HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

PRESTON & OTHERS

(APPELLANTS)

v.

WOLVERHAMPTON HEALTHCARE N.H.S. TRUST & OTHERS

(RESPONDENTS)

AND

FLETCHER & OTHERS

(APPELLANTS)

v.

MIDLAND BANK PLC

(RESPONDENTS)

ON 8 FEBRUARY 2001
[2001] UKHL/5

LORD SLYNN OF HADLEY

My Lords,

Lord Slynn of Hadley
Lord Goff of Chieveley
Lord Nolan
Lord Hope of Craighead
Lord Clyde

1. These appeals are brought by part-time workers to challenge the compatibility in relation to their employment of sections 2(4) and 2 (5) of the Equal Pay Act 1970 (as amended by section 8(6) of and paragraph 6(1) of Part I of Schedule 1 to the Sex Discrimination Act 1975), section 2(5) being read with effect from 6 April 1978 with regulation 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 (SI 1976 No 142).

Those provisions are as follows. Section 2:

> "(4) No claim in respect of the operation of an equality clause relating to a woman's employment shall be referred to an industrial tribunal. . .if she has not been employed in the employment within the six months preceding the date of the reference. (5) A woman shall not

be entitled, in proceedings brought in respect of a failure to comply with an equality clause (including proceedings before an industrial tribunal), to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than two years before the date on which the proceedings were instituted."

Regulation 12:

"(1) The Equal Pay Act shall be so modified as to provide that where a court or an industrial tribunal finds that there has been a breach of a term in a contract of employment which has been included in the contract, or modified, by virtue of an equality clause and which relates to membership of a scheme, or where it makes an order declaring the right of an employee to admission to membership of a scheme in pursuance of the equal access requirements, it may declare that the employee has a right to be admitted to the scheme in question with effect from such date ('the deemed entry date') as it may specify, not being earlier than whichever is the later of the following dates, namely - (a) 6 April 1978; and (b) the date two years before the institution of the proceedings in which the order was made. . . ."

Article 119 of the EC Treaty (OJ 1992 C 224, p 6) provides:

"Each Member State shall . . . maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment, from his employer. . . . "

2. The facts of the cases are set out in my speech on 5 February 1998 [1998] 1 WLR 280, 283 et seq to which I refer. Your Lordships asked a number of questions of the European Court of Justice pursuant to article 177 of the EC Treaty, to which that Court (Case C-78/98) [2000] ICR 961 replied in its judgment delivered on 16 May 2000.

3. The Court in that judgment, at pp 995-996, para 31, referred to its decision in *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] ECR 1989, 1997, para 5 that

> "in the absence of Community rules on this subject, it is for the domestic legal system of each member state. . .to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law. . ."

4. However, where reliance is placed on the performance of domestic procedural conditions those conditions must not be such as to make the enforcement of Community law rights impossible in practice and they must not be less favourable than those applying to a similar claim of a domestic nature.

5. It is in the light of the Court's judgment in the present case that the issues on the appeal must now be decided.

Effectiveness – section 2(4)

6. The first question posed asked (in part (a)) whether the requirement of section 2(4) that a claim could only be referred to an Industrial Tribunal if a woman had been employed in the employment within the six months preceding the date of reference meant that it was excessively difficult or impossible in practice for rights under article 119 to be exercised. The Court said that it was settled case law that the fixing of reasonable limitation periods for bringing proceedings satisfied the Community law principle of effectiveness in that it constituted an application of the fundamental principle of legal certainty.

7. Accordingly in paragraph 34 of its judgment, at p 996, the Court ruled that a limitation period of six months

> "cannot be regarded as constituting an obstacle to obtaining the payment of sums to which, albeit not yet payable, the claimants are entitled under article 119 of the Treaty. Such a limitation period does not render impossible or excessively difficult the exercise of rights conferred by the Community legal order and is not therefore liable to strike at the very essence of those rights."

8. This, however, is subject to the proviso that such limitation period is not less favourable for actions based on Community law than for those based on domestic law.

