Case Nos: 507497/95 and others

THE EMPLOYMENT TRIBUNALS

BETWEEN

Applicants	Respondents
Mrs S Preston & others	Wolverhampton Healthcare NHS Trust & others (No. 3)

DECISION OF THE EMPLOYMENT TRIBUNAL

AT: Nottingham (sitting at London Central)

ON: 24, 25, 26, 27 June 2002 8, 9, 15 16 and 24 July 2002

CHAIRMAN: Mr J K Macmillan (sitting alone)

REPRESENTATION

For the Applicants: See Schedule 3

For the Respondents: See Schedule 3

DECISION

The decisions in respect of the individual test cases are set out in the First Schedule to this Decision. An executive summary of test issues and answers is set out in the Second Schedule.

EXTENDED REASONS

Introduction

1. I have before me (sitting alone at the request of the parties) a further range of test cases in the part-time worker pension litigation, which are claims (perhaps some 60,000 in number) brought by part-time employees, mostly women, under sections 1 and 2 of the Equal Pay Act 1970 as modified by the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 [SI 1976/142] and Article 141 (formerly 119) of the Treaty of Rome alleging discrimination in a matter relating to pay, namely denial of access to membership of their employer's occupational pension schemes, the scheme rules laying down minimum qualifying hours thresholds with which, as part time workers, they could not comply. That qualifying threshold, it is claimed, was indirectly discriminatory against women,

(hence the need to invoke Art 141, which disapplies the domestic provisions to the extent that they did not encompass claims based on indirect discrimination, in respect of periods of claim prior to 31st May 1995 when the domestic legislation was amended) as the great majority of the part time workforce in the United Kingdom is female. A more detailed exposition of the background to theses cases and the case management techniques adopted to deal with them can be found in the opening paragraphs of my Decision on certain preliminary issues of December 1995 and it would be idle to repeat them here. Suffice it to say that the first decision dealt with a range of preliminary issues of universal application, such as time limits and the backdating of periods of claim. The appeal process culminated in two decisions of the House of Lords on 5th February 1998 and 8th February 2001, the latter after a reference of certain questions to the European Court of Justice.

2. The parties have always understood that a second round of test cases would be necessary. The second round has generally been referred to as the common points, as it was anticipated that it would deal with issues which, whilst not of universal application, affected either all, or the majority of, cases within a sector or arose in similar form across a number of sectors. Inevitably perhaps, further universal points have been identified (whether an applicant must be able to identify a comparator; does an applicant lose her right to bring a complaint if she failed to opt into the scheme when the qualifying threshold was removed) or have arisen as a result of the judgments of the House of Lords (whether a stable employment relationship exists) and these have been included in the second round. But it is necessary to sound a cautionary note about what some of these test cases can achieve. A test case properly so called will resolve all other cases raising identical questions of fact and law. However, the nature of this litigation is such that in some issues (principally whether a stable employment relationship exists and the various points which arise in respect of those applicants who failed to opt in after becoming eligible to do so) the factual experiences of individual applicants has been so varied that true test cases are impossible to find. The parties have therefore agreed that in those areas, whilst findings on the law will of course be binding, the cases can only be illustrative of some of the enormously wide range of factual possibilities. However, by careful selection of cases, the dividing line between success and failure should become apparent and thus, with good will and good sense on the part of parties and their advisors, facilitate settlement or withdrawal of a large number of cases without the need for a multiplicity of individual hearings. I should add for the avoidance of doubt that I have heard no evidence and the test cases are to be determined on agreed facts, or facts agreed only for the purposes of the test issues.

3. The translation of case management theory into practice has not been without its complications and I must pay tribute to those respondents who have either volunteered to allow their cases to go forward as test cases or have permitted me to twist their arms into agreeing. I have to say that the experience of this litigation is that the English legal system is ill-equipped to handle its, hopefully unique, complexities. In particular, the requirement for representatives, who by and large were not instrumental in completing the forms of Originating Application, to

identify specific cases which raise the legal issues which are to be tested in this round, was the proverbial search for the needle in the haystack. Had I been permitted to give answers to questions which were theoretical only in the sense that no specific cases could be found which raised them, but which were accepted by all parties as requiring judicial determination before they could know their obligations as employers and rights as employees, it would have simplified matters enormously. Grateful as I am to those union and legal representatives who have expended much energy in identifying appropriate cases, it is apparent that their labours have not been entirely successful and some issues remain either un-addressed or inadequately addressed.

4. The test issues were agreed at a Directions hearing on the 21st November 2001 and I propose to deal with them in this decision, for ease of reference, in the order in which they were publicised thereafter, rather than the order in which they have been argued before me. Two additional issues emerged during the hearing in connection with opting in and they are dealt with in this decision as issues 5.1(b) and 5.4. I have also slightly amended issue 3(a) by subdividing it into two parts.

The law

5. As this decision is to be published on the internet and is therefore likely to be read by many unrepresented applicants and representatives who may not be immediately familiar with the legal complexities, I shall briefly summarise (in language as non-technical as this very technical subject allows) what I believe to be the established legal principles and explain the unresolved questions which form the test issues. I trust I may be forgiven by not citing the legislative provisions and judgments of appellate courts from which this summary is drawn.

6. Where a woman is employed on essentially the same work as a man or on work which is of equal value to a man's, she is entitled to equal pay with that man, unless the difference in pay can be objectively justified by factors which have nothing to do with their respective sexes. To achieve this, the law implies into the contract of employment of every employee an equality clause. The equality clause is broken if the woman's pay is not equal to that of the man and the woman can bring a complaint to an employment tribunal. However, she must bring the complaint within 6 months of the ending of the employment in question or her right to complain is lost forever. The tribunal has no discretion to extend that time limit in any circumstances. If her complaint succeeds, the tribunal can order her employer to pay her the difference between her pay and the man's pay for, at most, the two years before she started proceedings.

7. Membership of a pension scheme is regarded as part of an employees pay, but because of the special nature of pensions, special rules apply. Part-time workers who were excluded from pension schemes because they worked fewer than the minimum qualifying hours can complain to an employment tribunal because their exclusion is indirectly related to their sex, the great majority of part-timers in this country being women. The question of whether in such a case an actual male comparator is required (which would present a problem in all female or largely female workforces) is currently being considered by the European Court of

Justice and any part-timer worker pension case in which that point is being taken is stayed until it is resolved.

8. A complaint that a woman has been excluded from her employers occupational pension scheme because she worked part-time must also be made to an employment tribunal within 6 months of the end of the employment in question or the right to claim will be lost. However, where an employee has worked for an employer periodically rather than continuously, but in a way which gives rise to a stable employment relationship, the 6 month period runs not from the end of each separate period of employment but from the end of the whole relationship. I have to decide [test issue 6] the circumstances which cause a stable employment relationship to arise. This question is of particular importance in the education sector for teachers who work on termly or academic year or sessional contracts, and home tutors and supply teachers who are paid by the hour. But I am also asked to consider whether such a relationship arises in other circumstances such as when an employee leaves her employment voluntarily but returns after a few months or a few years, or moves to another employer who is in the same pension scheme [test issue 4]. Does the 6 month limitation period run from the end of the first employment or can the gap between the periods of employment be bridged?

9. I am also asked to decide what happens when an employee changes employer in two circumstances where the law regards the employment as continuing. They are where there has been a transfer of a business under the Transfer of Undertakings Regulations and when the health service and further education were re-organised in the early 1990's [test issues 3 and 4].

10. If an applicant succeeds, I have no power to award damages. The only remedy I can give is a declaration requiring the employer to admit her to the pension scheme between certain dates. The declaration is not restricted to the two year period immediately before the date on which the applicant started her tribunal claim. It can cover any period during which her part-time hours excluded her from membership of the pension scheme right back to the start of her employment or, if later, the 8th April 1976. If I make such a declaration both the employer and the applicant are required to make contributions to the scheme sufficient to fund the applicant's pension. But is an applicant entitled to a declaration even if she did not join the scheme when the rules changed to allow her to do so? Perhaps she wouldn't have joined even if the rules hadn't excluded her? Perhaps she never joined at all. Perhaps she never knew the rules had changed, or perhaps she was told she still couldn't join or was given bad advice by her employer. Is she still entitled to the declaration and if so for what period of time? [issue 5]

The test issues

11. Before I deal with the issues which I have just outlined, I must briefly deal with two other, more technical, matters.

Issue 1.

Where a respondent does not admit that the qualifying hourly threshold for admission to the pension scheme has a disproportionate impact on women,

is the burden on the applicant to prove disproportionate impact or upon the respondent to disprove disproportionate impact?

12. In addition to the cases in the sectors involved in these test issues, (health, education, local government, banking and electricity supply) there are many cases against private sector employers in which this point is raised which have been stayed pending the outcome of this hearing. In perhaps the majority of those cases, this issue is the only one preventing the case from either settling or being listed for hearing for disposal. It is therefore of the first importance.

13. At the start of the hearing, all of the respondents in the test cases conceded that the imposition of a qualifying hours threshold does have a disproportionate impact on women. That concession, although not of course binding on any respondent not represented before me, necessarily robs me of the opportunity to give a formal decision on the issue, much needed though one appears to be. I have therefore caused to be sent to all respondents in the private sector who take the point, a letter giving 28 days in which to indicate whether they adopt the concession. Any respondent who does not adopt the concession will be invited to show cause why the relevant part of their Notice of Appearance should not be struck out. If necessary I will arrange a further test case hearing as a matter of urgency, with a view to linking the decision with this decision for the purposes of any appeal.

Issue 2.
Can a male applicant succeed in any event or only where a female applicant in the same employment has previously succeeded?

14. The only sector in the test cases which appears to have a male applicant is education. But the employing local authority, which is not represented before me, has indicated that it has no wish to take the point or to become involved in the test cases. There is therefore no test case which will allow me to hear argument and determine the point.

15. However, Mr Paines Q.C. for the Secretary of State is prepared to concede the point in terms which Mr Cavanagh Q.C. for the union represented applicants in the test case sectors, is prepared to accept, (subject to one reservation), as follows:

1. A male part-time worker can maintain a claim in respect of his exclusion from a pension scheme in the following circumstances:

(1) he can identify as a comparator a female part-time worker doing work equal to his: and

(2) he can demonstrate that his comparator herself had a right, under her equality clause, to be admitted to the scheme in respect of a period encompassing the period for which he claims:

2. That involves the man showing that the woman in turn had a male comparator doing work equal to hers who was entitled under the rules of the scheme to be admitted to it in respect of that period, and that the scheme rules governing access were either directly sex-discriminatory or had a disproportionate

impact upon women and were not objectively justified. [Mr Cavanagh does not accept the need for the woman to be able to identify a male comparator, a question which is the subject of a reference to the European Court of Justice in ***Allonby –v- Accrington and Rossendale College and others*** *[2001] IRLR 364 CA*]

3. If the male claimant can establish these matters, his claim can succeed without it being necessary that his female comparator brings any proceedings.

16. In view of the limited nature of the concession a final resolution of this issue must await the outcome of the appeal in ***Allonby***.

Issue 3 Transfers of undertakings.

Where there has been either a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) [hereinafter 'TUPE'] or a statutory novation under section 6 of the National Health Service and Community Care Act 1990 or under section 26 of the Further and Higher Education Act 1992 or under any other relevant statutory provision:

a) does the transferor's liability transfer to the transferee –
i. in the case of a transfer under TUPE;
ii. in the case of a statutory novation;

b) if not, does time run as against the transferor from the date of the transfer;

c) if neither the Regulations nor the statutory provisions stop time running as against the transferor, is time nonetheless prevented from running if the applicant had a stable employment relationship with the transferor which continued with the transferee;

d) what principles are to be applied when construing an Originating Application so as to ascertain whether or not a person or body has been named as a respondent;

e) on what principles may an applicant be granted permission to amend her Originating Application so as to name a different respondent?

Issue 4. Overarching pension scheme.

4.1 Where an applicant has voluntarily changed employer but both employers are covered by the same pension scheme, does time run as against the first employer (and any subsequent employers) from the date the applicant left their employment, or does time begin to run against all of the employers only from the date on which the applicant left the last in such a series of employments?

4.2 Having regard, inter alia, to Regulation L4 of the NHS Pension Scheme, do the rules with regard to stable employment relationships apply equally to changes of employment under an overarching pension scheme as they do to a series of contracts of employment with the same employer?

17. These issues were argued together and there is a measure of overlap between them. I will therefore deal with them together. There is also a reference to the stable employment relationship question which I will deal with in detail in issue 6. For the purposes of issues 4 and 5, I am asked to answer one narrow point of principle only, whether the rules with regard to stable employment relationships embrace periods of employment with more than one employer where both (or all) employers are participants in the same pension scheme.

18. Issue 3(a) is the subject of further concessions. For the applicants, Mr Cavanagh concedes that in the light of the authorities, the answer to question 3(a)i must be 'no' although he reserves the right to pursue the point further on appeal. The only test case in which this is the only issue raised against a respondent is ***Johnson*** where the third respondent, ***Guidance Enterprises Group Ltd*** acquired Mrs Johnson's services under a TUPE transfer from North Yorkshire County Council. Mr Cavanagh accepts that he cannot succeed as against Guidance Enterprises Group before me but invites me to stay, rather than dismiss, the proceedings against them to keep the point open. Whether that is an appropriate course of action must await the outcome of issue 6 as ***Johnson*** is also a stable employment relationship test case in respect of her service with the County Council. A list of the unions whose members Mr Cavanagh represents and who are therefore bound by this concession is in Schedule 3 to the Decision.

