May 1990 cannot have any bearing, *notwithstanding the fact that the contributions underpinning the entitlement had been paid before the date of that judgment.* Furthermore, neither the Federal Republic of Germany nor the Freie und Hansestadt Hamburg suggested any limitation in time of the effects of the present judgment and no evidence submitted to the Court indicates that they should be so limited". (emphasis added)**

34. She relies upon the part I have italicised. But this is not, and could not be, a statement that someone in the position of Mr Römer, and hence Mr Maruko in his case, could complain of unequal treatment on the grounds of sexual orientation prior to the **Barber** judgment: it is not the issue which is being addressed, and a specific answer had been given to the question of retrospective entitlement to complain of past unequal treatment in paragraph 64. It may have to be understood by the way the argument progressed before the court, as to which the case report gives little assistance. As the Court points out, in any event, the temporal limitation on the **Barber** decision had no relevance to the decision it was reaching.

35. In summary, therefore, the Directive does not purport to have retrospective effect such that inequalities in pay arising on the basis of sexual orientation prior to the date it was to be

transposed can form the basis of a claim after transposition though they could not have done before. It is a basis for ensuring equal treatment as between those with different sexual orientation but who are (viewed broadly) in comparable situations after the latest date for transposition. Paragraph 18 does not infringe the latter principle. Nor is it contrary to the Directive in leaving past discrimination unremedied. As the Secretary of State points out, there may be very good financial reasons for this such that, although a different legislative choice might have been made (as it may well have been made in Germany: **Maruko**, **Römer**) it was not mandated.

36. The Tribunal was wrong in law to hold the opposite.

Discrimination

37. Discrimination consists of treating those in a like situation in an unlike manner. If the reason for that is sexual orientation, it is unlawful in domestic law. Marriage is a status which is not exactly comparable to that of a civil partnership. The Appellants point to the fact that as a matter of status a spouse is entitled to a pension or survivor's benefit without the restriction which Paragraph 18 places upon a civil partner. This means the status of one is slightly different from that of the other, such that a person holding one status may not legitimately be compared with a person holding the other.

38. The Court of Justice said in **Römer** (paragraphs 42,43):-

> **"…The assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. In [Maruko], concerning the refusal to grant a survivor's pension to the life partner of a deceased member of an occupational pension scheme, the Court did not carry out an overall comparison between and marriage and registered life partnership under German law, but, on the basis of the analysis of German law carried out by the court which made the reference for a preliminary ruling, according to which there was a gradual harmonisation in German law of the regime put in place for registered life partnerships with that**

> **applicable to marriage, it made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension.**
>
> **43. Thus, the comparison of the situations must be based on an analysis focussing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage…"**

Accordingly, Mr Randall QC argues that a focus upon the relative rights and obligations of spouses and civil partners in the UK, in relation specifically to pension benefits, shows that they cannot be regarded as in the same material position whatever the comparability of marriage and civil partnership is in general UK law. Accordingly, discrimination if it exists can only be indirect, and if indirect may be justified.

39. We reject this argument. Ms Lester points out in response that Section 23 of the Equality Act 2010 deals specifically with comparability and provides:

> **"(3) If the protected characteristic is sexual orientation, the fact that one person… is a civil partner while another is married is not a material difference between the circumstances relating to each case."**

Though this is generally expressed, there is no reason to think it inapplicable to the present case. It provides the short answer to it.

40. If there had been no such Section, nonetheless we would have come to the same conclusion. As Lady Hale said in **Bull v Hall** [2013] UKSC 73, paragraph 29, marriage is only available between a man and a woman and a civil partnership only available between two people of the same sex. Although some people of homosexual orientation can and do get married, and it may be that some people of heterosexual orientation can and do enter civil partnerships, that could be left to one side. She regarded the "criterion of marriage or civil partnership as indissociable from the sexual orientation of those who qualify to enter it". Though those comments are addressed in the specific circumstances of a Christian hotel keeper

refusing a double bedded room to a same sex couple who had entered a civil partnership, they are highly persuasive more generally.