9. The applicants' argument on this point must therefore be rejected.

Effectiveness – section 2(5)

10. The first question in part (b) asks whether the rule that pensionable service is to be calculated only by reference to service after a date falling no earlier than two years prior to the date of her claim meant that it was excessively difficult or impossible in practice for the claimant to exercise her rights under article 119. The Court of Justice, at p 997, stressed two preliminary points. The first (paragraph 37) is that the object of such a claim as that in the present case is

> "not to obtain, with retroactive effect, arrears of benefits under the occupational pension scheme but is to secure recognition of the right to retroactive membership of that scheme for the purpose of evaluating the benefits to be paid in the future."

In the second place (paragraph 38), a claimant could not claim more favourable treatment if she succeeded than she would have had if she had been duly accepted as a member. This meant (paragraph 39) that in order to claim retroactively to join an occupational pension scheme, contributions relating to the period of membership concerned would have to be paid.

11. The Court then referred, at p 997, para 40, to its own decision in *Magorrian v Eastern Health and Social Services Board* (Case C-246/96) [1998] ICR 979 in which it had been held (paragraph 41, p 1003) that a rule similar to the rule in the present case, that the right to be admitted to a scheme may have effect from a date no earlier than two years before the bringing of proceedings,

> "would deprive the persons concerned of the additional benefits under the scheme to which they were entitled to be affiliated, since those benefits could be calculated only by reference to a starting date falling two years prior to commencement of proceedings by them."

Such a rule struck at the very essence of the rights conferred by the Community legal order and rendered any action by individuals relying on Community law impossible in practice: p 997, para 41. Such a rule

as that in section 2(5) of the 1970 Act was therefore incompatible with Community law as was a procedural rule like regulation 12 of the 1976 Regulations which prevented the entire record of service completed by those concerned before the two years preceding the date on which they commenced proceedings from being taken into account for the purpose of calculating the benefits which would be payable even after the date of the claim: p 997, para 42 and 43.

12. Accordingly the rules in section 2(5) of the 1970 Act and in regulation 12 of the 1976 Regulations are precluded by Community law. The respondents cannot therefore rely on that section or that regulation to defeat a claim for periods prior to the two years to be taken into account, subject to the employee paying contributions owing in respect of the period for which membership is claimed retroactively. Future pension benefits have therefore to be calculated by reference to full and part-time periods of service subsequent to 8 April 1976, the date of the Court's judgment in *Defrenne v Sabena* (Case 43/75) [1976] ICR 547 (when the Court held that article 119 of the EC Treaty had direct effect: see *Vroege v NCIV Instituut voor Volkshuisvesting BV* (Case C-57/93); *Fisscher v Voorhuis Hengelo BV* (Case C-128/93) [1995] ICR 635.

Equivalence – section 2(4)

13. Having decided that section 2(4) of the 1970 Act did not render the claim impossible in practice, there remained the question whether the limitation was less favourable than for similar actions based on domestic law. In the first place it has to be asked whether there is a similar action to take as the comparator. On the basis of its judgment in *Levez v T H Jennings (Harlow Pools) Ltd* (Case C-326/96) [1999] ICR 521 the Court [2000] ICR 961, 998, para 51, ruled that since the 1970 Act was adopted to give effect to the Community principle of non-discrimination on grounds of sex in relation to pay pursuant to article 119 and Council Directive (75/117/EEC) of 10 February 1975 (OJ 1975 L 45 p 19) ("the Equal Pay Directive") it was not appropriate to compare the procedural rules for the two claims. Accordingly an action alleging a breach of the 1970 Act was not a domestic action "similar" to a claim for infringement of article 119.

Similarity

14. Whether a domestic law action is similar to a claim for infringement of article 119 depends on whether the purpose, the cause of action and the essential characteristics of the two proceedings are

similar: see paragraphs 55-57 of the Court of Justice's judgment in the present case, at p 999.

15. The first question is thus whether the purpose, essential characteristics and cause of action in proceedings identified by the applicants as being similar are in fact similar to a claim for the infringement of article 119.