19. As to question 3(a)ii, all respondents to which this point applies, that is the Health Authorities and the NHS Trusts, the local authorities and the Further Education Colleges [FECs], all concede that liability for the exclusion of part time employees from the respective pension schemes passed to the transferees – the NHS Trusts on the one hand and the FECs on the other – but only in respect of contracts of employment which were actually subsisting on, or (to adopt the expression used by Mr Jeans QC for the FECs) which straddled, the transfer date specified in the relevant legislation.

20. They expressly do not admit that liability passed in respect of any earlier contract which had terminated prior to the transfer date, even if there had existed a stable employment relationship between the transferor (a Health Authority or local authority) and the employee. They rely on the express words of the relevant legislation, section 6 of the National Health Service and Community Care Act 1990 and section 26 of the Further and Higher Education Act 1992. I only propose to deal in this part of the decision with the correctness of that concession. What amounts to a stable employment relationship must await the outcome of issue 6, although in dealing with some of Mr Cavanagh's submission on issues 3 and 4 I must necessarily trespass prematurely into territory more properly associated with issue 6.

21. I must add one cautionary note. The test issue as formulated at the directions hearing referred not only to the 1990 and 1992 Acts but also to *"...any other relevant statutory provision."* No other provision has been drawn to my attention from which I conclude that none are relevant. However, in case I am

wrong it must be emphasised that the conclusions to which I have come on this issue will only apply to such a provision if its language is identical, or identical in its effect, with sections 6 and 26.

22. After he had completed his reply to the respondent's submissions, I suggested to Mr Cavanagh that underlying his submissions was the assumption that the jurisprudence of the European Court of Justice required pension claims to be elevated above the level of ordinary equal pay claims and be afforded special treatment. He readily agreed, and asserted that running through all of the European cases was the thread that pensions are deferred pay and that in order to give an effective remedy applicants must be credited with their full service. When I suggested to him that the concept of deferred pay had been of relevance only as part of the European Court's reasoning for disapplying section 2(5) of the Equal Pay Act and in identifying the need to create the stable employment relationship concept, he submitted that it would be wrong to put what the European Court had said about section 2(5) into a box marked procedure. It was, he submitted, of equal relevance to the substantive issues in equal pay pension claims.

23. In issues 3 and 4 the applicants are, in essence, submitting that, for a variety of reasons, certain time limit and other provisions of domestic law should not have the effect, which at first sight it must be said they appear to have, of depriving them of the whole or part of their claims. If Mr Cavanagh is right about the extent of the relevance of the concept of deferred pay, it must necessarily inform the approach I make to those submissions and to my interpretation of those provisions. In support of his underlying argument Mr Cavanagh relies principally on what was said by the European Court on the reference to it by the House of Lords of certain questions in these proceedings (***Preston and others –v- Wolverhampton Healthcare NHS Trust and others: Fletcher and others –v- Midland Bank Plc*** *[2000] ICR 961 ECJ)* and by the Industrial and Fair Employment Tribunals in Belfast in ***Magorrian and another –v- Eastern Health and Services Board and another*** *[1998] ICR 679 ECJ].*

24. The background to both references is that UK law provided as a remedy to equal pay complaints involving denials of access to occupational pension schemes, not an award of damages or compensation, as would be the case if the claim related to straightforward inequality of wages or salary, but a declaration of entitlement to membership of the pension scheme (Regs. 11 and 12 Occupational Pension Schemes (Equal Access to Membership) Regulations 1976). Such a declaration requires (I précis slightly inaccurately) both the employers [Regs 12(2) and (3)] and the successful applicant (***Fisscher-v- Voorhuis Hengelo BV*** *(Case C-128/93) [1994] IRLR 662* ECJ) to pay into the scheme the contributions they would have made had the applicant been admitted to the scheme throughout the period covered by the declaration. However, in respect both of claims relating to inequality of pay (section 2(5) of the 1970 Act), and claims relating to denial of access to a pension scheme (Reg.12(1)(b) of the 1976 Regulations) the maximum period of the award or declaration was limited to the two years preceding the commencement of proceedings. Because a pension is deferred pay, that is pay which only becomes payable after retirement, and is only earned in full if

contributions are paid for the whole of the period prescribed by the scheme rules, it is immediately apparent that such a limited declaration may provide a very inadequate remedy indeed, the extreme example being that of an applicant who does not bring her claim until the day she retires after 40 years of service. With no chance to earn further credits, the two years of contributions permitted to her under section 2(5) would secure her but a pittance of a pension.

25. Another extreme case was ***Magorrian*** itself. The applicants were employed as qualified mental health nurses and were currently working part time. Because of their part time hours they did not fulfil the definition of mental health officer in the applicable pension scheme. Mental health officers who had served for more than 20 years and continued to serve after the age of 50 had service after that age counted as double for pension purposes and the right to a pension at 55 rather than 60. Both applicants had in excess of 20 years service on retirement, including some as full time mental health officers. The tribunal's inability to backdate their claims for longer than two years meant that they were unable to achieve, even partially, the additional benefits which mental health officer status would have bestowed.

26. In ***Magorrian***, the question which the tribunal referred to the European Court was in these terms:

> *"Where the relevant national legislation restricts backdating entitlement in the event of a successful claim to a period of two years prior to the date on which the claim was made, does this amount to the denial of an effective remedy under Community law and is the industrial tribunal obliged to disregard such provisions in domestic law if it feels necessary to do so?"*

27. In response the European Court said this:

> *"37. The court has consistently held that, in the absence of relevant Community rules, it is for the national legal order of each member state to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law: see, to that effect [inter alia]* ***Rewe-Zentralfinanz e.G*** *(Case 33/76) [1976] E.C.R.@ p 1997-1998 paras. 5 and 6....*
>
> *41. As far as this issue is concerned, it must be stated that application of a procedural rule such as regulation 12 whereby, in proceedings concerning access to membership of occupational pension schemes, the right to be admitted to a scheme may have effect from a date no earlier than two years before the institution of proceedings, would deprive the applicants of the additional benefits under the scheme to which they are entitled to be affiliated, since those benefits could be calculated only by reference to*

periods of service completed.....two years prior to commencement of proceedings by them.

42. However, it should be noted that, in such a case, the claim is not for the retroactive award of certain additional benefits but for recognition of entitlement to full membership of an occupational scheme through acquisition of mental health officer status which confers entitlement to the additional benefits.

44 Consequently, unlike the rules at issue in the Judgments (in ***Steenhorst-Neerings*** *(Case C-338/91) [1993] ECR I-5475* and ***Johnson – v- Chief Adjudication Officer*** *(Case C-410/92 [1995] ICR 375*) *which in the interests of legal certainty merely limited the retroactive scope of a claim for certain benefits and did not strike at the very essence of the rights conferred by the Community legal order, a rule such as that before the national court in this case is such as to render any action by individuals relying on Community law impossible in practice.*

47. Accordingly, the reply to be given to the second question must be that Community law precludes the application, to a claim based on Article [141] of the E.C. Treaty for recognition of the claimant's entitlement to join an occupational pension scheme, of a national rule under which such entitlement, in the event of a successful claim, is limited to a period which starts to run from a point in time two years prior to commencement of proceedings in connection with the claim."

28. In my judgement, there is nothing in ***Magorrian*** which assists Mr Cavanagh. On the contrary. It seems clear that the sole issue before the court was the validity of a procedural rule, which had the effect of so artificially constraining the national court that it was incapable of affording an effective remedy *"....in the event of a successful claim..."* It tells us nothing about the matters in issue in these test cases which could well be categorised as obstacles in the way of making a successful claim. However, ***Preston*** undoubtedly does tell us something about them.

29. The questions referred to the European Court in ***Preston***, so far as material, were as follows:

"1(a) Is a national procedural rule which requires that a claim for membership of an occupational pension scheme ...which is brought in the [employment] tribunal, be brought within the six months of the end of the employment to which the claim relates: (b) a national procedural rule which provides that a claimant's 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;.....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 [141].

3. In circumstances where: (a) an employee has served under a number of separate contracts of employment for the same employer covering defined periods of time and with intervals between the periods covered by the contracts of employment; (b) after the completion of any contract, there is no obligation on either party to enter into further such contracts; and (c) she initiates a claim within six months of the completion of a later contract or contracts but fails to initiate a claim within six months of any earlier contract or contracts: is a national procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme from which the right to pension benefit flows to be brought within six months of the end of any contract or contracts of employment to which the claim relates and which, therefore, prevents service under any earlier contract or contracts from being treated as pensionable service, compatible with: (1) the right to equal pay for equal work in Article [141] of the E.C. Treaty; and (2) 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 [141]?"

30. Before going on to consider how those questions came to be formulated as they were, I pause only to note that, contrary to Mr Cavanagh's submission, it could scarcely be clearer that both ***Magorrian*** and ***Preston*** are indeed about procedural rules.

31. In order to fully explain the view to which I have come about all but two of Mr Cavanagh's submissions on test issues 3 and 4, it is necessary to examine in some detail the progress of the first round of test cases through the various stages of appeal. However, I propose to restrict this examination only to the time limit point (question 1(a)) and the so called stable employment relationship exception to it (question 3). The answer which the European Court gave to question 1(b) is identical in its effect to the answer which it gave to the similar question in ***Magorrian*** and nothing further needs to be said about it.

32. I will begin with the relevant provisions in the Equal Pay Act 1970, secs. 1(1), 2(4) and 1(6):

"1(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include ...an equality clause they shall be deemed to include one.

2(4) No claim in respect of the operation of an equality clause relating to a woman's employment shall be referred to an employment tribunal .....if she has not been employed in the employment within the six months preceding the date of the reference.

1(6) .....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."

33. In its conclusions to what became question 1(a) the Employment Appeal Tribunal [***Preston (No.1)** (1996) IRLR 484*] under the Chairmanship of Mr Justice Mummery (as he then was) said this (paras 120 – 127: all emphases in the original):

"In our judgement the legal position is as follows:

*(1) The scheme of the 1970 Act is that the principle of equal pay for equal work, without discrimination based on sex, takes effect through the mechanism of an equality clause introduced by statute into a **particular** contract of employment. The 1970 Act does not contain any provisions for employment under different contracts with the same employer to be treated as continuous employment cf. [Part XIV Chapter 1 Employment Rights Act 1996]*

(2) Section 2(4) bars a claimant if the claimant:
*'...has not been employed **in the employment** within six months preceding the date of the reference.'*

(3) The earlier reference in section 2(4) to 'employment' is in the context of the nature of the claim, i.e. a claim 'in respect of an equality clause relating to a woman's employment'. Such a claim is in respect of a particular contract of employment, because an equality clause is a clause in or introduced into a specific contract of employment, either as a mater of express agreement or incorporated into the specific contract by statute. Under section 1(6)(a) 'employee' is defined, only for the purposes of section1 as 'employed under a contract of service'.

(4) The second reference to 'employment' in section 2(4) is in the context of a limitation on the jurisdiction of the [employment] tribunal to entertain such a claim. An [employment] tribunal has no jurisdiction in respect of the claim if the applicant 'has not been employed in the employment' within the specified period of six months. The 'employment' referred to in the jurisdictional context must, on a natural, ordinary and consistent reading of the provision, refer to the same employment in respect of which the claim is made. As that claim must be in respect of an equality clause in a particular contract, so the limit on jurisdiction must also be a reference to employment under the contact of employment containing the equality clause....

(5) If the applicant is employed under a succession of separate contracts of employment, the prima facie position is that she is not entitled to bring a claim in respect of the equality clause in any contract of employment which has expired more than six months prior to the bringing of the claim to the tribunal.

(6) There are two possible modifications of the position...where there has been a succession of contracts-

(a) where there is no break in fact in the employment under a succession of immediately consecutive contracts.....

(7) This analysis of the position is consistent with the demands of legal certainty and fairness. The applicants accepted that, even on their contention, a part-time employee could not bring a claim within the time limits in section 2(4) in the case of irregular employment; if for example there was a five year gap between the two periods of working under different contracts with the same employer. The six month period would, in that case, start to run in respect of the first contract from the end of that contract, not from the end of the later contract under which he was re-employed.

It is not possible to divorce section 2(4), which places a time limit on the enforcement of the right, from section 1, which defines the nature of the right conferred. They are rights in a particular contract. When that contract expires, the employment will also expire, even if another contract follows after the break and even if the break itself is related to the periodical nature of the work and the employee in fact does the same work contract after contract, term after term, year after year, for the same employer and will enjoy continuity of service for the purpose of enjoying and exercising other employment rights such as the right not to be unfairly dismissed: see ***Ford – v- Warwickshire County Council*** *(1983)IRLR 126."*

34. ***Preston*** next came before the Court of Appeal [*(1997) ICR 899*]. Lord Justice Otton dealt principally with section 2(4) of the 1970 Act. After setting out the holding of both the employment tribunal and the Employment Appeal Tribunal to the effect that time ran under the section from the end of each contract under which an employee was employed, not from the end of a succession of separate contracts with the same employer, Otton L.J. said [at page 920F-922D] :

"The notice of appeal asserts that the appeal tribunal was wrong in law in adopting this construction and they ought to have held that:

'(a) The entirety of a claim is in time if the claim is made within six months of the end of the period of regular employment in which there are regular breaks in the contract of employment. (b) The entirety of the claim is in time if the claim is made within six months of the end of a period during which the applicant has been employed in irregular employment in the same capacity (for example supply teachers) whether or not there is an 'umbrella contract'.(c) There is no basis for placing a gloss on section 2(4) so as to require that the claim is made within six months of the ending of the same contract as that in respect of which the claim is made.'