41. What is required is, in our view, sufficient (or put another way, material) comparability rather than an exact match. Focussing, if despite Section 23 we must, upon Paragraph 43 in **Römer**, both a civil partner and a spouse have entered into lifelong mutually supportive relationships. The purpose of a survivor's benefit is to provide financially for a partner to such a relationship, so that the provision continues for one, to the extent it can, after the death of the other. The alleged act of discrimination here is not the withholding of the benefit wholesale, but restricting it so that pay deferred at a time when it was lawful to provide that that pay would fund benefits only to spouses if surviving was to continue to be subject to that restriction. To argue, as the Appellants do, that the existence of the restriction creates a difference in circumstance is to argue that because someone has been the victim of an act alleged to be discrimination that person is not in a comparable position to someone in respect of whom such an act has not been committed. As Ms Lester, calling this a "boot-straps" argument, observes, this assumes that the act is non-discriminatory, and it cannot therefore be a reason for holding it so.

42. If direct discrimination be ruled out, the Tribunal's conclusion that there was indirect discrimination which had not been justified would come into question. Mr Randall argued below that the discrimination was indirect. If it was not direct, this plainly must be so - for a restriction on civil partnerships would be far more likely adversely to affect those of homosexual than it would those of heterosexual orientation. The Tribunal's reasoning is set out at Paragraph 16. What was being addressed was the effect of Section 19 of the **Equality Act 2010**:-

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B.**
>
> **(2) For the purposes of sub-section (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-**
>
> **(a) A applies, or would apply, to persons with whom B does not share the characteristic**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it**
>
> **(c) it puts, or would put, B at that disadvantage and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim."**

Sexual orientation is a relevant protected characteristic. Section 19 (1) and sub-sections (2) (a) (b) and (c) were thus satisfied. The question was whether Innospec could show the rules of the scheme to be a proportionate means of achieving a legitimate aim.

43. The relevant rules of the scheme are those which provide for a spouse's pension (Rule 8.1) amended to the extent necessary to comply with legislative requirements relating to benefits payable to surviving civil partners (where a civil partnership has been entered into in accordance with the **Civil Partnership Act 2004**). The legitimate aim is said to be ensuring the proper funding of the scheme.

44. The Tribunal held that the Respondents failed to produce any cogent evidence upon the issue, had simply sought to rely upon generalised assertions and had thus failed to show that it was proportionate. That is a conclusion of fact or judgment which the Tribunal was entitled to reach, unless it was either perverse or took into account an irrelevant factor or left out of account a material relevant one. Mr Randall's argument is that the Tribunal wrongly rejected Innospec's evidence because of the considerable uncertainties – he submits it should not, as it did, have considered it unsatisfactory for Innospec to suggest that there was no way of knowing what the potential additional liabilities might be, and then to seek to rely upon this uncertainty

as a basis for showing that the PCP was a proportionate measure for achieving a legitimate aim. This was a fundamental misapprehension of Innospec's case, which was that certain risks have necessarily to be assessed. They are uncertain, but the uncertainties will fall within parameters the boundaries of which can be judged. The aim was to exclude further uncertain risks, which could not so readily be calculated, and for which no provision had been made when initially judging where the parameters fell for the purposes of funding the scheme.

45. He argues that it is inherent in a scheme providing for future pensions that the actual liabilities which will arise cannot be established in advance with precision. They must be actuarially determined. An actuary assesses risk. He does so within carefully defined parameters, which do not include the possibility of subsequent legislative change: statutory regulation prohibits this. To rely on the fact that an actuary could not say for sure what the potential liability might be if the class of those entitled to survivors' benefits were extended beyond those who were spouses, but that neither could he say for certain what the potential liability would be if it were not, therefore missed the point that what must be taken into account are necessarily uncertain matters – such as the chance of a scheme member being married, the age of their spouse, the chance of that person surviving and if so for how long: and that what the PCP excluded was a further range of uncertainties as to which not even an actuarial prediction had been made.

46. We accept that there are bound to be uncertainities surrounding the level of funding needed to secure promised future benefits with precision. As we see it, the Tribunal did not suggest otherwise. The point it made was an evidential one: Innospec advanced insufficient evidence of the scale of the additional risks to funding if civil partners were treated equally to spouses so as to demonstrate that it was proportionate to discriminate by adopting the PCP.