16. The applicants originally relied on claims under the 1975 Act and the Race Relations Act 1976 but they no longer pursue those contentions. They do however say that claims for breach of contract are similar to claims for infringement of article 119 as limited by section 2(4) of the 1970 Act since the breach of contract alleged is in respect of a failure by the employer to conform with the deemed equality clause introduced into the contract by section 1 of the 1970 Act. It is said that Advocate General Léger in his opinion in the present case, at pp 981-983 contemplated an appropriate comparison being one with a domestic action by a part-time worker who complained that he had been unlawfully excluded from an occupational scheme when the employer knew or ought to have know that such exclusion was unlawful: see paragraphs 92 –101 of his opinion.

17. The respondents say that the domestic law claim to be similar must "in juristic structure [be] very close to the Community claim": *Matra Communications SAS v Home Office* [1999] 1 WLR 1646, 1658, *per* Buxton LJ. The claim in Community law is essentially to establish the right of retroactive access to the pension scheme as the Court of Justice has stressed. A claim in contract could only be for damages for failure to give effect to the bargain agreed between the parties by the employer failing to pay into the pension scheme and thereby not paying the appropriate pension when it eventually fell due. A claim in contract is essentially different from a claim to a statutory right or a claim under article 119 which is for the enforcement of a fundamental right which overrides any bargain which the parties might have agreed. The fact that regulation 11 of the 1976 Regulations excludes the right to damages and that regulation 12 gives a right of retrospective access to the scheme only serves to emphasise the lack of similarity.

18. It is clear that there may be no similar action for the purposes of this inquiry: see *Palmisani v Istituto Nazionale della Previdenza Sociale* (Case C-261/95) [1997] ECR I-4025, 4049, paragraph 39 and *Levez v T*

H Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521, 546, paragraph 50. The Court is not therefore driven to find the nearest comparison but to decide whether there really is a similar action to that to enforce rights under the statute and under article 119.

19. Some distinctions between what on the surface were arguably similar claims have been accepted by the Court of Justice as precluding the application of the principle of equivalence. Thus in *Palmisani's* case [1997] ECR I-4025, 4048, paragraph 34 the Court said:

> "the measures implementing the Directive [Council Directive (80/987/EEC) (OJ 1980 L 283, p. 23)] contained in the [Italian] Legislative Decree [No 80] pursue an objective that differs from that of the compensation scheme established by that decree. While the former aim to provide employees, by means of specific guarantees of payment of unpaid remuneration, with protection under Community law in the event of the insolvency of their employer, the latter seeks, by definition, to make good to a sufficient extent the loss or damage sustained by the beneficiaries of the Directive as a result of its belated transposition."

20. Again in *Edilizia Industriale Siderurgia Srl v Ministerio delle Finanze* (Case C-231/96) [1998] ECR I–4951) the Court was asked to consider whether Community law permitted actions for the reimbursement of charges paid in breach of a Community law Directive (Council Directive (69/33/EEC) (OJ, English Special Edition 1969 (II), p 412)) to be subject to a time limit of three years, a period which differed from the limitation period (10 years) which italian national law laid down for actions for the recovery of sums paid between individuals when they were not due. The Court, having set out the established principles of national procedural autonomy, subject to observance of the principles of effectiveness and equivalence, went on to hold that the principle of equivalence does not oblige a member state to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law: paragraph 36, p 4991.

> "37. Thus, Community law does not preclude the legislation of a member state from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to

challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies."

21. I accept that there force in the respondents' arguments and that one should be careful not to accept superficial similarity as being sufficient. It is not enough to say that both sets of claims arise in the field of employment law, nor is it enough to say of every claim under article 119 that somehow or other a claim could be framed in contract. I have, however, come to the conclusion that these arguments should not prevail.

22. The essential matter here is that moneys have not been paid to the trustees of a pension fund to purchase pension rights on eventual retirement or on reaching the prescribed age. A successful claim under article 119 obtains retroactively full access to the scheme so that the necessary contributions to obtain the appropriate pension rights for that individual have to be paid. A claim in contract would be for damages for the failure to pay those sums to the trustees leading to a total or in some cases a partial loss of the pension rights. In form they are plainly different but in substance the eventual benefit to the employee is sufficiently similar for present purposes. To adopt the words of the Court of Justice in paragraph 57 of its judgment [2000] ICR 961, 999 the "right of action available under domestic law is a domestic action similar to proceedings to give effect to rights conferred by article 119 of the Treaty . . . ". This is so whether the contractual term is express, implied or imposed by statute.