Mr Cavanagh...identifies four types of contract where breaks of service occur: (1) regular employment with regular breaks in the contract of employment (teachers with termly or academic yearly contracts); (2) irregular employment in the same capacity where there is an 'umbrella contract'; (3) irregular employment in the same capacity where there is no umbrella contract (supply teachers or home tutors); and (4) a complete break in employment followed by re-employment some years later.

As regards category (2), the appeal tribunal acknowledged that where there is an umbrella contract there is a continuing contractual relationship. No point thus arises.
[Counsel for the banking employees] contends that section 2(4) of the Act of 1970 does not in terms refer to the ***same*** *contract of employment. It makes no sense for the time limit not to cover the whole period of a person's employment if the breaks in service flow from the nature of the work and are a direct consequence of it. A teacher may work year after year without a contract covering her for the school holidays, or, at least, the summer holidays. Nevertheless, she will be doing a full year's teaching work. The only difference between such a teacher and a full time teacher will be the way in which the employer decides to order its affairs....*[emphasis in the original]

....

I am unable to accept the argument advanced on behalf of the applicants. It is common ground that an umbrella contract constitutes a single contract of employment, so that time runs from the ending of it, not from the beginning of a break in service under it. Conversely the applicants accept that (as to [Mr Cavanagh's] category (4)) where there is a 'complete' break in employment, subsequent re-engagement by the same employer does not make time run afresh in relation to the earlier employment. The applicants contend, in reality, that the mere repetition of episodes of service, whether or not on a regular pattern, means that the employee is 'employed in' a single employment stretching over all the periods of employment.
When sec 2(4) of the Act of 1970 is construed in the light of sections 1 and 2(1) the time limit which it imposes runs from the end of the contract of employment alleged to contain the equality clause in respect of which the claim is made. This construction does not involve placing a gloss by way of the addition of the word 'same' on the section. I accept [the submission of Counsel for the further education employers and the banking employers] that 'rather it entails giving section 2(4) a meaning consonant with the statutory scheme of which it forms part'.

....

It follows that I am not persuaded that the legislature inadvertently overlooked the need to include provisions bridging breaks in service which relate to the nature of the work....Accordingly I cannot fault the approach of the Employment Appeal Tribunal on this issue."

35. The questions were referred to the European Court of Justice by the House of Lords *(1998) ICR 227).* In concluding that a judgment could not be given in the

absence of rulings from the European Court, Lord Slynn of Hadley said [at 233C-E]:

> *"On this appeal two groups of questions have arisen...as to the compatibility of provisions of the [Equal Pay Act 1970], as amended, with Article 119 of the Treaty and which clearly must be decided before judgment can be given.*
>
> *The applicants contend, first, that the effect of the provision of section2(4) of the Act of 1970, that a claim for membership of an occupational pension scheme...must be brought within six months of the end of the employment to which the claim relates, makes it impossible in practice or excessively difficult for claimants to exercise their rights under Article [141]...*
>
> *As to the requirement that a procedural rule must not be "impossible in practice" the applicants contend that the six-month limitation makes it impossible for them to claim the full amount of future benefits payable under the scheme since they cannot rely on years of past service in making the computation...."*

36. Later at p. 236 B – 238 B:

> *"There is one further issue...which involves in the first place a question of domestic law, namely the proper interpretation of section 2(4) of the Act of 1970. It concerns part-time teachers or lecturers who respectively belong to one of three groups: (a) those who were employed at the same school under a succession of contracts for the academic year, the only break being for the period of each long vacation; (b) those employed under a succession of fixed term contracts with breaks during vacations or courses; and (c) those who work intermittently...*
> *The question essentially is whether, if a woman claims in respect of the operation of an equality clause within six months of the end of her employment, the equality clause is to be read as applicable to the particular contract governing that employment or as applying to the employment relationship covering a number of different contracts with the same employer, whether as in (a) and (b) above (periodic but regular) or as in (c) above (intermittent)...*
> *...It is [the applicants' case] that in section 2(4) 'employed in the employment' refers to the whole employment relationship under a series of successive contracts, even where there are breaks, so long as a claim is made within six months of the end of the employment generally. If this were not so, workers in the public sector, particularly part-time teachers, would be at a serious disadvantage...*
> *Looked at as a whole, they say, the purpose of section 2(4) must be to allow a claim to be brought in respect of the full employment relationship and to exclude claims which are not brought within six months of the end of that relationship. It is unreal not to have regard to the continuity and artificial to say that the employment relationship ends at each day, each term or each year of the contract when really the teachers are employed under a series of*

contracts which contribute to the pension rights about the quantum of which they complain...Indeed to require a claimant to bring a separate claim in respect of each separate contract makes it 'impossible in practice' to enforce full pension rights. Moreover it does not make sense to do so when the claims all arise under the same pension scheme and the benefits are only paid when the 'employment' rather than 'a contract of employment' comes to an end.

....

I do not... consider that this interpretation of section 2(4) of the Act of 1970 can be accepted...

....

....section2(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 [employment] tribunal's jurisdiction must cover employment which has ended within six months of the claim before the [employment] tribunal...Where there are breaks between separate contracts, at any rate where there is no umbrella clause under which periodically and regularly work must be given and accepted, the time to bring a claim expires six months from the end of each contract.

That conclusion, contrary to the applicant's contention, does not involve putting a gloss on or reading words into sec 2(4). It is the natural meaning of the words in their context...."

37. [at p.239 B]

"On the domestic law question raised in this appeal I agree with the conclusions of Otton L.J. with which the other members of the Court of Appeal agreed and I would dismiss the appeal on that point."

38. The European Court of Justice gave its rulings on the 16th May 2000 [(Case C-78/98) (2000) ICR 961]. Nothing of significance emerges from either the Report for the Hearing (other than to note in passing that the Commission in its written submissions may have coined the phrase 'over-arching pension scheme' but in a context where it clearly means 'the same scheme') nor the Advocate-General's Opinion, and I will turn immediately to the judgment of the court. Question 1(a) (the basic time limits question) was dealt with in paragraphs 33 to 35:

33. As regards the compatibility of a time requirement, such as that contained in section 2(4) of the Equal Pay Act 1970, with the Community law principle of effectiveness, it is settled case law, and has been since ***Rewe-Zentralfinanz*** *(1976) ECR 1989, 1997-98, para. 5, that the setting of reasonable limitation periods for bringing proceedings satisfies that requirement in principle, inasmuch as it constitutes an application of the fundamental principle of legal certainty...*

34. Contrary to the contention of the applicants in the main proceedings, the imposition of a limitation period of six months, as laid down in section

2(4) of the Equal Pay Act 1970, even if, by definition, expiry of that period entails total or partial dismissal of their actions, cannot be regarded as constituting an obstacle to obtaining the payment of sums to which, albeit not yet payable, the applicants are entitled under Article [141] of the E.C. 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

35. The answer to the first part of the first question must therefore be that Community law does not preclude a national procedural rule which requires that a claim for membership of an occupational pension scheme...must, if it is not to be time-barred, be brought within six months of the end of the employment to which the claim relates, provided, however, that that limitation period is not less favourable for actions based on Community law than for those based on domestic law."

39. The question of whether that limitation period was or was not less favourable than limitation provisions for actions based on domestic law was referred back to the House of Lords with guidance on how to approach the task.

40. In response to the third question referred to it (the stable employment relationship question) the European Court said this:

"65. This question relates to a number of actions before the national court which are distinguished by the fact that the claimants work regularly, but periodically or intermittently for the same employer, under successive legally separate contracts. According to the order for reference, in the absence of an umbrella contract, the period prescribed in section 2(4) of the Equal Pay Act 1970 starts to run at the end of each contract of employment and not at the end of the employment relationship between the worker and the establishment concerned...

67. As pointed out in paragraph 33 of this judgment, the court has held that the setting of reasonable limitation periods is compatible with Community law inasmuch as the fundamental principle of legal certainty is thereby applied. Such limitation periods cannot therefore be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law.

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 E.C. 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 pension scheme applies....

72. The answer to the third question must therefore be that Community law precludes a procedural rule which has the effect of requiring a claim...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."

41. On the referral back (as ***Preston (No. 2)*** *[2001]UKHL/5*), the House of Lords ruled that the 6 months time limit for bringing a claim in section 2(4) was not less favourable than time limits applying to similar domestic proceedings and, other than in the case where a stable employment relationship existed, did not contravene Community law [per Lord Slynn of Hadley, at para. 31]. As regards stable employment relationship, Lord Slynn, with whose speech on this point the other Law Lords concurred, said:

"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 when 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.

37. I would accordingly allow the appeal to the extent:...(b) of declaring that the respondents cannot rely on the six months' limitation in sec 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 applicants can satisfy that condition back to the employment tribunal."

42. I trust I may be forgiven for quoting so extensively from the judgments of the appellate courts in connection with the first round of test cases. I have not done so from motives of mere pedantry but because, in my judgement, other than in respect of test issues 3(a)ii and the issues on interpreting Originating Applications

and adding respondents, the answers to Mr Cavanagh's submissions (not only on issues 3 and 4 but also on issue 6) are to be found therein, or, as Miss Booth QC for the local authorities submits, the judgements demonstrate that his submissions do not stand up to scrutiny. In particular, it seems to me to be clear beyond argument that no warrant whatever is to be found in those judgments for the proposition that pension cases fall to be dealt with more favourably than other equal pay claims, (other than as expressly ruled by the European Court and held by the House of Lords) whether because they are concerned with deferred pay or otherwise, irrespective of the violence that would have to be done to both statutory language and established legal concepts and principles, not the least being the fundamental principle of legal certainty, to achieve what Mr Cavanagh would no doubt categorise as the desired objective.

43. On the contrary. It could scarcely be clearer that the issue of deferred pay was advanced at various stages of the appeal process in support of the argument that section 2(4) should be disapplied in toto because it prevented full recovery in certain cases. That argument was rejected, other than where a stable employment relationship exists. In short, therefore, (Mr Cavanagh does not of course advance his argument in quite these terms), part-time pension claims are not (with apologies to Lewis Carol) the forensic equivalent of the caucus race in which everybody has won, and all must have prizes. Subject to the disapplication of section 2(5) and the very limited disapplication (if that is what in fact it is) of section 2(4) to accommodate the stable employment relationship, they are subject to the same procedural and other rules as other equal pay claims and, indeed, to the same vicissitudes that affect litigation in general.

44. Before setting out what I believe those rules to be, I must say something briefly about Mr Cavanagh's submissions (other than in respect of issue 3(a)ii and the interpretation and amendment issues). The response of Mr Jeans and Mr Coppel in their written skeleton to one of his points is to condemn it as 'mere sophistry.' Whilst I would certainly not accept that description in its most pejorative sense of being intentionally deceptive, I regret that I do regard at least some of the arguments advanced on behalf of the applicants as specious. Not only do many teeter on the brink of arguability, some clearly fall beyond it. Some appear to be an attempt to re-run arguments which, expressly or by necessary implication, were rejected in the first sequence of appeals. Some are clearly attempts to push concepts derived from those appeals into territory from which, in my respectful view, the judgments taken as a whole make abundantly clear they are excluded. And, it has to be said, to the extent that the arguments are extensions of those concepts, there seems to be no reason why they could not have been advanced on the first occasion, but every reason to suppose that if they had been, they would have been rejected. I am not invited to refer any of these new arguments to the European Court and would have unhesitatingly declined to do so had I been asked, as I believe the position in respect of each of them to be *acte claire.* I will return to this point at the end of this decision.

45. What then are the legal principles to be applied to these claims?

(a) a claim seeking a declaration of entitlement to membership of an occupational pension scheme must be referred or presented to the employment tribunal within six months of the ending of the contract of employment to which the claim relates: [section 2(4) Equal Pay Act 1970 approved by the European Court and the House of Lords in ***Preston***]

(b) the only exception to this principle arises is those cases where a stable employment relationship exists between the parties when time runs from the end of the relationship as a whole, not from the end of the individual contracts in the series which give rise to the relationship: [the European Court and the House of Lords in ***Preston***]

(c) The European Court and the House of Lords confirmed the general validity and therefore applicability of section 2(4) despite the arguments advanced on behalf of the applicants about the difficulties which the 6 months time limit placed in the path of some applicants in obtaining full recovery, given that pensions represent deferred pay. Those arguments (other than to the extent that they gave rise to the creation of the concept of the stable employment relationship) must therefore have been rejected.

46. So far as test issue 3 is concerned, three additional propositions can be asserted with confidence.

(a) Reg. 7 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 [SI 1981/1794] (as amended) (TUPE) faithfully transposes into UK law Article 3(3)A of the so called Acquired Rights Directive [77/187/EC] and in consequence UK domestic law, which prevents pensions schemes and rights and liabilities under or in connection with them, enjoyed by employees of the transferor from passing to the transferee, accords with both Community law and Community social policy

(b) both Reg. 7 and Article 3(3)A are unambiguous in their terms and clear as to their meaning

(c) Reg. 5 of TUPE, although not worded identically with Article 3(1) of the Directive, nonetheless fully implements it and therefore is at one with both Community law and Community social policy.

47. Regulations 5 and 7 of TUPE, so far as material provide:

5(1) ...a relevant transfer shall not operate to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) ... on the completion of the relevant transfer-

...

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

Exclusion of occupational pension schemes
7(1) Regulations 5 ... shall not apply-

(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme...

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

48. Although several of Mr Cavanagh's submissions are prayed in aid in respect of more than one of the test issues, I propose (as far as possible) to deal with the issues discreetly and in turn. Although I have already made it clear that I am wholly un-persuaded by the great majority of his arguments I will endeavour to deal briefly with each one in its most appropriate place. I trust that Counsel for the various respondents will forgive me if I make only such passing reference to their written and oral submissions as I find necessary to dispose of Mr Cavanagh's arguments.

