HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 13
on appeal from[2004] EWCA Civ 1281

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Preston and others
v.
Wolverhampton Healthcare NHS Trust and others (No 3)
(formerly Powerhouse Retail Limited and others (Respondents) *v.* Burroughs and others (Appellants))

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
John Cavanagh QC
(Instructed by Unison Employment Rights Unit)

Respondents:
Christopher Jeans QC
Jason Coppel
(Instructed by Eversheds LLP)

Intervener
Nicholas Paines QC and Raymond Hill (Instructed by Treasury Solicitor) for the First Secretary of State

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LORD HOPE OF CRAIGHEAD

My Lords,

1. The issue in this appeal is confined to a single point of statutory construction. It arises out of a series of claims brought by about 60,000 part-time workers under the Equal Pay Act 1970. They had been denied access to their employers' occupational pension schemes. This was because the schemes laid down as a condition of membership thresholds as to minimum weekly working hours with which, as part-time workers, they could not comply. Their claims were the subject of a series of test cases under what has been described as the Preston litigation: see *Preston and others v Wolverhampton Healthcare N H S Trust and others* [1998] ICR 227 (HL), *Preston and others v Wolverhampton Healthcare N H S Trust and others* (Case C-78/98) [2000] ICR 961 (ECJ) and *Preston and others v Wolverhampton Healthcare N H S Trust and others (No 2)* [2001] UKHL 5, [2001] ICR 217. The first round of cases dealt with a range of preliminary issues of general application. The current round which has given rise to this appeal deals with issues which, while not of universal application, affect all or at least the majority of cases within a particular group or sector. Mrs Preston, after whom the litigation takes its name, is no longer involved in these proceedings. Her claim was successful before the employment tribunal on the preliminary issue which was relevant to her, and there has been no appeal against that decision.

2. The appellants' cases were selected to deal with a particular issue that affects claimants who were transferred from the employment of one employer to another by the operation of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794)

("TUPE"). The question that has arisen in their cases relates to the meaning and effect of the statutory time limit on the bringing of claims under the 1970 Act where there has been a TUPE transfer and the claim relates to the operation of an equality clause on an occupational pension scheme. The appellants were all employed in the electricity industry, but the issue is not confined to claimants who were employed in that sector. It applies also to the claims of other persons employed in the private sector, including the banking and local government sectors. It is an issue of general public importance as it affects so many claims. In view of the importance of the case the First Secretary of State was given leave to intervene in the appeal, and brief submissions to the effect that it should be dismissed were made on his behalf by counsel.

3. Section 2(4) of the 1970 Act was amended by the Sex Discrimination Act 1975, section 8(6) and Part I, para 6(1) of Schedule 1, and it has been amended again since the events with which this case is concerned. At the relevant time it provided as follows:

> "No claim in respect of the operation of an equality clause relating to a woman's employment shall be referred to an industrial tribunal otherwise than by virtue of subsection (3) above, if she has not been employed in the employment within the six months preceding the date of the reference."

4. For reasons that I shall explain more fully later, claims in respect of the operation of an equality clause relating to an occupational pension scheme where there has been a TUPE transfer must be brought against the transferor, not the transferee. The time limit affects every claim which depends on facts that occurred prior to the date of the TUPE transfer, and the appellants' claims are all in that category. The question with which this case is concerned, put simply, is whether time begins to run in a claim against the transferor for equality of treatment under its occupational pension scheme from the date of the transfer, or whether it runs from the end of the employee's employment with the transferee.

5. As a result of the decisions mentioned above, it is common ground that section 2(4) of the 1970 Act applies to the appellants' claims. So, if they are to be entertained by an employment tribunal, they must be brought within the statutory time limit. It is also common ground that, where a claim is brought in time, the employment tribunal is empowered to declare that a successful applicant has the right of

retrospective access to the scheme, subject to the payment of appropriate contributions, in respect of periods of employment not earlier than 8 April 1976. That was the date as from which direct effect was given to the judgment of the European Court of Justice in *Defrenne v Sabena* (Case C-262/88) [1976] ICR 547, in which the court ruled that article 119 of the EC Treaty (now article 141 EC) could be relied on to claim equal treatment in the right to join an occupational pension scheme. The question as to the meaning and effect of the time limit affects all those claimants in whose cases the facts giving rise to the claim occurred prior to the date of the TUPE transfer.