23. Accordingly, resisting the temptation to say simply that a claim under article 119 and under the 1970 Act is sui generis, I would uphold Mr Pannick submission that a claim in contract may provide a sufficiently similar comparison.

Less favourable rules

24. That, however, leaves the question whether the rules of procedure for claims under article 119 are no less favourable than those governing domestic actions in contract so as to satisfy the principle of equivalence.

25. In deciding that question "the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national court (*Levez v T H Jennings (Harlow Pools) Ltd* (Case C-326/96) [1999] ICR 521, 545, paragraph 44): see [2000] ICR 961, 999.

The court further ruled, at pp 999-1000:

> "62. It follows that the various aspects of the procedural rules cannot be examined in isolation but must be placed in their general context. Moreover, such an examination may not be carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules at issue.
>
> "63. In view of the foregoing, the answer to the third part of the second question must be that, in order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar, taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules."

26. The applicants contend that the six-year limitation period for bringing a claim for breach of contract provided for by section 5 of the Limitation Act 1980 is plainly more favourable than the six months from the date of termination of employment under section 2(4) of the 1970 Act. Under section 5 of the 1980 Act the time does not run until the cause of action has accrued, and where there is (as there is here) a continuing obligation to provide equal access to the rights under the pension scheme, then time does not run until the last time when the employers could have admitted the applicants to the scheme - ie the last date of employment. This is a much longer period and therefore more favourable than the six month limitation from the end of employment provided for in section 2(4) of the 1970 Act.

27. I do not accept that the limitation period in contract only begins to run from the date of the termination of employment. In *Bell v Peter Browne & Co* [1990] 2 QB 495, 501 Nicholls LJ distinguished cases where

> "a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast are the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the obligation is not breached once and for all, but it is a contractual obligation obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach."

28. In the present case it seems to me that there was an obligation to admit the employee to the scheme and to provide payments for the employee's future pension periodically during the period of employment. That obligation may have been on a daily or weekly or other periodic basis but each time there was an obligation to admit to the scheme and to make the necessary payments to the trustees and the obligation was breached a complete cause of action arose since the damage existed at once. The next time the obligation was breached a separate cause of action occurred in respect of that second breach. The time limit of six years runs from each complete cause of action. Accordingly I do not accept that the comparison is between six years from the date of termination of employment for all failures to carry out the equality clause obligations by giving access to the scheme and six months from the date of termination of employment under section 2(4). Once six years had run in respect of each specific breach claims in respect of that breach were statute barred.

29. There is still a six-year period for contract claims rather than a six-month claim for infringement of article 119. This, however, is not the end of the inquiry. Merely to look at the limitation periods is not sufficient. It is necessary to have regard to the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts" [2000] ICR 961, 999, para 61.

In *Levez v T H Jennings (Harlow Pools) Ltd* (Case C-326/96) [1999] ICR 521, 546 the Court of Justice said:

> "51. On that point, it is appropriate to consider whether, in order fully to assert rights conferred by Community law before the county court, an employee in circumstances such as those of the applicant will incur

> additional costs and delay by comparison with a claimant who, because he is relying on what may be regarded as a similar right under domestic law, may bring an action before the industrial tribunal, which is simpler and, in principle, less costly."

30. There are thus factors to be set against the difference in limitation periods. As has already been seen the claim under a contract can only go back six years from the date of the claim whereas a claim brought within six months of the termination of employment can go back to the beginning of employment or 8 April 1976 (the date of the judgment in *Defrenne v Sabena* (Case 43/75) [1976] ICR 547), whichever is the later. Moreover the claimant can wait until the employment is over, thus avoiding the possibility of friction with the employer if proceedings to protect her position are brought during the period of employment, as will be necessary since the six year limitation runs from the accrual of a completed cause of action. It is in my view also relevant to have regard to the lower costs involved in the claim before an Employment Tribunal and if proceedings finish there the shorter time-scale involved. The period of six months itself is not an unreasonably short period for a claim to be referred to an Employment Tribunal. The informality of the proceedings is also a relevant factor.