Issue 3(a)ii: Does the transferor's liability pass to the transferee in the case of a statutory novation?

49. The respondents concede that the answer to this question is a limited 'yes', the limitation being that it is only contracts which exist on, or 'straddle', the transfer date together with their contingent liabilities, which pass. Mr Cavanagh does not accept this concession and submits that liability for earlier contracts transfers where a stable employment relationship existed between the transferor and the employee, or where an overarching pension scheme exists, or where a transferee admits a transferred employee into his scheme. I will deal with the latter two points elsewhere in the decision where they seem to arise more naturally.

50. The respondents rely on the language of the relevant statutory provisions and the judgment of the Court of Appeal in the unreported case of ***Cooke –v- Birmingham City Council and Birmingham College of Food Tourism and Creative Studies*** *(judgment 14th November 1996).* As it is common ground that the effect, if not the wording, of section 6 of the National Health Service and Community Care Act 1990 and section26 of the Further and Higher Education Act 1992 is identical, I will consider only the latter. The statutory novation of relevant contracts of employment is created by section 26(3) which I need not set out. Suffice it to say that it is to the same effect as Reg. 5 of TUPE. There is however, no equivalent to Reg. 7 of TUPE, no doubt because in all cases both the transferor local authority and the transferee Further Education College were subject to the

same statutory pension scheme provided by the Secretary of State. Hence the respondents' concession.

51. The limit imposed on that concession derives from section 26(1),(2) and (7) which provide (emphasis added):

> *"(1) This section applies to any person who **immediately before the operative date** in relation to a further education corporation established to conduct an institution, which, on the date the corporation was established, was maintained by a local education authority-*
>
> *(a) is employed by the transferor to work solely at the institution the corporation is established to conduct, or*
>
> *....*
>
> *(2) A contract of employment between a person to whom this section applies and the transferor shall have effect from the operative date as if originally made between that person and the corporation*
>
> *(7) For the purposes of this section –*
>
> *(a) a person employed by the transferor is to be regarded as employed to work at an institution if his employment with the transferor for the time being involves work at that institution, and*
>
> *(b) ...a person employed by the transferor is to be regarded as employed to work solely at an institution if his only employment with the transferor (disregarding any employment under a separate contract with the transferor) is for the time being at that institution.*

52. Pausing there, sub-section (7)(b) appears designed to exclude from the statutory novation a teacher employed by the local authority under a single contract to teach a subject at one or more institutions which became FEC's on the relevant date but not a teacher who taught at more than one such institution but who had a separate contract in respect of each. There are two examples of the latter in the test cases, but none of the former. As it must be presumed that a teacher in the former category would have continued in the employment of the local authority or been made redundant at the time of the transfer, nothing seems to turn on the distinction for the purposes of these cases.

53. In ***Cooke,*** the Court of Appeal held that section 26 applied only to contracts subsisting at the time of the transfer or which straddled it. They accordingly held that liability for the provision of a pension under the contract of a full-time member of staff which had ended on the day before the transfer date when she took voluntary early retirement, did not pass to the transferee College of Tourism but remained with the transferor local authority. Mr Jeans submits that I am bound by ***Cooke*** and must follow it.

54. In reply Mr Cavanagh submits that ***Cooke*** is not a 'Get out of jail free' card for the respondents as it is plainly right on its facts, was not concerned with a contract or employment relationship which did in fact straddle the transfer date,

and, most importantly, pre-dates ***Preston (No.1)*** and the concept of the stable employment relationship. I agree. ***Cooke*** does not assist me, still less bind me, for all of those reasons and I must address the question in the light of the principles established by ***Preston (No.1)*** and ***(No.2)***.

55. If teacher 'A' was employed by local authority 'B' to work at college 'C' on a part time, but continuous, contract without pension rights for 20 years, the liability for her pension claim would pass to college 'C' on the transfer date by virtue of section 26. Why, rhetorically, should the position be different if Mrs A had worked at college 'C' for 20 years but under a succession of termly or academic yearly contracts? This is precisely the argument advanced on behalf of the applicants in ***Preston (No.1)*** on the general applicability of section 2(4) of the 1970 Act, which succeeded to the extent that section 2(4) is to be interpreted so as to accommodate the concept of the stable employment relationship. Although section 26 is not concerned with time limits as such, the restrictive interpretation for which the respondents contend would have precisely the same effect on an applicant's ability to make recovery in full for past service, and would therefore make section 26 incompatible with Community law to the same extent, and for the same reasons, as section 2(4). Section 26, to the extent that it cannot be interpreted so as to give applicants their full rights under Article 141, must therefore also be interpreted, or if necessary disapplied, so as to admit the principle of the stable employment relationship.

56. It is clearly no answer, in my judgment that section 26 involves two employers and the European Court and the House of Lords appear to have been contemplating the possibility of a stable employment relationship arising between an employee and a single employer. That argument may be compelling where reliance is placed on the existence of a stable employment relationship to bridge the gap between two employers who are distinct legal entities. But here, section 26 itself is the bridge and the concept of the stable employment relationship is invoked only to determine what passes across it and to ensure that staff on regular but broken contracts, are not disadvantaged by their status, vis-à-vis their continuously employed colleagues, in the enforcement of their Article 141 rights. Moreover, subsection (2) creates, by novation, the legal fiction which presumes the contract to have always been with the one employer, the transferee. I shall develop this point in connection with issue 3(b)

57. That argument appears, at least at first sight, not to apply to those employees who had a stable employment relationship with the transferor but who happened to be between contracts on the transfer date. It is unclear whether this arises in the test cases but may do so in the case of Mrs Fox in respect of her service with Hull College (see below). Where such an employee is taken into the service of the transferee and the stable employment relationship continues but with the transferee substituted for the transferor, can liability for the whole of the period of that relationship pass to the transferee? To hold otherwise would be obviously unjust as it might have the effect of causing an employee to lose (post ***Preston (No.1)***) valuable established rights by sheer bad luck, even clerical error in the insertion of a date in a contract, or contrivance by the transferor and transferee.

Yet the plain words of section 26 seem to produce this outcome. But to so hold would be to deprive the employee of her Article 141 rights and allow her to become the victim of her part time status by failing to rectify the exact mischief which the European Court held (inferentially) to be necessary to rectify and which the stable employment relationship exception to section 2(4) was designed, (compatible both with the fundamental principle of legal certainty and the applicability of time limits which did not infringe Community law) to so rectify.

58. In my judgement, section 26 can, without undue difficulty, be rendered compliant with Community law. The word *"employed"* wherever it occurs in subsections (1) and (7) is as apt to cover employment in a stable employment relationship as it is employment under a contract of employment, and the words *"contract of employment"* in subsections (2) and (3) (which I have not quoted), must be disapplied to the extent that on their natural meaning they exclude employment under a stable employment relationship. A stable employment relationship must continue in existence during periods between contracts. Indeed that is the fundamental concept which distinguishes it from employment under a continuous contract. It must therefore follow, the phenomenon of being out of contract being as much a part of the relationship as the phenomenon of being in contract, that section 26 operates to transfer a stable employment relationship which subsists immediately before the transfer date in precisely the same way as it operates to transfer a contract of employment, whether or not the employee is in contract or out of contract on that date, provided the elements which comprised the relationship continue after the transfer but with the transferee substituted for the transferor.

59. Although, for the reasons I have attempted to explain, I am satisfied that the existence of two legally distinct employers on either side of the transfer is not inimical to the existence of a stable employment relationship because of the novation effected by section 26(2), if further support for the proposition is required, I would, for this limited purpose only, accede in part to (or perhaps more accurately, develop) Mr Cavanagh's submissions based on ***South Ayrshire Council –v- Morton*** *([2002] IRLR 256 CS).* In that case, Mrs Morton, a primary school head teacher employed by South Ayrshire Council, claimed equal pay with a secondary school head teacher. She named as her comparator a male head teacher employed by Highland Council. The Equal Pay Act limits comparators to those employed in the same establishment as the complainant or at an establishment of an associated employer provided common terms and conditions were observed. The applicant conceded that the two education authorities were not associated employers for this purpose. The employment tribunal decided that the authorities did have a sufficient community of interest for the whole structure of education to be regarded as a service, a reference to paragraph 22 of the judgment of the European Court in ***Defrenne –v- Sabena (No.2)*** *(Case 43/75) [1976]ECR 455* which held for the first time that the equal pay provisions of what was then Article 119 of the E.C. Treaty were directly enforceable.

60. On appeal, the Court of Session held that both paragraph 21 of ***Defrenne*** and paragraph 22, were in point. They read, so far as is material:

"21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119 must be included in particular those which have their origin in legislative provisions...and may be detected on the basis of a purely legal analysis of the situation.
22. This applies even more in cases where men and women receive unequal pay for work carried out in the same establishment or service, whether public or private."

The Court of Session held that where, as in the case of teachers, a complainant's employer and the employer of a proposed comparator were in the same branch of public service and subject to a uniform national system of pay and conditions set by a statutory body, it was permissible to name that person as the comparator.

61. It will be seen that ***Morton*** has no direct relevance to the point immediately in issue here. There are of course some parallels, in particular the existence of a pension scheme of statutory origin and two employers delivering the same public service. However, it seems to me that it is possible to develop, albeit tangentially, what appears to lie at the heart of ***Morton*** and apply it to this issue. ***Morton*** suggests that where in the delivery of a public service to which uniform terms and conditions of employment apply, the state chooses to establish as a mechanism for that delivery separate and distinct legal entities, each with their own employees, that is not to be allowed to create an artificial barrier to prevent women employees of one of those distinct entities from comparing themselves with employees of another such entity for the purposes of an equal pay claim.

62. But for the decision of the state to create fresh legal entities (the Further Education Colleges) for the delivery of one part of the public service of education, which entities would assume responsibility for the delivery of that service from the entities currently charged by the state with its delivery, (the local authorities) the applicants would have maintained a stable employment relationship with the local authorities. Is the change of policy with regard to the delivery of that public service which unilaterally interposes into the stable employment relationship a change of employer, to deprive employees of that relationship by erecting the artificial barrier that a stable employment relationship cannot exist unless the identity of the employer is constant throughout? In my view, the answer must be no. However, I rely on this reasoning not as justification for the conclusion to which I have come on this issue, but as merely bolstering that conclusion.

63. But it is essential that section 26 be interpreted or disapplied only so far as necessary to make it compliant with Community law. Mr Cavanagh quite rightly concedes that employment with a transferor local authority unconnected with the education establishment which became an FEC on the transfer date, cannot pass to that FEC even if the employee in question transfers to it under section 26(3). Thus, in the case of ***Fox –v- Secretary of State for Education (1); East Riding County Council (as successor to Humberside County Council) (2) Grimsby College (3) and Hull College (4)*** liability for Mrs Fox's employment by the County

Council at the Grimsby Adult and Basic Education Centre between 1987 and 1989 cannot pass to either college as the work was connected with neither.

64. I would therefore answer **test issue 3(a)ii** as follows:
In the case of a statutory novation, liability passes to the transferee in respect of employment which subsisted on or straddled the transfer date in respect of all of the past service of the employee in question, where either the employee was employed under a continuous contract or under a broken series of contracts which gave rise to a stable employment relationship with the transferor. Employment straddles the transfer date for this purpose whether, on the transfer date, an employee who had a stable employment relationship with the transferor was in contract or out of contract, provided that after the transfer the employee entered the employment of, and the factors giving rise to the stable employment relationship continued with, the transferee.

Issue 3(b)
If the transferor's liability does not transfer to the transferee, does time run as against the transferor from the date of the transfer.

65. Given that liability does not transfer to the transferee, Mr Cavanagh's principal submission is that time does not start to run from the date of the transfer in respect of the applicant's residual claim against the transferor, because the applicant remains in the same *"employment"* for the purposes of section 2(4) of the 1970 Act after the TUPE transfer. He further submits that applicants who have transferred under TUPE also have a claim against the transferee in two circumstances. Firstly, where both employments are covered by the same pension scheme, (the overarching pension scheme argument); secondly, where the transferee has agreed to the transfer of the employee's accrued pension benefits from the old employer's pension scheme to the new employer's scheme. In these cases, the right to claim against the transferee is coexistent with the right to claim against the transferor.

66. There are four test cases on this and issue 3(c). In the Local Government sector is the case of ***Johnson -v- North Yorkshire County Council (1) Secretary of State for Transport, Local Government and the Regions (2) and Guidance Enterprises Group Ltd (3),*** which is also a test case under issue 4.1. In the electricity sector are ***Burroughs -v- Powerhouse Retail Ltd (1) and Southern Electric Ltd (2); Bartlett -v- Midlands Electricity plc*** and ***Sheen -v- Powerhouse Retail*** which are also test cases on issues 3(d) and (e). In his original skeleton argument, Mr Cavanagh submitted that the overarching pension scheme issue arose in the electricity supply cases as all the organisations for which the applicants worked were members of the Electricity Supply Pension Scheme. However, at the conclusion of Mr Jeans' submissions on behalf of the electricity employers, Mr Cavanagh conceded that there was no overarching pension scheme and the point therefore falls by the wayside in those cases. The electricity supply sector TUPE cases are therefore much more representative of

the generality of cases involving TUPE transfers than they would have been had there been an overarching pension scheme.

67. Mr Cavanagh's submission that time does not run against the transferor from the date of a transfer under TUPE is founded on the language of section 2(4) of the 1970 Act. He points to the words "*in the employment*" which, by virtue of section 1(1) and (6)(a), mean employment under a contract of service. Regulation 5(1) expressly provides that the transfer of an undertaking does not terminate the contract of employment. Accordingly his submission is not inconsistent with Regulation 7 which merely excludes potential liability from transferring to the transferee but does not affect any existing liability of the transferor. Because Regulation 5 expressly provides that the contract is not terminated by the transfer, it must follow that the employment to which section 2(4) refers is also not terminated by the transfer until the employee's service with the transferee comes to an end. It is only from that moment that the six month limitation in section 2(4) begins to bite in respect of the transferor. In other words, the claim against the transferor is preserved during the currency of the applicants' employment with the transferee.