The facts

6. The appellants were originally employed by an employer within the nationalised electricity industry. They all worked part-time in an electricity showroom. Prior to 1 April 1988 their working hours were insufficient to qualify them for membership of the occupational pension scheme to which their employers were affiliated. This was the industry's Electricity Supply Pension Scheme (the "Scheme"). On 1 April 1988 the working hours threshold was removed. The appellants then joined the Scheme and began to accrue benefits under it. In 1990 the electricity industry was privatised. The Scheme was then split into 17 separate Groups, each of which was aligned with the respective privatised businesses and the companies that had been formed to run these businesses. As a result each Group within the Scheme became, in effect, a discrete pension scheme. In 1992 a TUPE transfer took place (in fact there were two successive transfers on successive days, but nothing turns on this) as a result of which the appellants' employment was transferred to a new employer, Powerhouse Retail Ltd.

7. The appellants' claims relate entirely to periods prior to 1 April 1988, except in the case of Mrs Burroughs whose claim relates to the period prior to October 1986 when she became eligible for membership of the Scheme because her working hours had increased. They all relate to periods when the appellants were employed by the transferor. The pension benefits which they accrued between 1 April 1988 and the date of the transfer remained with their original employer's Group for a short period after the transfer. They were then transferred to the Powerhouse Retail Group of the Scheme. The effect of the transfer was to align the Group with the appellants' new employment with the transferee. The appellants accept however that the effect of regulation 7 of TUPE is that their claims for retrospective access to the Scheme in respect of periods

of employment prior to 1 April 1988 must be made against the transferor.

8. The appellants' originating applications were presented to the employment tribunal in November and December 1994. They had been prompted by the decisions of the European Court of Justice in *Vroege v NCIV Instituut voor Volkshuisvesting B V* (Case C-57/93) and *Fisscher v Voorhuis Hengelo BV* (Case C-128/93) [1995] ICR 635, in which the court ruled (1) that the right to membership of an occupational pension scheme, as well as benefits payable under the scheme, fell within the scope of article 119 of the EC Treaty, (2) that the exclusion of married women from membership of such a scheme entailed discrimination based on sex, (3) that the exclusion of part-time workers from membership could amount to a contravention of that article if it affected a much greater number of women than men unless the employer showed that the exclusion was explained by objectively justified factors unrelated to discrimination on the ground of sex and (4) that the article could be relied on to claim equal treatment in the right to join an occupational pension scheme as from 8 April 1976.

9. The dates when these applications were presented were more than six months after the date of the relevant TUPE transfers. The appellants contend that time runs against their claims from the end of their employment with the transferee. On this approach, as they were still in the employment of the ultimate transferee employer when their claims were presented, their claims were all in time. The respondents, on the other hand, contend that the appellants' "employment" within the meaning of section 2(4) of the 1970 Act for the purposes of their claims for equal treatment under the occupational pension schemes was their employment with the transferor. If this is right, the claims were all out of time, as the appellants' employment with the transferor ended with the date of the TUPE transfer.

The Equal Pay Act 1970

10. The 1970 Act had, as has already been mentioned, been amended by the Sex Discrimination Act 1975 in order to establish the demarcation line between discriminations which were subject to the Equal Pay Act and those which were subject to the Sex Discrimination Act by the date when the European Court of Justice issued its decision in the *Defrene v Sabena* case on 8 April 1976. The words "equal pay clause" in the 1970 Act as originally enacted were replaced by "equality

clause" to make it clear that discriminations which were subject to the Equal Pay Act related not just to pay but to other terms and conditions of the woman's contract. The 1970 Act as amended is set out in Part II of the Schedule to the 1975 Act.