31. I am not satisfied that in these cases it can be said that the rules of procedure for a claim under section 2(4) are less favourable than those applying to a claim in contract. I therefore hold that section 2(4) does not breach the principle of equivalence.

A stable employment relationship

32. The employees concerned in these appeals were variously employed, some under consecutive but separate contracts of service with breaks in between (eg teachers on a termly or academic year contract); some were regularly employed over a long period on this basis, others were not regularly employed but were employed from time to time and in that category some had what has been called an "umbrella" contract. Where there is an "umbrella" contract there is an ongoing contractual relationship but in the other cases there are separate contracts of employment. The Employment Appeal Tribunal [1996] IRLR 484 and the Court of Appeal [1997] ICR 899 held that section 2(4) was dealing with specific contracts so that as a matter of interpretation a claim could only be brought in respect of employment in existence within the six months preceding, the reference of the claim to the Industrial Tribunal.

Your Lordships [1998] 1 WLR 280 agreed with that interpretation but the question inevitably arose as to whether or not such interpretation meant that section 2(4) was incompatible with article 119. The Court of Justice [2000] ICR 961, 1001, whilst accepting that time-limits could be imposed in the interests of legal certainty, considered that

> "68. Whilst it is true that legal certainty also requires that it be possible to fix precisely the starting point of a limitation period, the fact nevertheless remains that, in the case of successive short-term contracts of the kind referred to in the third question, setting the starting point of the limitation period at the end of each contract renders the exercise of the right conferred by article 119 of the Treaty excessively difficult.
>
> "69. Where, however, there is a stable relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies, it is possible to fix a precise starting point for the limitation period.
>
> "70. There is no reason why that starting point should not be fixed as the date on which the sequence of such contracts has been interrupted through the absence of one or more of the features that characterise a stable employment relationship of that kind, either because the periodicity of such contracts has been broken or because the new contract does not relate to the same employment as that to which the same pension scheme applies."

33. Accordingly it is clear that where there are intermittent contracts of service without a stable employment relationship, the period of six months runs from the end of each contract of service, but where such contracts are concluded at regular intervals in respect of the same employment regularly in a stable employment relationship, the period runs from the end of the last contract forming part of that relationship.

34. Unless, as is to be hoped and indeed expected, agreement can be reached as to which of the applicants had such a stable environment relationship, the question must be referred back to the Employment Tribunal.

35. I would accordingly allow the appeal to the extent: (a) of declaring that the respondents cannot rely on the two-year rule in section 2(5) of the 1970 Act to prevent the applicants from retroactively gaining membership of the pension scheme in the period of employment back to 8 April 1976 or to the date of commencement of employment, whichever is the later, or from receiving pension benefits from such schemes which would otherwise have been due to be paid in the period after the application to the tribunal, calculated so as to take into account their service since 8 April 1976, so long as relevant pension contributions are paid by the applicants; (b) of declaring that the respondents cannot rely on the six months limitation in section 2(4) of the 1970 Act as amended, so as to require a claim for membership of an occupational pension scheme to be brought within six months of the end of each contract of employment to which the claim relates where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies. I would refer the question as to which of the Appellants can satisfy that condition back to the Employment Tribunal.

36. I would declare that the provision in section 2(4) in the cases where there is no stable relationship does not violate Community rules as to effectiveness and equivalence.

LORD GOFF OF CHIEVELEY

My Lords,

37. I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend Lord Clyde. I agree with it; and on the basis there set out I concur in the order proposed by my noble and learned friend Lord Slynn of Hadley

LORD NOLAN

My Lords,

38. I have had the opportunity of reading in draft the speech prepared by noble and learned friend Lord Clyde. I agree with it; and on the basis there set out I concur in the order proposed by my noble and learned friend Lord Slynn of Hadley.

LORD HOPE OF CRAIGHEAD

My Lords,

39. I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Slynn of Hadley. I agree with it, and for the reasons which he has given I would allow the appeal to the extent that he has indicated and make the same order as he has proposed.