68. He cites in support of this argument ***National Power -v- Young*** *[2001] IRLR 33 CA*. In that case, Mrs Young presented an Originating Application to an employment tribunal claiming equality of pay with male comparators on the 24th April 1997. Her employment had come to an end on the 31st October 1996. Between 1991 and 1994 when she went on extended sick leave, she had been employed as a value for money analyst in the respondent's value for money group. When she returned in May 1995 she worked in different departments until her employment terminated some 18 months later. Her male comparators were employed in the value for money group. The employment tribunal held that the relevant employment for the purposes of section 2(4) was her job as a value for money analyst which had come to an end more than six months prior to the presentation of the complaint, which meant that they had no jurisdiction to entertain it. The applicant's appeal to the Employment Appeal Tribunal was allowed. The employer appealed to the Court of Appeal, which held that the word "*employment*" in section 2(4) referred to contract of employment, which meant that the employment tribunal did have jurisdiction to entertain a complaint provided that it was brought within six months of the ending of the applicant's contract of employment, even if the work in respect of which the claim was brought had come to an end long before.

69. I have to say with respect to Mr Cavanagh that, in common with many other authorities which he relies upon, I see nothing in ***National Power -v- Young*** which is directly in point, nor can I derive any assistance from it. I derive even less assistance from the other case which he cites on this point ***HQ Service Children's Education (MOD) -v- Davitt*** *[1999] ICR 913 EAT* which held simply that time runs under section 2(4) not from the applicant's last day of work but from the ending of the contract.

70. The respondents submit that Mr Cavanagh's contention is wholly inimical to the fundamental principle of legal certainty which underpins both the domestic and community legal order. An applicant's employment with a transferee may last for many years after the transfer and it would be impossible for the transferor to know whether time had started to run against it. In response, Mr Cavanagh draws an analogy with the asbestosis litigation where the first symptoms of the disease, and therefore the first knowledge that the disease has been contracted, may not appear for many years after the employee has left the employment which caused it. He further submits that the principle of legal certainty is satisfied if the employee alone knows the date from which time runs, provided he gives sufficient information to the employer to enable him to determine whether he has a limitation defence. Although I accept Mr Paines' submission that the limitation period for industrial disease claims arises from a specific statutory exception and is therefore not a true analogue, I am not persuaded that the respondents' submission is a complete answer to the point.

71. However, the submission of Miss Booth on the effect of Regulation 5 of TUPE, which Mr Paines and Mr Jeans adopted, is, in my judgement unanswerable. Regulation 5 does not in fact transfer a contract from the transferee to the transferor. It operates a species of statutory novation in which the transferee is substituted into the original contract in the stead of the transferor. From the moment of the transfer, for the purposes of the contract of employment, it is as if the transferor had never existed. In my judgement, that submission must be right from the plain words of paragraphs (1) [emphasis added]:

> *"...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 ...*

and (2)(b):

> *"...anything done before the transfer by or in relation to the transferor ... shall be deemed to have been done by or in relation to the transferee."*

72. In response, Mr Cavanagh argues that if the respondents are right and immediately upon the transfer it is as though the respondent had never existed for the purposes of the contract, the applicants could never bring a claim against the transferor. However, it seems to me that Mr Jeans' footnote to Miss Booth's submission is the complete answer to that argument. He relies on the opening words of Regulation 7(1); "*Regulation 5 ... shall not apply*" to occupational pension schemes. Given that Regulation 5 is the statutory novation which abrogates (in circumstances to which the Regulations apply) the common law rule that a change in the identity of the employer automatically terminates the contract (***Nokes-v-Doncaster Amalgamated Collieries Ltd*** *[1940]A.C. 1014 HL)* the effect of Regulation 7 is two-fold. First, the relevant transfer does not have the effect of substituting the transferee for the transferor in the original contract in so far as the contract relates to a pension scheme. Second, the transfer is not prevented by the statutory novation from bringing that part of the contract to an end. That being so,

section 2(4) requires proceedings to be brought against the transferor within six months of the transfer.

73. Mr Cavanagh further submits in his skeleton argument, that where an overarching pension scheme exists and an applicant moves from one employer to another, either by way of a TUPE transfer or voluntarily, the new employer will be liable in an equal pay claim in respect of the failure of the old employer to provide access to the occupational pension scheme where the same pension scheme applies or, pursuant to Part IV of the Pension Schemes Act 1993 or its predecessors, the new employer has arranged for the transfer of an employee's accrued pension rights to the new employer's scheme. At paragraph 80 of his skeleton he submitted that this argument was in the further alternative in respect of applicants covered by statutory novation, but as the respondents conceded his principal submission on that issue, a concession which I have extended, I assume that the submission is no longer made in respect of employees caught up in a statutory novation. If it is pursued, then I would reject it for the same reason that I reject it in connection with a TUPE transfer and a voluntary change of employer

74. The first part of the submission now disappears as far as the test cases are concerned because of Mr Cavanagh's concession that there was not an overarching pension scheme in the electricity supply cases. However, as I have heard argument on it I will briefly deal with it and with Mr Cavanagh's further alternative submission that where there is an overarching pension scheme across a TUPE transfer, time does not run as against the original employer until the applicant concerned has ceased to be employed by an employer which participates in the same pension scheme as the original employer. This further alternative plainly cannot be right. In my judgement, the co-incidence that a transferor and a transferee happen to be members of, for example, a group of companies which operates one group-wide pension scheme, cannot, in the absence of specific legislative provision, effect Regulation 5(1) and 5(2)(b) and the substitution by statutory novation of the transferee for the transferor in the contract of employment. For the reasons which I rejected Mr Cavanagh's principal submissions on this point, I reject it also in those rare subset of cases where an overarching pension scheme exists across either side of a relevant transfer.

75. Developing the first part of his principal submission on this point, Mr Cavanagh submits that where there is a TUPE transfer within the umbrella of an overarching pension scheme, the new employer assumes fresh obligations of its own vis-à-vis the pension rights of transferred employees, including an obligation to fully recognise the right to retroactive membership of the scheme. It follows from the existence of that obligation, Mr Cavanagh submits, that there is a new breach by the transferee, following the transfer, if the transferee, on admitting an applicant to the overarching scheme under its aegis, fails to recompense her for her exclusion from the scheme whilst under the transferor's aegis. In my respectful view, that is little more than a transparent attempt, for which no basis in law is advanced, to circumvent the clear provisions of Regulation 7 of TUPE and Article 3(3)A of the Acquired Rights Directive and the Community social policy which

underpins it. It is perhaps the most extreme example of the caucus race theory which I have already rejected.

76. The same can be said for Mr Cavanagh's alternative route to the same conclusion that as the applicant remains in the same employment throughout, the new employer becomes liable for the breaches of the equality clause committed by the old employer. Once one rejects, as I already have, the notion that because pensions are deferred pay, claims in respect of them must be given preferential treatment, there ceases to be any legal basis for this submission. In short, in the absence of any provision in either the Directive or the Regulations dealing with the special circumstances of inter-group transfers or other transfers where the transferor and transferee happen to be members of the same pension scheme, I am unable to see any basis on which the clear express intention of Regulation 7 and Article 3(3)A can be evaded, howsoever the attempt to do so may be made. I reject as intellectually unsustainable Mr Cavanagh's assertion that his submission is not inconsistent with Regulation 7 because the transfer of liability is not by operation of TUPE. The transfer of liability, were I to hold that it taken place, would have been by little more than a clumsy slight of hand whose sole intention was to disguise the fact that it was defeating the purpose of Regulation 7.

77. Mr Cavanagh further submits that in every case in which an overarching pension scheme applies to both the old employment and the new employment, a term is implied into the employee's contract with the new employer that the employee will be afforded her full entitlement and benefits under the pension scheme. Therefore, at the moment when the employee enters the employment of the new employer, if she is not credited for pension purposes with her full past service (including of course service for which, in breach of the equality clause the old employer has made no contributions to the scheme) there is a fresh breach of the equality clause by the new employer. Accordingly, the new employer does not inherit the liability of the old employer; rather a free-standing liability comes into existence.

78. This is one of a number of submissions by Mr Cavanagh which the respondents in their skeleton arguments and in oral submissions, characterise as bizarre. The implied term for which Mr Cavanagh contends would have the effect of obliging the transferee to assume, sometimes long after the event, legal responsibility for the failure of the transferor to admit the employee to the scheme, even though, at the time of the transfer the transferor's failure was not recognised as unlawful. That would indeed be bizarre. In his oral submission, Mr Cavanagh accepts that none of the conventional routes for implying terms, such as the officious bystander test and the unstated consensus of the parties, would permit the implication of this term. Instead, he relies on a short extract from Chitty on Contracts (paragraph 13 - 003 of the 1999 edition):-

> "*The Court is in fact laying down a general rule of law that in all contracts of a defined type - for example, sale of goods, landlord and tenant, employment, the carriage of goods by land or sea - certain terms will be implied unless the implication of such a term would be contrary to the*

express words of the agreement. Such implications do not depend on the intentions of the parties, actual or presumed, but on more general considerations."

79. In response, Mr Jeans draws my attention to paragraph 13 - 009 which deals with those circumstances in which terms should not be implied:-

> *"A term ought not to be implied unless it is in all the circumstances equitable and reasonable but this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out more convenient." "The touchstone is always* ***necessity*** *and not merely* ***reasonableness*** *(**Liverpool City Council -v- Irwin [1977] AEC 239 at 266**)."* [emphasis added]

80. He also draws my attention to the cases mentioned in the footnote to the passage from Chitty upon which Mr Cavanagh relies. Those cases, Mr Jeans submits, demonstrate that the nature of the terms which the court is prepared to imply on this basis are wholly different from the term Mr Cavanagh invites me to imply. To demonstrate that Mr Jeans point is well made, I need mention only one of the examples which he cites, the term of mutual trust and confidence which is implied into every contract of employment.

81. I reject Mr Cavanagh's submission that I can imply such a term into the contract as utterly misconceived. But even if I could imply such a term, it would not in my judgement remedy a breach of the equality clause as Mr Cavanagh submits. It would actually place women on a more favourable footing than men. The true comparison is between a female with a cause of action against her former employer in respect of past pension rights and a male colleague with a similar cause of action. I asked Mr Cavanagh whether he was submitting that a term could be implied into the contract that, for example, a male employee who, post the transfer, discovered that on admission to the transferee's pension scheme, the transferor had fraudulently or incompetently underfunded his pension, would have a right of action against the transferee in respect of that fraud or negligence. Mr Cavanagh answered that he would, but adduced neither authority nor argument in support of the proposition. Quite plainly, for the reasons which Mr Jeans submits, no such clause could conceivably be implied; it would be grossly unjust to the transferee and is plainly not necessary. If no such clause can be implied in respect of a male employee, it cannot in respect of a female employee with a different but closely related complaint.

82. I now turn to Mr Cavanagh's final submission on this issue which relates, in the test cases, only to the electricity supply sector. Mr Cavanagh submits that where a transferee agrees to take over the pension rights which the transferred employees enjoyed with the transferor, the equality clause implied into the contract of employment of the female transferred employees by section 1(1) of the 1970 Act, operates upon that agreement and so to the extent that the transferee fails to

credit a part-time worker or former part-time worker with the whole of her past service, the transferee is liable.

83. Mr Cavanagh submits in support of this proposition the same arguments which he advances in respect of overarching pension schemes (under which in his skeleton argument he includes employees who transfer under TUPE as well as those who move voluntarily) and that the proposition is consistent with Article 3(3)B of the Acquired Rights Directive. So far as the former point is concerned, under TUPE this submission seems to be nothing more than a scarcely disguised reiteration of the implied term argument which I have already rejected. I will deal with the overarching pension argument below under issue 4.

84. So far as the argument that the submission is consistent with Article 3(3)B of the Acquired Rights Directive I again have to say, with respect to Mr Cavanagh, that the point is misconceived. Article 3(3)B provides (after having provided in Article 3(3)A that pension rights and liabilities shall not transfer):-

> *"Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old age benefits including survivor's benefits under supplementary schemes referred to in the first subparagraph."*

85. In the United Kingdom this has been done by Part IV of the Pensions Schemes Act 1993 and the Protected Rights (Transfer Payment) Regulations 1996 [SI 1996/1462]. The fact that amongst the arrangements which have been devised for preserving pension benefits is the transfer (with the consent of both the new employer's scheme and the affected employees), of rights accrued in the old employer's scheme to the new employer's scheme, seems to me to be wholly beside the point. Regulation 3(3)B is directed to Member States, requiring them to adopt certain measures to protect the interests of employees. Those measures have been adopted and Mr Cavanagh does not submit that they do not fully implement Article 3(3)B, although even if they did not, it would not assist him. Mr Cavanagh's submission would transfer the State's obligations onto individual employers to provide at their own expense, not the preservation of existing pension rights but the funding of contingent pension liabilities. That is wholly unconnected with the mischief at which Article 3(3)B is directed and plainly cannot be right.