11. In order to set section 2(4) into its context, the following provisions in section 1 of the 1970 Act, as amended, should be noted:

> "(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.
>
> (2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract'), and has the effect that –
>
> (a) where the woman is employed on like work with a man in the same employment –
>
> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable ….
>
> …
>
> (6) Subject to the following subsections, for the purposes of this section –
>
> (a) 'employed' means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly."

12. Section 2 of the Act, as amended, provides:

> "(1) Any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration or damages

> in respect of the contravention, may be presented by way of a complaint to an industrial tribunal.
>
> (1A) Where a dispute arises in relation to the effect of an equality clause the employer may apply to an industrial tribunal for an order declaring the rights of the employer and the employee in relation to the matter in question."

The TUPE Regulations

13. The Transfer of Undertakings (Protection of Employment) Regulations 1981 were made under section 2(2) of the European Communities Act 1972. They gave effect to Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses ("the Acquired Rights Directive"). The first indent of article 3(1) of the Directive provides:

> "The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of article 1(1) shall, by reason of such transfer, be transferred to the transferee."

Article 3(2) provides that after the transfer the transferee shall continue to observe the terms and conditions agreed in any collective agreement until the date of termination or expiry of the agreement or the entry into force or application of another collective agreement. The first indent of article 3(3) provides:

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

14. Regulation 5(1) of TUPE provides:

> "… a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee."

Regulation 5(2) provides that, on the completion of a relevant transfer:

> "(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee."

15. Regulation 7(1) provides that regulation 5 shall not apply:

> "(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Social Security Pensions Act 1975 or the Social Security Pensions (Northern Ireland) Order 1975; or
>
> (b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme."

16. The effect of these provisions is to replace the common law rule that a change in the identity of an employer terminates a contract of employment: *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014. But the rule which they create that a relevant transfer does not terminate the contract, with the result that all the rights and obligations of the transferor are transferred to the transferee, is subject to the exception set out in regulation 7. The transferee does not inherit the pension obligations of the transferor.

The decisions below

17. In the employment tribunal, Mr J K Macmillan held that time began to run under section 2(4) of the 1970 Act from the date of the TUPE transfer, so proceedings had to be brought against the transferor within six months of that date. In the employment appeal tribunal, Judge J McMullen QC held that the employment tribunal chairman erred in holding that time began to run from the date of the TUPE transfer: [2004] ICR 993. In his opinion it did not begin to run until the end of the employee's employment with the transferee. In para 146 of his judgment he said:

> "In my view, the fiction, which is created by TUPE regulation 5 so as to deem employment with the transferor to have been always with the transferee, extends the limitation period against the transferor almost indefinitely. 'Employment' means employment under the contract which is deemed to continue. The equality clause in relation to pensions, said to have been breached, remains actionable throughout the period of employment (with the transferee) plus six months."

18. The Court of Appeal (Pill, Jonathan Parker LJJ and Laddie J) [2004] EWCA Civ 1281 allowed the respondents' appeal against the decision of the employment appeal tribunal: [2005] ICR 222. In para 25 of his judgment, with which the other members of the court agreed, Pill LJ said that, while the effect of TUPE was that the continuing contract of employment was deemed always to have been with the transferee, it must be acknowledged that the pension rights had been removed from it and that it could not be treated as if they had not. He then explained how, as he saw it, this reasoning fits with the wording of section 2(4) of the 1970 Act:

> "The employment under a contract of employment about which complaint is made is the contract between the transferor and employee, with its equality clause providing pension rights, and the post-transfer contract of employment, shorn as it is by statute of existing pension rights, is not the specific contract of employment for the purposes of section 2(4). The claim is based on the previous contract and, in so far as its terms have not been transferred, it terminated upon the transfer and time began

> to run. The existence, in each of the contracts, of an equality clause does not mean that they can be treated as the same contract."