47. The Tribunal did not have the benefit, as we do, of the material produced by the Government Actuaries Department and annexed to Mr Coppel's skeleton. They show that across society as a whole an extension of survivors' benefits in respect of previously accrued pension entitlement would involve very substantial sums – ranging from an additional cost of some £88 million to a potential £3 billion. We mention this not to make any finding upon it (Mr Coppel has not invited us to do so, the material was not in evidence before the Tribunal, there has been no application to receive it as fresh evidence, and it has not been subject to cross-examination nor assessed against any contrary evidence there may be) but to show (1) that although there is a real point to be made, (2) Innospec simply did not develop its case on this in any way which might correspond even to the level of detail now indicated by the Government Actuary's note. We do not consider that the Tribunal was unaware that the issue was one of risk: but it was entitled to have sufficient evidence of the general boundaries within which the risk might fall if weight was to be placed upon it, and proportionality assessed by reference to it. It was entitled to conclude as it did in respect of the absence of justification, and we reject the appeal on this ground. It was not perverse, nor was the approach erroneous.

48. Accordingly, whether viewed as direct or indirect discrimination, there was discrimination which but for the provisions of Paragraph 18 would have entitled the Claimant to the reassurance of knowing that his partner would have a full survivor's pension should he predecease him.

49. Since Paragraph 18 is compatible with Directive 2000/78, standard domestic construction is applicable, and Mr Walker's claim cannot succeed. If we were wrong on our conclusion as to compatibility, however, the question would arise whether Paragraph 18 could be interpreted so as to provide for a survivor's pension as if Mr Walker's partner were his spouse.

Interpretation

50. Where a statutory provision is, on a domestic construction, incompatible with European law, the statute must be interpreted so far as possible to achieve conformity with Community law. Though **Ghaidan v Godin-Mendoza** [2004] 2 AC 557, HL concerned the approach to interpretation under Section 3 of the Human Rights Act 1998, it sets out the applicable principles: this was recognised in **HMRC v IDT Card Services (Ireland) Ltd** [2006] EWCA Civil 29, CA. The national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the Directive concerned in order to achieve the result sought by the Directive and consequently comply with its European obligations. The linguistic features of the legislation are not conclusive. The effect of interpretation may be to change the meaning of the legislation, in order to correspond with the purpose of the European law concerned. But the Court is not a legislator. There is a critical difference between interpretation on the one hand and legislation on the other. Thus in **Ghaidan** it was accepted that the interpretation chosen by a court must "go with the grain of the legislation", for this would be consistent with the legislative purpose, whereas going against that grain would constitute the court a law-maker. Lord Nicholls, Lord Steyn and Lord Rodger all accepted that there would be occasions when the courts could not adopt an interpretation that would make the legislation compatible with Convention rights because that would involve making policy choices which the court was not equipped to make. Though it is possible to read the legislation up (i.e. expansively) or down (restrictively) or to read words into the legislation, the interpretation required to make the statute in question Convention-compliant or EU law-compliant must not involve a departure from fundamental features of the legislation.

51. In commenting upon those propositions in **IDT**, Lady Justice Arden said:

> **"The latter cannot be the case where the effect of the interpretation would be to bring the statute into conformity with the objectives of the Sixth Directive…"**
>
> [that was a directive as to VAT which was in issue in that case]
>
> **"…in the absence of clear statutory language to the effect that Parliament intended that there should not be such conformity."**

52. It was that statement which was relied upon by the Tribunal in the present case to hold that there would be no departure from a fundamental feature of legislation if Paragraph 18 were to be interpreted to the effect that service prior to the coming into force of the **Civil Partnerships Act** would give rise to benefits for a civil partner exactly as it would if the pensioner had been married. The Tribunal reasoned in its paragraph 23:

> **"..there is no clear statutory language to the extent that Parliament intended the contested provision not to conform with the Directive. In such circumstances, we are satisfied that to interpret the contested provision so as to make the statute in question Directive-compliant would not involve a departure from the fundamental feature of the legislation. Further, we are satisfied that to interpret the contested provision so as to make it compatible with the Directive would not go against the grain of the legislation because the fundamental feature of the Equality Act 2010 is the prohibition of discrimination. Further, we are satisfied, having regard to the judgment of the Court of Appeal in the IDT case, that it is possible to interpret the contested provision as applying only to the extent compatible with the Directive. We are further satisfied that it is not necessary for us to identify the precise words which have to be spliced into the language used by Parliament so the contested provision is applicable is only to the extent compatible with the Directive. However, if it were necessary for us to splice in additional words into the paragraph, we accept Mr Schaefer's alternative submission that it would be appropriate for us to splice in the words "or in a civil partnership" between the words "who is not married" and "from having access to a benefit facility or service" we also accept Mr Schaefer's submission that whether the contested provision is interpreted as applied only to the extent compatible with the Directive, or whether the words "or in a civil partnership" are spliced into the paragraph neither interpretation would deprive the contested provision of effect. We are satisfied that the contested provision would still operate to excuse other potentially discriminatory conduct in circumstances not necessarily prohibited by the Directive. For example it would prevent a gay or lesbian who is not in a civil partnership from having access to benefits accrued before 5 December 2005 which are provided to married people."**

53. The opening words of that paragraph suggest – and if the suggestion is well-founded, demonstrate - that the Tribunal may have been looking for an express statement in the statute that the legislature recognised its obligations under European law, and was deliberately setting its face against them. No one before us was aware of any statute which contains any such express statement. Rather, what is necessary is seeing whether Parliament clearly adopted a

legislative choice which was directly at odds with that required by the Directive. Here, if one assumes that the right provided for by the Directive is a right to have a benefit which is payable in every respect in the same way and to the same extent as would be paid to a married person, irrespective of the date of the periods of service which gave rise to it, then the exception created by Paragraph 18 does not conform. Nor could it have been thought that it did.

54. This is not the case of a lacuna in the statute such as was left in **IDT**. The exception is specific, and clear. Viewed broadly, the intention of Parliament was not to confer upon those who were civil partners a right equivalent in every respect to those who were married: it was to do so in every respect *save this*. Though there may be occasions when a red line may simply be drawn through statutory wording, they will be when the overall thrust ("the grain") of the legislation is unaffected. Here it is not permissible in our view to have regard to the general prohibition on discrimination by reason of protected characteristics which is apparent from reading the **Equality Act 2010**: though it is undoubtedly the purpose of that Act to outlaw many occasions on which such discrimination occurs, it is impossible to generalise from this such that in any circumstance when discrimination can be identified it must necessarily be held unlawful. Otherwise it would be necessary merely for the Act to say so. Yet the Act, though aiming to proscribe discrimination on the grounds of the protected characteristics identified in Section 4, is careful also to delineate the circumstances in which discrimination on that basis will give rise to a claim. Parliament plainly intended discrimination should be remedied in some circumstances, though not in all. As Mr Randall argued, where Parliament creates a specific exception it is less likely to be amenable to be written out by a process of interpretation, since it shows that Parliament intended there to be an exception of the general sort identified: that this should be one of those circumstances in which discrimination would not lead to a remedy.

55. The effect is demonstrated by considering the words which the Tribunal would have read in (though we accept that the precise words do not matter since it is the effect of the provision which is being considered): they would prevent an exception, in itself plainly intended to limit the rights of civil partners compared to those who were married, from having that effect. Yet this does not begin to touch the case of the gay or lesbian not in a civil partnership to whom the Tribunal referred, and for whom there would be no obvious relevance in mentioning the date on which the **Civil Partnership Act 2004** came into force, nor for dating pensionable service by reference to that date.

56. Paragraph 18 must be read in context and as a whole. In context, it is part of Schedule 9 which is headed "Work: Exceptions" a title which shows that its purpose is to make exceptions to what would otherwise be the general position. 18(2) is to the effect that giving those who are married or in a civil partnership benefits, but excluding others (for example, the gay or lesbian couple to whom the Tribunal referred) from having them is not discrimination against the latter. This is clear. It is consistent with the policy of the Civil Partnership Act. But it excludes any potential for arguing that others who (applying a broad test) are discriminated against, but who are neither married nor in a civil partnership from making a claim. It is difficult to see why, if the Tribunal's approach be right, they also should be restricted in this way. In short, Paragraph 18 makes deliberate exceptions to an otherwise general approach.