86. I would therefore answer **test issue 3(b)** as follows.
Time runs as against the transferor under a TUPE transfer (and in the case of a transfer under a statutory novation, in respect of any liabilities which do not pass to the transferee under test issue 3(a)ii) from the date of the transfer. Therefore, the tribunal has no jurisdiction to entertain a complaint of exclusion from an occupational pension scheme brought in respect of a period of employment prior to the transfer of an undertaking unless the proceedings were commenced within 6 months of the date of the transfer

Issue 3(c)
If neither TUPE nor the statutory novation provisions stop time running as against the transferor, is time nonetheless prevented from running if the applicant had a stable employment relationship with the transferor which continued with the transferee.

87. In his skeleton argument, Mr Cavanagh submits that time does not start to run where there is a stable employment relationship, even where two employers are involved. This argument appears to hold good for both transfers of undertakings and statutory novation cases on the one hand, and overarching pension scheme cases where there has been a voluntary change of employer on the other. To deal with his argument I must, inevitably, discuss at some length here, matters which more properly fall for consideration under issue 6. His argument begins with the quotation in his skeleton argument of paragraph 72 of the judgment of the European Court in ***Preston*** which I have set out in paragraph 40 above. He then submits that "*It will be seen that time starts to run according to the ECJ at the end of the employment to which the same pension scheme applies, not the end of employment with the one employer*".

88. I have to say that if sophistry in its most pejorative sense is a fair description of any of the applicant's submissions, it is to this sentence that it applies. Not only is the word "*same*" (which, critically, appears in the judgement) omitted before the word "*employment*" where it first appears, in my judgement the only reading of the passages which I have quoted at length from the judgments of the Employment Appeal Tribunal, Court of Appeal, European Court of Justice and House of Lords is that not only were the various judgments predicated on the basis that the employment in question was with the same employer, they were so predicated because that was the basis of the applicant's submissions on the point.

89. The stable employment relationship is the exception to the rule that time runs from the end of a contract of employment. At paragraph (1) of his summary of the legal position (quoted at paragraph 33 above), Mummery J. referred to: "*A particular contract of employment*" and "*different contracts for the same employer*". One cannot of course have a particular contract of employment with different employers. The rest of that part of the judgment makes it clear beyond argument that he is dealing with, on the one hand, the position where a contract of employment with an employer comes to an end, and, on the other hand, the position where that contract is the last in a series of broken contracts between the same employee and that employer. That it was not merely the learned judge but also counsel, who were talking about contracts with the same employer appears from paragraph (7) of the summary:-

> "*The applicants accepted that, even on their contention, a part-time employee could not bring a claim within the time limits in section 2(4) in the case of irregular employment; if for example there was a 5 year gap between the two periods of working under different contracts* ***with the same employer***".

90. That the subject under discussion was a succession of contracts with the same employer is put beyond doubt, in my judgement, by the last (unnumbered) paragraph which I quote from Mummery J's Judgment in paragraph 33 above:-

> *"When that contract expires, the employment will also expire, even if another contract follows after the break and even if the break itself is related to the periodical nature of the work and the employee in fact does the same work contract after contract, term after term, year after year,* ***for the same employer*** *and will enjoy continuity of service for the purposes of enjoying and exercising other employment rights ..."* [emphasis added]

91. The notice of appeal to the Court of Appeal (which I have quoted in paragraph 34 above) at (a) speaking as it does of "*regular employment in which there are regular breaks in the contract of employment*" is couched in language appropriate only for a relationship between the same employer and the same employee. The remainder of the notice of appeal and Mr Cavanagh's submissions as recorded by Otton LJ speak of an applicant being employed "*in the same capacity*". That seems inappropriate language for anything other than contracts with the same employer. Miss McNeill QC, who now appears with Mr Cavanagh, is attributed with[1] submissions to the Court of Appeal on behalf of the banking employees. The submission, which I have quoted at paragraph 34, is also clearly predicated on the basis that the employment, albeit broken, will be with the same employer. The last sentence of the submission could scarcely be clearer: "*The only difference between such a teacher and a full-time teacher will be the way in which* ***the employer*** *decides to order* ***its*** *affairs.*" [emphasis added]

92. If there is room for doubt (which I do not accept), it is laid to rest by the speeches in the House of Lords and the questions which their Lordships referred to Europe. At page 236 D of the report (quoted above at paragraph 36), Lord Slynn said:-

> *"The question essentially is whether, if a woman claims in respect of the operation of an equality clause within six months of the end of her employment, the equality clause is to be read as applicable to the particular contract governing that employment or as applying to the employment relationship covering a number of different contracts* ***with the same employer****."*

Moreover, and conclusively, question 3 which their Lordships referred to the European Court begins:-

> *"In circumstances where a) an employee has served under a number of separate contracts of employment* ***for the same employer*** *...."*

[1] I understand that the attribution may be erroneous and the submissions may have been made by Mr Cavanagh himself

93. Although in the ruling in answer to question 3, the European Court refers to the same employment and not the same employer, paragraph 65 of the judgment makes it clear that the two expressions are used interchangeably:-

> *"65. This question relates to a number of actions before the national court which are distinguished by the fact that the claimants work regularly, but periodically or intermittently,* ***for the same employer****, under successive legally separate contracts."*

94. Contrary to Mr Cavanagh's submission, the European Court unquestionably ruled, when the question and answer are read together, that a stable employment relationship arises out of a succession of short-term contracts concluded at regular intervals in respect of the same employment with the same employer to which the same pension scheme applies.

95. Mr Cavanagh goes on to submit that the fundamental principle in the European Court's eyes was that time should not run until the stable employment relationship under the auspices of the same pension scheme has come to an end. That is plainly right provided one interpolates after the words "*pension scheme*" the words "*with the same employer*". He goes on to submit that if that is the case for a succession of short-term contracts (the specific instance addressed to the European Court), it must be all the clearer in the case of an employment relationship which is even more stable involving the same job being carried out for two successive employers. Once again, I have to say with great respect that that is misconceived.

96. Mr Paines entertained us with an analogy relating to his private life in which transferor and transferee became wife and mistress (no doubt entirely hypothetical in the case of the latter) and asserted that it would be nonsense to suggest that following such a relevant transfer he enjoyed stable matrimonial relations. If I may put it more succinctly, but I think accurately, other than in the exceptional case of statutory novation, a proposition that a stable employment relationship can involve different employers is an oxymoron. It is also a proposition without relevance where the employment relationship consists of a single unbroken contract, the stable employment relationship having been devised expressly to cater for certain, limited, situations where a single unbroken contract does not exist.

97. Having held in the case of employees employed under a single unbroken contract, that time in respect of pension claims runs as against the transferor from the date of the transfer and cannot under any circumstances (other than, possibly, by express agreement) transfer to the transferee, I could not hold otherwise in respect of employees (full or part-time) employed not under a single unbroken contract but a succession of regular but broken contracts without (assuming those employed under the broken contracts are largely female) creating a breach of the equality clause in the contracts of their male comparators on unbroken contracts. However, the entire point is misconceived for another and more fundamental reason. By virtue of Regulation 5 the employment is deemed not to be

employment for two successive employers but one continuing employment with one employer, the transferee.

98. I would therefore answer **test issue 3(c)** as follows:
The question is misconceived. As a matter of law, where there is a transfer of an undertaking, the applicant's relationship with the transferor and the transferee is deemed always to have been a relationship with one employer, the transferee. The existence or otherwise of a stable employment relationship is irrelevant, and therefore the legal analysis which led to the conclusion on issue 3(b) applies equally to issue 3(c). Therefore time is not prevented from running *"if the applicant had a stable employment relationship with the transferor which continued with the transferee"* and complaints must be brought to the tribunal within six months of the date of the transfer.

99. Before going on to deal with issues 3d) and e), I shall consider briefly whether, in respect of any claim brought after the 1st January 1996 sections 62 and 63(4) of the Pensions Act 1995 would compel me to a different conclusion with regard to time limits. Section 62 introduces the concept of an equal treatment rule into pension schemes in respect of a breach of which a complaint will lie to an employment tribunal. Section 63(4) provides in substitution for section 2(4) of the Equal Pay Act, a limitation provision in respect of such complaints:-

> *"(4) No claim in respect of the operation of the equal treatment rule in respect of an occupational pension scheme shall be referred to an employment tribunal ... unless the woman concerned has been employed in a description or category of employment to which the scheme relates within the six months preceding the date of that reference."*

100. In the House of Lords, Lord Slynn of Hadley, dealing with the point hypothetically as it did not then appear to arise (it does now arise in the case of Mrs Richardson whose Originating Application was presented on the 30th May 2001),said this (page 238 H to 239 A):-

> *"... As Miss Booth showed, there is a clear independent reason for the difference in wording. The Act of 1970 is concerned with contracts, a contract between a specific employer and a specific employee. It was therefore appropriate to import a clause into that contract. The Act of 1995 is concerned with pension schemes applicable not just to one contract or form of contract, but to different employment contracts not all of which are identical. A broader group was needed, hence the words "description or category of employment" for the purposes of such schemes. It was also appropriate to refer to rules rather than clauses being inserted into the pension scheme."*

101. Miss Booth has repeated that submission before me and I accept it. Section 63(4) does not apply directly in the case of Mrs Richardson who has not made a complaint under section 62 of the 1995 Act nor, so far as I am aware, have any

other cases in the so called part-time worker pension cases been so formulated. I am very far from being persuaded that if they had been so formulated, section 63(4) could have been interpreted in a way materially differently from section 2(4) which would have been of assistance to the applicants, and I am wholly unpersuaded that it affects the interpretation of section 2(4) for the reasons given by Lord Slynn.

102. The effect of my answers to the preceding test issues is that all of the electricity test cases must fail and be dismissed. **Mrs Burroughs** presented her Originating Application on the 25th November 1994. The only period when she was denied access to the pension scheme and therefore to which the complaint relates, was prior to the transfer of her employment from Southern Electricity to Powerhouse Retail Ltd, both of which are named as respondents to her Originating Application. That transfer was a transaction to which the Transfer of Undertakings (Protection of Employment) Regulations applied and took place on the 27th and 28th April 1992, apparently in two stages. Liability for Southern Electricity's failure to admit Mrs Burroughs to the pension scheme did not pass to Powerhouse Retail because of Regulation 7 of TUPE and Mr Cavanagh's attempts to persuade me that it passed by other means have failed. The complaint against Powerhouse Retail must therefore be dismissed. The complaint against Southern Electric must also be dismissed because of section 2(4) of the 1970 Act, the proceedings having been commenced very substantially outside the six month limitation period which began to run, at the latest, on the 28th April 1992.

103. The same is true of **Mrs Bartlett** who names only Midlands Electricity as a respondent. Her claim was presented on the 16th December 1994 in respect of her exclusion from the Electricity Supply Pension Scheme because of her part-time hours between the 5th January 1981 and the 14th April 1986. The retail business of Midlands Electricity for which she worked was transferred to a subsidiary company by way of a TUPE transfer on the 30th October 1992 and by way of a further TUPE transfer on the following day to Powerhouse Retail Ltd. For precisely the same reasons that apply to Mrs Burroughs, had she commenced proceedings against Powerhouse Retail as well as Midlands Electricity I would have had to dismiss them as no liability passed to Powerhouse Retail. The complaint against Midlands Electricity must also be dismissed as the proceedings were started substantially later than six months after the transfer from Midlands Electricity, that being the moment at which Mrs Bartlett's claim against them crystallised and from which time began to run.

104. **Mrs Carey** presented her Originating Application on the 30th November 1994 and has named only Powerhouse Retail as a respondent, having previously been employed by Eastern Electricity as a sales assistant. The period of claim in her case is from October 1978 to the 23rd May 1988. That part of Eastern Electricity's business in which she worked reached Powerhouse Retail Ltd by the usual two-stage series of TUPE transfers on the 27th and 28th April 1992. The complaint against Powerhouse Retail must be dismissed for the same reasons that I have given in the case of Mrs Burroughs as no liability transferred to it. Had Mrs Carey commenced proceedings against Eastern Electricity, that claim would also

have had to be dismissed because the proceedings were commenced many months later than the six month time limit prescribed by section 2(4) which began to run at the latest on the28th April 1992.

105. **Mrs Sheen** has also named only Powerhouse Retail Ltd although she, like Mrs Carey, also previously worked for Eastern Electricity as a sales assistant. Although she started work for Eastern Electricity in October 1970, her period of claim can only begin on the 8th April 1976 (date of judgement in ***Defrenne –v-Sabena (No.2))*** and runs until the 1st April 1988 when she became eligible to join the electricity supply pension scheme although she did not actually join until the 24th June. The part of Eastern Electric in which she worked reached Powerhouse Retail by the TUPE transfers which took place on the 27th and 28th April 1992. No liability transferred to Powerhouse Retail and the claim against them must therefore be dismissed. She did not commence her proceedings until the 13th December 1994, many months outside the six month limitation period provided for by section 2(4) that applied to any possible claim against Eastern Electricity.

106. I have dealt in detail with the electricity supply sector cases at this point because of test issues 3d) and 3e). I will deal with Mrs Johnson's case under issue 4.1.

Issue 3d)
What principles are to be applied when construing an Originating Application so as to ascertain whether or not a person or body has been named as a respondent.

107. Because of the answers which I have given to test issues 3a) to 3c), this question no longer arises in connection with any of the electricity supply sector cases. It is possible that there may be a few private sector cases in which an applicant has commenced proceedings within six months of a TUPE transfer but named only the transferee. Because I have come to the conclusion that the question of whether or not such an applicant might be able to successfully apply to join the transferor to her claim involves the exercise of a judicial discretion, nothing that I say in respect of the electricity supply cases can have a direct bearing on any such case and I accordingly propose to say nothing.

Issue 3e)
On what principles may an applicant be granted permission to amend her Originating Application so as to name a different respondent.

108. Because the electricity supply cases have all been dismissed, this point no longer directly arises but I have been asked to deal with it in any event in case any relevant parts of my decision are overturned on appeal. I will do so but only briefly.