Discussion

19. Mr Cavanagh QC for the appellants said that the Court of Appeal were wrong to separate out the contract containing the equality clause relating to the pension rights from the contract with the transferee. He said that the effect of regulation 5(1) of TUPE was that the contract with the transferor was not brought to an end on the transfer. The same contract continued in existence after that date as a contract with the transferee. Regulation 7 had two consequences only: first, the terms of the transferor's contract relating to the pension rights were not transferred to the transferee; and second, the transferee had no responsibility to provide a pension for any period before the date of the transfer. The liability for claims as to the operation of an equality clause relating to periods before the transfer remained with the transferor. But it was going too far to say that, as a side-effect of these provisions, time started to run against the claimant on the date of the transfer. It was the contract itself that was transferred. So it was the contract itself which identified the claimant's "employment" within the meaning of section 2(4) for the purposes of the time limit.

20. He sought to find support for this argument in a passage in the speech of Lord Slynn of Hadley in *Preston and others v Wolverhampton Healthcare NHS Trust and others* [1998] ICR 227 (HL), 237G-H, where, having noted that there was no provision in the 1970 Act that different contracts of employment are to be treated as continuous employment, Lord Slynn said:

> "… section 2(4), as amended, refers to a claim in respect of the operation of 'an equality clause relating to a woman's employment.' That equality clause is a clause in a contract of employment which as I see it can only be the specific contract in respect of which the claim is made and which for the purposes of the industrial tribunal's jurisdiction must cover employment which has ended within six months of the claim before the industrial tribunal."

21. Mr Cavanagh also submitted that his argument was supported by the fact that the provision in the contract that was relied on in the appellants' claims was the equality clause. This was a term that was introduced into every contract of employment by section 1(1) of the 1970 Act, and it sat above all the other terms of the contract. It was this clause, which he described in his written case as an umbrella equality clause and which plainly did transfer over to the transferee, rather than any specific terms about the right to participate in a pension scheme, on which the claims were based. This, he said, reinforced his argument that, as it was wrong to see the equality clause relating to the pension rights as part of a separate contract from that which the claimant had with the transferee, the time limit in section 2(4) was not affected by the transfer.

22. I am unable to accept these arguments. As with any other issue of statutory construction, the question begins and ends with the words of the statute. The first point that must be made is that the word "contract" does not appear anywhere in section 2(4). It was used by Lord Slynn in the passage from his speech in the first *Preston* case, but that was in a different context. The question which he was addressing in that case was how the word "employment" was to be applied to a situation where the woman was employed by the same employer but under a succession of different contracts. For the reason that he gave, the argument that a succession of contracts could be treated as a single contract for the purposes of the time limit had to be rejected. Where there was a succession of contracts with the same employer, the contract in respect of which the claim was made in respect of the operation of the equality clause was the relevant contract of employment for the purposes of the time limit. But in my opinion his analysis does not provide the answer to the quite different question that has been raised in this case about the operation of the time limit where there has been a TUPE transfer.

23. The second point is that the word that the subsection uses to identify the moment which starts the running of the time limit is the word "employment". The question which it asks is whether the woman was employed "in the employment" within the six months preceding the reference of the claim to the tribunal. The claim to which the time limit is to be applied is, of course, the claim in respect of the operation of an equality clause relating to the woman's employment: see the opening words of the subsection. When the subsection is read as whole, its plain and natural meaning is that the claim must be brought within six months of the end of the employment to which the claim relates.

24. It comes as no surprise, then, to find that the first question that was referred by the House to the European Court of Justice at the conclusion of the first *Preston* case [1998] ICR 227 was, so far as relevant to this case, framed in these terms:

> "1. Is … a national procedural rule which requires that a claim for membership of an occupational pension scheme (from which the right to pension benefits flows) which is brought in the industrial tribunal be brought within six months of the end of *the employment to which the claim relates*…compatible with the principle of Community law that national procedural rules for breach of Community law must not make it excessively difficult or impossible in practice for the claimant to exercise her rights under article 119?" [emphasis added]

The European Court adopted the same wording when it answered this question in the negative: *Preston and others v Wolverhampton Healthcare N H S Trust and others* (Case C-78/98) [2000] ICR 961 (ECJ), para 35.