57. What confirms us that we are firmly in the realms of policy, and being asked to legislate rather than interpret, is the realisation that many benefits such as those in question here accrued upon a basis which it was legitimate to adopt at the time, which if we decided as asked might be invalidated retrospectively. This would be likely to have far reaching consequences were the legislation not to contain the exception it does. We as a Court are ill-placed to judge and provide for them: that is the role of Parliament. Paragraph 18 does not prevent a pension

scheme adopting the equalisation of benefit for all time past and future as between the spouse and the civil partner, and we are told some have done so: but it permits those who consider they should not do so from being obliged. Given the way in which the statute is drafted, to interpret it as the Claimant asks and as the Tribunal held would be to take a step which impermissibly crosses the line between interpretation and legislation.

Disapplication

58. In the event that we concluded that Paragraph 18 was not compliant with the Directive, but that we could not interpret it to be compatible, we are invited to disapply the Paragraph. The principle is that recognised by Lord Mance speaking for the majority of the Supreme Court, in **R (Chester) v Secretary of State for Justice** [2013] UKSC 63, at paragraph 61-62:-

> **"The Court of Justice has accepted that, although the Treaty contemplates that the general principle of non-discrimination underlying Article 13 EC will be implemented by directives, Member States will be bound thereby to discontinue, disregard or set aside measures so far as they involve discrimination on a basis contrary to Article 13 at least after the time for transposition of such a directive: Case C-555/07 Kücükdeveci v Swedex GmbH and Co KG [2010] 2CMLR 33, para 61… however, for the general principle of non-discrimination to apply the context must fall within the scope of Community or now Union law…"**

Those last 11 words should be emphasised. The Court of Justice in **Römer** accepted that in **Mangold** [2006] 1 CMLR 43 at 74 and in **Kücükdeveci** the court had held that Directive 2000/78 did not itself establish the principle of equal treatment, but had the sole purpose of laying down a general framework for combating discrimination on various grounds. In its judgment there follow three significant paragraphs:-

> **"Nonetheless, for the principle of non-discrimination on the ground of sexual orientation to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of EU law (see Kücükdeveci)**
> **61. However, neither art. 13 EC nor Directive 2000/78 enables a situation such as that at issue in the main proceedings to be brought within the scope of EU law in respect of the period prior to the time limit for transposing that Directive…**
> **62. Article 13 EC which permitted the Council, within the limits of the powers conferred upon it by the EC treaty to take appropriate action to combat discrimination based on sexual orientation, could not, as such, bring within the scope of EU law, for the purposes of prohibiting any discrimination of that nature, situations which, as in the main proceedings, did not fall within the framework of the**

measures adopted on the basis of that article, specifically, as regards Directive 2000/78, before the time limit prescribed therein for its transposition…"

59. Discrimination on the ground of sexual orientation in a manner such as that permitted by Paragraph 18 thus fell outside the scope of EU law at least until 3rd December 2003. Given that all the service of Mr Walker was complete earlier in 2003, his claim, in effect to have a survivor's pension assured to his partner contingently on Mr Walker predeceasing him, commensurate with that which would have been paid to a spouse, fell at the relevant time outside the scope of EU law.

Conclusions

60. In conclusion, the Tribunal was wrong to think that Paragraph 18 was incompatible with Directive 2000/78 and EU law. That law did not have retrospective effect in the field of sexual orientation, any more than would have been the case of a claim for previous inequality of pay based on sex, which arose before the acceptance of the right to equal pay, would have given rise to a claim for back pay, or pension entitlement based upon it. If, contrary to that, we had concluded that the provision was incompatible we could not have interpreted Paragraph 18 so as to permit the claim, for to do so would be diametrically opposed to the thrust of the legislation in this particular respect and to the apparent intention of Parliament. Nor could we have disapplied the statute, since the right in question was not at the material time within the scope of EU law. Despite the attractive and eloquent submissions of Ms Lester, to which we pay tribute, the Tribunal was in error to hold to the opposite effect, and the appeal is allowed.