LORD CLYDE

My Lords,

40. Following on the reference made by this House the European Court of Justice has advised that the limitation period of six months laid down in section 2(4) of the Equal Pay Act 1970, as amended, is not contrary to Community law provided that "that limitation period is not less favourable for actions based on Community law than for those based on domestic law": paragraph 35 of the Court's judgment [2000] ICR 961, 996). This question now has to be resolved. It involves an application of the so-called principle of equivalence. The initial problem which has arisen is whether there is any action based on domestic law which will serve as a comparison, and if so, what it is.

41. It is said of the comparable action, if it exists, that it is to be "similar" to the action based on Community law. Obviously that does not mean that it is to be identical. But the requirement of similarity or comparability is an inexact one and it is not immediately easy to identify the candidate for comparison, if it exists. The House sought guidance from the Court of Justice on this issue. This formed the second question put to the Court. In its judgment the Court has replied, at p 998, para 49:

> "In order to verify whether the principle of equivalence has been complied with in the present case, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to verify whether the procedural rules intended to ensure that the rights derived by individuals from community law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of the allegedly similar domestic actions: see *Levez v T H Jennings*

(Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521, 544, 545, paras 39 and 43."

42. In paragraph 57, at p 999, the Court, having answered the first part of the second question by holding that an action alleging infringement of a statute such as the 1970 Act, which was the means used by the United Kingdom of discharging its obligations under article 119 of the EC Treaty, answered the second part of the second question, which sought guidance on the criteria for identifying a "similar" action in domestic law, in these terms:

> "In view of the foregoing, the answer to the second part of the second question must be that, in order to determine whether a right of action available under domestic law is a domestic action similar to proceedings to give effect to rights conferred by article 119 of the Treaty, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics."

43. The sole candidate which the applicants have put forward as a comparator is an action for breach of contract. The respondents have replied that the action based on Community law is sui generis and that there is no comparable action. If one applies the criteria laid down by the Court there seems to me to be considerable force in that submission. The claim under Community law was regarded by the Advocate General, in paragraph 95 of his opinion, at p 982, as "concerned not with arrears of pay or other remuneration but with retroactive membership for the claimants of an occupational pension scheme". If one then looks to the considerations of purpose and cause of action, or the essential characteristics, being the criteria specified by the Court of Justice, it seems to me that the action under Community law is in essence requiring a provision to be added to the terms of the claimants' contracts of employment which ought to be there in order to comply with the law. The purpose of such an action is the establishment of a right which should in accordance with European law be recognised in the United Kingdom and should be among the terms of the contracts of employment. On the other hand if the criteria are applied to the suggested action under domestic law, it seems to me that that action would in essence be one which proceeded upon a breach of contract, on the basis that the employer had failed to observe an obligation in the contract which gave the right to membership of the pension scheme to the employee in question, and the purpose of the action, being one for breach of contract, would presumably be to obtain an award of damages.

I have considerable difficulty in seeing that as between these two actions one would be comparing like with like. If there is no comparator, that is an end of the case.

44. But it may be that this is to apply too strict or precise a standard for the comparison. Certainly the Advocate General was able to conceive that a comparator might exist. In paragraph 101, at p 983, he stated that:

> "I consider that, in order to comply with the principle of equivalence, the House of Lords might regard as 'similar' to the claims in the main proceedings an action under domestic law by a part-time worker who, for reasons unconnected with discrimination on grounds of sex or race, has been unlawfully excluded from membership of an occupational pension scheme, even though his employer knew or ought reasonably to have known that such exclusion was illegal."

If one adopts a broad view of the exercise of comparison I can see that an action for breach of contract might well be accepted as an appropriate comparator. To use the language of my noble and learned friend Lord Slynn of Hadley, whose speech I have had the advantage of reading in draft, the suggested action for breach of contract "may provide a sufficiently similar comparison".

45. But even if by that standard the principle of equivalence can be satisfied I do not consider that the applicants should succeed. On the basis of the wider approach to the problem of comparison which my noble and learned friend Lord Slynn of Hadley has adopted I am in full agreement with him that the rules of procedure for a claim under section 2(4) of the 1970 Act are not less favourable than those which would apply to a claim for breach of contract in the circumstances of the present cases. I would accordingly agree with the conclusion which he has reached and with the form of order which he proposes.