109. Mr Jeans submits that although the authorities on adding a fresh cause of action to existing tribunal proceedings may not all speak with one voice, it is nonetheless clear that it is impermissible to add a fresh cause of action against a respondent after the time limit applicable to the proposed additional cause of action

has expired. He further submits that the addition of a second respondent gives rise to a fresh cause of action and therefore, given that there is no provision in section 2(4) for extending the six month time limit, it is impermissible to join an additional respondent once that time limit has expired.

110. Whilst Mr Jeans may well be right about the effect of time limits when an application is made to add a cause of action against a respondent to proceedings, (a matter about which I need say nothing as it does not arise here) I reject his second submission. Whilst in a sense the addition of a second respondent creates a fresh cause of action, it only does so vis-à-vis that respondent and not per se. Very different considerations may well give rise to an application to add a second respondent which would be absent from applications to add a cause of action against an existing respondent. The most obvious is where, after the limitation period has expired, the first respondent enters or amends a Notice of Appearance alleging that liability falls on some other, presumably former, employer.

111. The leading authority on adding or substituting a respondent remains ***Cocking -v- Sandhurst Stationers Ltd*** *[1974] ICR 650 NIRC.* At the conclusion of the judgment, Sir John Donaldson P. set out the seven stages in the process which the tribunal should follow. Stages 3 and 4 make it clear that there is no power to amend where the unamended Originating Application was presented outside of the relevant statutory time limit. It is for that reason that this point is entirely academic in relation to the electricity supply cases in respect of any attempt to add the transferor. If the Originating Application was presented in time, then the tribunal has a discretion whether or not to allow the amendment. I will set out paragraphs 6 and 7 of Sir John Donaldson's list in full:-

> *"6. In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identify of the person intending to claim or, as the case may be, to be claimed against.*
>
> *7. In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular, they should consider any injustice or hardship which may be caused to any of the parties (including those proposed to be added) if the proposed amendments were allowed or, as the case may be, refused."*

Mention is then made of the possibility of awarding costs as a condition of allowing the amendment.

112. If this had remained a live issue in the electricity supply sector cases and if the unamended Originating Applications had been presented in time, I would have allowed the applications to add, as appropriate, the transferors in the case of Mrs Carey and Mrs Sheen and the transferee in the case of Mrs Bartlett. As Mr

Cavanagh points out, all of the electricity supply respondents are represented by the same legal team. The electricity supply pension scheme remains in existence but with sub-schemes within it, each growing in their independence and each unquestionably independent of the other and the main scheme. The applicants have demonstrated in their Originating Applications with sufficient particularity that their claim relates to, or potentially to, periods of time in which they were not employed by the party they have named but about which there can have been no real confusion because of the nature and structure of the industry at the time. The balance of prejudice lies in favour of the applicants.

113. I propose to say no more than that because the point is now academic in the test cases and because it would be wrong for this decision to be regarded as any kind of a precedent in respect of an application to amend in relation to any other claim. The authority must be ***Cocking -v- Sandhurst*** not this decision.

114. I would therefore answer **test issues 3d) and e)** as follows:
These issues no longer arise for decision in the test cases. To the extent that they may arise in other cases, the guidance given in Cocking -v- Sandhurst (Stationers) Ltd [1974] ICR 650 NIRC is to be followed.

Issue 4 - Overarching pension scheme

4.1 Where an applicant has voluntarily changed employer but both employers are covered by the same pension scheme, does time run as against the first employer (and any subsequent employer) from the date the applicant left their employment or does time begin to run against all of the employers only from the date on which the applicant left the last in such a series of employments?

4.2 Having regard, inter alia, to Regulation L4 of the NHS Pension Scheme, do the rules with regard to stable employment relationships apply equally to changes of employment under an overarching pension scheme as they do to a series of contracts of employment with the same employer?

115. For the reasons which I hope I have made clear when dealing with test issue 3c), the answer to test issue 4.2 must be 'no'. Regulation L4 of the NHS Pension Scheme is in fact a red herring. It is part of the scheme which deals with early leavers, that is those who leave employment without being entitled to an immediate pension. Regulation L4 applies to early leavers who return to pensionable employment in the NHS. If the interval between the two periods of pensionable employment is less than 12 months, that interval is ignored for the purposes of further pension entitlement. If it is more than 12 months, it is ignored if the effect of doing so is more favourable to the employee. Regulation L4 ameliorates Regulation L1 which would otherwise have the effect of preserving the pension earned in the first period of service, giving, on retirement at 60, two pensions rather than one.

116. As Mr Paines for the Secretary of State submits, for the purposes of calculating *benefits* to employees under the scheme, it is irrelevant whether the period of service was with one or more employers. However, for the purposes of

contributions, Regulation D2 requires each employing authority to contribute in respect of each scheme member in pensionable employment with it, the authorities being independent legal entities with their own budget and responsibilities as employers.

117. Three of the test cases on issue 4.1 graphically illustrate the magnitude of the applicant's task in the face of the European Court of Justice's finding that, subject to the stable employment relationship exception, section 2(4) of the 1970 Act was not incompatible with community law and the time for bringing a claim in respect of exclusion from an occupational pension scheme is six months from the end of the contract of employment in question. (There is a fourth, case, that of Mrs Bunyan, which I will consider in detail under issue 6.) The three cases are ***Richardson -v- Nottinghamshire County Council*** and ***Johnson***, (which have already been mentioned in connection with issue 3(b) and (c), and Mrs Johnson additionally with issue 3(a)i), and the most extreme example of all, ***Gardner-v-Hereford Hospitals NHS Trust (as successor to Coventry, Warwickshire, Herefordshire and Worcestershire Health Authority) (1) The Royal Bournemouth and Christchurch NHS Trust (2) The Royal West Sussex NHS Trust (3) Frimley Park Hospital (4) Secretary of State for Health (5)***.

118. **Mrs Richardson** was employed by Nottinghamshire County Council initially from January 1976 to January 1979 as a part-time tutor and was not eligible to join the pension scheme. There was then a gap of nearly 5 years while she brought up her children. She returned to work for Nottinghamshire on 15 March 1983 as a home tutor and supply teacher until December 1983. During this period she was eligible to join the pension scheme. She then worked spasmodically for them from the autumn of 1984 to the end of 1985. In January 1986, she moved, apparently entirely for her own reasons, to work for Derbyshire County Council where she stayed for the whole year in a pensionable post. She then re-joined Nottinghamshire from the 1st January 1987 where she remained in pensionable employment until she retired in April 2001. The Originating Application was presented in June 2001. Derbyshire is not a respondent and it is not suggested that it should be made a respondent.

119. Unless Mr Cavanagh can persuade me to the contrary, Mrs Richardson's claim is doomed to fail by virtue of section 2(4). The period of employment in respect of which the first complaint is made, ended in January 1979. The second period of claim began in the autumn of 1984 and came to an end on the 31st December 1985. By virtue of section 2(4), time would appear to run from that date and end on the 30th June 1986, in which case her complaint is many years out of time.

120. **Mrs Johnson's** case presents similar difficulties. She was originally employed as a clerk and then a library assistant at North Yorkshire County Council from November 1975 to August 1986. She then worked in the Council's career service until July 1987 when, again apparently entirely for her own purposes, she moved to East Sussex where she worked for the County Council until the end of August or beginning of September 1988. She then returned to North Yorkshire

County Council working in the careers service, initially on a temporary contract. In March 1994, her employment was transferred under TUPE to Guidance Enterprises. She presented her Originating Application on the 23rd December 1994. She has bought back all of her service for pension purposes, except for the period 1st July 1985 to the 10th August 1986, which is therefore the period of claim and which predates her voluntary move to East Sussex. Again applying section 2(4), the time for bringing a complaint to an employment tribunal in respect of that period began to run when the contract of employment under which the claim arose, came to an end. That was July 1987 and the time for bringing the proceedings, unless Mr Cavanagh can persuade me to the contrary, therefore expired at around the end of January 1988.

121. In **Mrs Gardner's** case the multiplicity of respondents demonstrates the peripatetic nature of her career. What it does not reveal is a gap of 5 months between the second and third respondents and four months between the third and fourth respondents. Each move appears to have been of her own choosing. She was eventually permitted to join the NHS pension scheme in May 1992 when she was appointed to a substantive part-time post at Frimley Park. However, as she had been employed as a 'bank' midwife at the hospital since 3rd December 1988 about which no details have been provided, the question of whether during that time she was employed under a continuous contract or was in a stable employment relationship with the fourth respondent, and in consequence whether her claim against it, which was presented on 21st August 2001 is in time, must be remitted to a full tribunal at London South.

122. Mr Cavanagh's contention is that because in Mrs Richardson's case in her first period of employment she would, if full-time, have been entitled to join the education pension scheme and was, during her brief sojourn in Derbyshire and on her resumption of employment in Nottinghamshire, a member of the education pension scheme, the existence of that overarching scheme allows section 2(4) to be disapplied. He employs the same argument in the cases of Mrs Johnson and Mrs Gardner with the appropriate factual adjustments. The first point which must be made is that the factual circumstances which enable Mr Cavanagh to make this submission have come about entirely fortuitously. Both Mrs Richardson and Mrs Johnson on returning to home territory happened to find employment with their previous employer. Mrs Gardner moved from one NHS hospital to another, but could just as easily have gone to work in the private sector. Mr Cavanagh's submissions with regard to the effect of an overarching pension scheme on voluntary moves by employees, largely parallel those which he makes in respect of its effect in TUPE transfers and statutory novations. The submission based on the implication of a term into the contract remains as misconceived when seen in the guise of an overarching pension scheme as it is when canvassed in support of employees transferred under a TUPE transfer, indeed the more so, given the absence of any contractual link between employers when employees move between them for their own purposes.

123. His submission that: "*Put another way, where there is an overarching pension scheme, the applicant remains in the same "employment" for the purposes*

of an equal pay claim" appears to owe its origins to the unhappily made submission (which I have dealt with at length above) that the European Court ruled that time starts to run at the end of the employment to which the same pension scheme applies, not the end of the employment with the one employer under the same scheme. It is the same point whether or not expressly so linked in the skeleton argument. Mr Cavanagh submits that there is no reason why a claim cannot be brought against a new employer where there is an overarching pension scheme. Even as a purely philosophical proposition that must be doubtful. But there seems to be no basis for such a contention in law and none is advanced in the submission. He goes on to submit that it does not matter who the employer is for the purposes of the declaration of the right to be admitted to the scheme because the declaration is directed to the world at large and would normally have to be given effect to by the trustee or administrator of the scheme, rather than the employer. That is simply not so. While it is the trustees who will admit a successful applicant to the scheme, it is the employer who must provide the necessary funds to secure the future pension (Reg 12(2) and (3) of the 1976 Regulations). The declaration, in reality, therefore bites only on the employer.

124. Given that the various employers of each of Mrs Johnson, Mrs Richardson and Mrs Gardner are independent legal entities with their own management and budgets and their own employment and contributions liabilities, this submission seems not merely to have overtones of the implied contractual term argument, it is yet another rehearsal of it, this time more heavily disguised. In the absence of any contractual link between the employers, it is even more inappropriate on this occasion. The submission also depends on what in my judgement is a misunderstanding of the speech of Lord Slynn in ***Preston (No 2)*** at page 227 C:

> *"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."*

After submitting that Lord Slynn was considering consecutive breaches by the same employer, Mr Cavanagh goes on to submit that the same applies where the employee moves from one employer to another under an overarching pension scheme. Although the new employer does not inherit existing liability from the old employer, the new employer assumes afresh a set of its own obligations to its employees, including obligations in relation to accrued pension rights, more specifically an obligation to provide recognition of the right to retroactive membership of the scheme. It therefore follows that there is a new breach after the move if the new employer does not, in effect, rectify the breach of the old employer.

125. Again, there are very clear overtones of earlier arguments which I have rejected but, more fundamentally, Mr Cavanagh's proposition is plainly not supported by the passage quoted from Lord Slynn. His Lordship was making it clear that the failure to admit an employee to a pension scheme is not a continuing breach of contract which subsists until the employee is admitted or the employment ends. Instead, a fresh breach arises each time the employer should have made a

contribution to the scheme in respect of that employee. This was in the context of the argument that section 2(4) was a less favourable time limit than the nearest comparable domestic time limit, the 6 years for breach of contract. Lord Slynn was demonstrating that whereas under the Equal Pay Act time did not run until the ending of the employment relationship itself, in breach of contract time would run from each successive failure to contribute to the scheme precisely because it was not a continuing breach. I accept Mr Paines' submission that if there is not a continuing breach by an employer, then there very plainly cannot be a continuing breach and therefore a continuing liability when the employment moves from that employer to another, particularly as that other cannot in any sense be regarded as successor to the first employer.

126. Mr Cavanagh further relies on a passage from the Judgment of the European Court in Preston:-

> *"37. It must first be borne in mind that the object of such a claim 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 the scheme for the purpose of evaluating the benefits to be paid in the future."*

He submits that this means that the equal pay claim relating to pension looks forward towards securing that the entirety of the applicants' rights are provided for rather than backwards as would be the case if the remedy was damages. Looking forward, a new employer who is not crediting the employee with the whole of his or her service is in breach just as much as the old employer was in breach. This argument, in my respectful view, contains both a misconception and a non-sequitur. Paragraph 37 of the Judgment is the beginning of that part of the Judgment which answers the House of Lords' question 1b), the compatibility of the two year backdating limit with Community law. I have already dealt at considerable length with the inappropriateness of translating the Court's ruling on question 1b) into a general statement of principle that because they are concerned with deferred pay, special consideration must be given to pension claims in all respects.