25. Why then should the subsection be given a different meaning when the time limit is invoked in the context of a claim relating to the operation of an equality clause which relates to a period of employment prior to the date of a TUPE transfer? It is true that section 2(4) of the 1970 Act was enacted before the coming into effect of the Acquired Rights Directive and, consequently, before the making of the TUPE regulations which transferred all the transferor's rights, powers, duties and liabilities under or in connection with the contract of employment to the transferee but left any rights, powers, duties and liabilities under or in connection with an occupational pension scheme with the transferor: see regulations 5(2)(a) and 7 (1)(b) of TUPE. But I do not think that the subsection can be taken to mean different things depending upon the part of the TUPE arrangements to which the claim relates.

26. It is often said that a statute is always speaking. This is so, and where the language permits there is this element of flexibility. It can be adapted to contexts that were not foreseen when it was enacted. But the metaphor must not be pressed too far. A statute cannot speak with two different voices at one and the same time. The rule that section 2(4) originally laid down was that a claim in respect of the operation of an equality clause must be brought within six months of the end of the

employment to which the claim related. It applied to each and every claim that might be made in respect of the contravention of a term modified or included by virtue of an equality clause: see regulation 2(1). The same rule must be applied where there has been a TUPE transfer. The only question is: to which employment does the claim relate? The answer, where the claim is in relation to the operation of an equality clause relating to an occupational pension scheme before the date of the transfer, is that it relates to the woman's employment with the transferor.

27. Mr Jeans QC for the respondents submitted that this interpretation of section 2(4) had the advantage of certainty. Why, he said, should time begin to run from a date that had nothing to do with the claim in question? It was to be assumed that the rule was intended to enable potential defendants to know exactly when it was that time had run out for the making of claims against them. The effect of the appellants' argument was that a transferor would be exposed to claims relating to its occupational pension scheme indefinitely. The problems that it would face in maintaining the necessary records long after the business had been transferred should not be underestimated. One of aims of TUPE was to achieve a smooth and orderly transfer. This would be inhibited if the transferor's liability in respect of occupational pension schemes was subject to a time limit which had nothing to do with the transferor, but was linked instead to the woman's employment with a transferee who was excluded by regulation 7 from any share in the liability.

28. Mr Cavanagh said that some lack of legal certainty was inevitable, given that the time limit ran not from the date of the breach or from loss sustained as a result of it but from the end of the employment. He gave various examples of how uncertainty could arise even on the respondents' interpretation of section 2(4). I think that on balance greater uncertainty is likely to be produced by the appellants' interpretation of it. But there is much more force in Mr Jeans' point that the best way of achieving the purpose of the time limit is to link it as closely as possible to the liability which is the subject of the claim. This is achieved if the period of six months within which the claim relating to the operation of an equality clause with regard to an occupational pension scheme provided by the transferor must be brought runs from the end of the claimant's employment with the transferor, to whom the liability belongs, rather than the end of her employment with the transferee. The fact that, where disputes arise, it is the link between the employee and the employer whose rights and obligations are in issue that matters is demonstrated by section 2(1A) of the 1970 Act, which

enables an employer to apply to an employment tribunal for an order declaring the rights of the employer and the employee where a dispute arises in relation to the effect of the operation of an equality clause. There is an element of symmetry here which supports the meaning that is conveyed by the words of the subsection. It is reassuring too that it was this interpretation of the subsection that the European Court of Justice had in mind when it ruled that the limitation period was compatible with the fundamental principle of legal certainty and did not make the exercise of rights conferred by Community law virtually impossible or excessively difficult.

Conclusion

29. For these reasons I would dismiss the appeal. The appellants must pay the respondents' costs before this House. Mr Paines QC for the First Minister accepted that no order for costs should be made in his case.

LORD SCOTT OF FOSCOTE

My Lords,

30. I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Hope of Craighead and for the reasons he gives, with which I agree and to which I cannot usefully add, I too would dismiss this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

31. I have had the advantage of considering the speech of my noble and learned friend, Lord Hope of Craighead, in draft. I agree with it and, for the reasons which he gives, I too would dismiss the appeal.

LORD CARSWELL

My Lords,

32. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Hope of Craighead. I agree with his reasons and conclusions, and for those reasons I too would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

33. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I agree with it and for the reasons he gives I too would dismiss this appeal.