127. But even if Mr Cavanagh's basic premise were correct, it simply does not follow that a new employer to whom the employee moves entirely voluntarily and probably fortuitously, is in breach to the extent the old employer was in breach. Indeed, it seems to me that the overarching pension scheme argument has at least in this respect already failed before the European Court because it depends for its success on a much wider disapplication of section 2(4) than the narrow stable employment relationship exception and the European Court has by necessary implication rejected any wider disapplication. In the absence of that wider disapplication, it must follow that the change of employer triggers the running of time under section 2(4) against the first employer, from which it would seem necessarily to follow that liability for the breach in respect of which time is then running, cannot pass, in the absence of express statutory provision, to the second employer which is unconnected in any contractual sense with the first employer.

128. I also cannot accept Mr Cavanagh's submission that since the 1st January 1996, section 63(4) of the Pensions Act 1995 gives statutory effect to the principle that time does not run until the end of the applicant's employment under the umbrella of the overarching pension scheme. Whilst it is true that whereas section 2(4) is aimed at complaints against individual employers in respect of alleged breaches of the equality clause in individual contracts of employment, and section 63(4) is aimed at claims against pension fund trustees in respect of breach of the equal treatment rule in the fund rules, and it is therefore possible that two separate limitation periods have been created, albeit unintentionally, the language of sections 2(4) and 63(4) are sufficiently similar for this proposition to be at best exceedingly doubtful. Whereas section 2(4) provides that a claim may not be brought against the employer for breach of the equality clause if the woman *"has not been employed in the employment within six months preceding the date of the reference"*, section 63(4) provides that a claim may not be brought against the trustees *"unless the woman concerned has been employed in a description or category of employment to which the scheme relates within the six months preceding the date of reference"*.

129. The words "*the employment*" (section 2(4)) have been replaced by "*a description or category of employment to which the scheme relates*" (sec 63(4)). It is clearly established (section 1(1) and (6) of the 1970 Act and ***Preston (No 1)*** and ***(No 2)***) that *"the employment"* in section 2(4) is a reference to the contract of employment in respect of which the complaint is brought. Given that section 63(4) substitutes its wording for section 2(4) in a complaint to which it relates but leaves section 1 unaffected, it seems to necessarily follow (*pace* ***Preston***) that the reference to employment in section 63(4) must also be a reference to a complaint in respect of the pension scheme rules subsisting under **the** contract of employment under which the applicant is employed at the time. Indeed, if there is a difference in the effect of section 63(4) and section 2(4), section 63(4) can only, in my judgement, be a narrowing of the time limit rather than a widening of it. For example, if a woman is in the employment of an employer in a category of employment which is pensionable but finds herself excluded from the pension scheme because of a breach of the equal treatment rule, but then changes jobs with the same employer, the new job not being pensionable, time runs in respect of the trustees from the date of the change of job but not against the employer (subject possibly to the argument that there has been a change of contract rather than a variation of contract, [but see ***Young-v- National Power*** *supra*]) until the ending of the employment.

130. Mr Cavanagh also relies on the recent case of ***South Ayreshire Council -v- Morton*** and an extract from the Opinion of Advocate General Geelhoed in ***Lawrence -v- Regent Office Care*** *[Case C-320/00 Opinion of the 14th March 2002]* to the same effect. I have set out the facts of ***Morton*** above. Mr Cavanagh submits that the effect of ***Morton*** and ***Lawrence*** is that employment by different employers can be treated as the same employment for equal pay purposes if the complaint relates to a common set of rules traceable to the same source. An overarching pension scheme is the paradigm of such a common set of rules. In

Lawrence, the applicants sought to use as a comparator male employees still in the employment of their old local authority employers. The Advocate General in his Opinion said that this was not possible because both employments were no longer covered by statutory rules or regulations or centrally bargained terms and conditions. Mr Cavanagh submits that it would be odd indeed if an applicant could select a comparator employed by her old employer but could not bring a claim in relation to something that was originally done or not done to her whilst she was employed by her old employer.

131. Again, this seems to me to be a non-sequitur, but I also accept Mr Paines' submission that it arises out of a misunderstanding of ***Morton*** and ***Lawrence***. In ***Morton***, it was conceded on behalf of the applicants that the two education authorities, the one employing the applicant and the other her proposed comparator, could not be treated as associated employers for the purposes of section 1(6)(c). A fortiori, if they were not associated employers, they could not be the same employer. Indeed, the ***Morton*** and ***Lawrence*** jurisprudence is developing precisely because the existence of an overarching pension scheme or overarching terms and conditions does not make the various legal entities who are the employers within those overarching terms, the same employer, even for the purposes of defining the group within which comparisons may be made. That being so, they plainly cannot be the same employer for the purposes of determining liability.

132. Mr Cavanagh further submits that whilst section 1(6) provides that *'employed'* in section 2(4) means employed under a contract of service or apprenticeship, the definition does not give much guidance as to what "*the employment*" means. He submits that the expression must be construed if possible in accordance with EC law. I agree. But following ***Preston (No. 1)*** and ***Preston (No. 2)***, it seems to me to be unarguable that "*the employment*" means anything other than the particular contract of employment into which the allegedly breached equality clause is implied by virtue of section 1(1) of the 1970 Act. The only exception is where a stable employment relationship exists between the employer and the employee and a stable employment relationship cannot exist where the employee moves for her own purposes between employers who are legally distinct and unconnected save for the tenuous link of a pension scheme which applies to both.

133. I would therefore answer **test issue 4.1** as follows:
Where an applicant has voluntarily changed employer but both employments are covered by the same pension scheme, time runs as against the first employer (and any subsequent employer) from the date on which the applicant left their employment. The running of time is not postponed until the date on which the applicant left the last in the series of such employments.

134. It must follow that **Mrs Richardson's** complaint against both the Secretary of State for Education and Nottinghamshire County Council is out of time and must be dismissed. Similarly, **Mrs Johnson's** complaint against both North Yorkshire

County Council and the Secretary of State for Transport, Local Government and the Regions is also out of time. I have been asked to stay the case against Guidance Enterprises Group but, given my ruling on the overarching pension scheme point, there is no prospect of success against them even if Mr Cavanagh were ultimately able to persuade the House of Lords that liability for occupational pension schemes does pass on a TUPE transfer, Regulation 7 notwithstanding. The complaint against Guidance Enterprises is therefore also dismissed. **Mrs Gardner's** complaints against The Hereford, Royal Bournemouth and Royal West Sussex, Hospitals NHS Trusts are all out of time and are dismissed. Her complaints against Frimley Park and the Secretary of State are remitted to a full tribunal at London South.

Issue 5. Opters

5.1(a) Will a claim brought by an applicant who had been excluded from membership of her employer's pension scheme because she worked less than the minimum qualifying hours threshold, necessarily fail merely because she did not join the scheme at the earliest possible moment after qualifying to do so?

5.1(b) In what circumstances is there a breach of the equality clause in respect of that period of an applicant's claim which predates her becoming eligible to join the scheme, if she failed to join the scheme upon becoming eligible.

5.2 Where an applicant was always eligible to join a pension scheme but did not do so, or did not do so after becoming eligible to join, can her cause of action in the employment tribunal extend beyond the date on which she became eligible to join where

(a) she did not opt into the scheme;

(b) her reason for not opting into the scheme was because of her employer's failure to alert her to the possibility of doing so;

(c) she attempted to opt into the scheme but was either discouraged from doing so, persuaded not to do so or continued to be denied the opportunity to do so.

5.3 In what circumstances, if any, may the remedy ordered by the tribunal involve a declaration of access to the pension scheme which applies in respect of any period after the date on which an applicant became eligible to join the scheme?

5.4 If an applicant can establish a breach of the equality clause, is she entitled to a declaration of access to the scheme as of right or only in the exercise of the tribunal's discretion?

135. None of the respondents now contend that because she failed to opt into a scheme on first becoming eligible to do so, an applicant's claim must necessarily fail. That is plainly right. Mr Randall for **Halifax plc (as successor to Birmingham Midshires Building Society)** makes a further concession in respect of test issue 5.1 as follows:-

> *"With respect to the test cases of **Evans** and **Mace**, it is further conceded that the fact that the applicants did not opt into the pension scheme at the*

first opportunity is not relevant to the earlier periods by reason of the fact that the advantaged groups were made members of the pension scheme on a compulsory basis. The earlier periods are any periods in employment prior to the 1st July 1988, the date on which compulsory membership for full-timers was abolished."

136. Mr Randall confirmed that the basis of the concession was two-fold; that membership was compulsory for full-time employees and that it was not possible to draw inferences adverse to Mrs Evans or Mrs Mace, in the sense that it was not possible to conclude that they would not have joined the scheme prior to the 1st July 1988 had they been allowed to do so, from their subsequent delay or failure to join. The effect of the concession is that both Mrs Evans and Mrs Mace are entitled to succeed in respect of that part of their claims which fell prior to the 1st July 1988. The concession does not affect any part of their claims which fall after that date.

137. The other respondents disassociated themselves from that concession, although Mr Paines for the Secretary of State accepted that it would have been properly made if the basis for it had been the applicants' ineligibility to join rather than the full-timers' obligation to join. Mr Randall's concession is therefore of limited application, being confined to employees of Halifax plc (and its predecessors), against whom no adverse inferences can be drawn from their post-eligibility conduct.

138. Miss McNeill for the banking and electricity supply applicants submitted that the concession did not go far enough. In doing so she effectively introduced a new test issue by turning issue 5.1 on its head and submitting that the fact that an applicant did not join the scheme when she became eligible to do so had no bearing whatever on her claim prior to that date because she was necessarily entitled to succeed in respect of that part of her claim which predated eligibility to join, irrespective of whether or not she thereafter joined.

139. Miss McNeill also submitted that the scheme of the domestic legislation requires a tribunal to declare that an applicant is entitled to membership of a pension scheme once it is established that she is a member of a group which, by virtue of the scheme rules, has been excluded from membership. There is no requirement in either domestic or community law for an applicant to establish that she personally has suffered a detriment. Her claim is either a claim in contract (in respect of the breach of the term implied by section 1(1) of the 1970 Act) or is analogous to a contractual claim, and therefore proof of damage is not necessary to establish a complete cause of action. Regulation 11 of the 1976 Equal Access Regulations precludes the award of damages and Regulation 12 makes a declaration of entitlement to membership of the scheme the only remedy. The test, being an objective examination of the rules of access in the scheme and the impact which they have on the class of which the applicant is a member, precludes any consideration of how the rule affected applicants individually.

140. Mr Jeans and Mr Paines submit that indirect discrimination in relation to matters of pay is unlawful only to the extent that it is prohibited by Article 141 EC, which is concerned with less favourable treatment not different treatment. Mr Jeans submits that those principles are reflected in so many decisions of the European court that it is impossible to name them but draws my attention in particular to paragraphs 34 and 35 of the judgment in ***Vroege -v- NCIV Instituut Voor Volkshuisvesting B.V.*** *(case C57/93) 1995 ICR 635 ECJ.* It cannot, they submit, be less favourable treatment not to offer a woman an option she would not have exercised had it been offered. Mr Paines further submits that whether there is less favourable treatment is not an abstract judgment but a practical one in individual cases.

141. Miss McNeill's submissions prompted a further examination of Regulation 12 of the 1976 Regulations which, contrary to the basic premise of her second submission, by the use of the word "*may*" seemed to suggest that breach of the equal treatment rule would not automatically qualify an applicant for a declaration of entitlement to membership, but rather that the tribunal had a discretion whether to grant a declaration. Miss McNeill submitted first of all that such a consideration was unconnected with the matters before me but in any event it was clear that there was no such discretion.

142. By reversing the proposition which is test issue 5.1, Miss McNeill necessarily raises the ancillary question of what does "*succeed*" mean. As Regulation 12 of the 1976 Regulations did not, on its face, appear to support her submission, I directed that the matter should come back for further argument, which I have now heard, as the newly formulated issue 5.4 (see above).

143. The starting point is Regulation 12 of the Occupational Pensions Schemes (Equal Access to Membership) Regulations 1976 which, so far as material, provides:-

> "***12 Power for court or (employment) tribunal to declare right to admission to scheme, and employer's duty to provide additional resources.***
> *(1) The Equal Pay Act shall be so modified as to provide that where a court or an (employment) 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 ... 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.....*
>
> *(2) The Equal Pay Act shall be so modified as to require that if the deemed entry date is earlier than the date of the declaration, the employer shall provide any such resources as are specified in paragraph (3) below.*"

144. Mr Cavanagh, (who again lead for the applicants on the resumed hearing) acknowledged that the authorities establish that *'may'* can never mean *'must'* but in certain circumstances, although merely empowering on its face, obliges a court or public officer to act in a certain way. He has taken me in detail through a number of authorities beginning with ***Julius -v- Lord Bishop of Oxford*** *(1885) AC 214 HL* and ending with ***Sheffield Corporation -v- Luxford*** *(1929) 2KB 180.* He relies in particular on an extract from the speech of Lord Cairns in ***Julius***:-

> *"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons (1) who are specifically pointed out, and (2) with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."*

He also relied on the judgment of Lord Blackburn whose speech is summarised in Stroud's Judicial Dictionary (p.1580) thus:-

> *"Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right: and if the object of the power is to enable the donee to effectuate a legal right, then it is the* ***duty*** *of the donee of the power to exercise the power when those who have the right call upon him to do so."* [emphasis in the original]

145. Mr Cavanagh concedes that the burden is upon him to satisfy me that the necessary circumstances exist for construing the permissive *'may'* as an obligatory *'shall,'*. He submits that Regulation 12 must be read in the light of Regulation 11, which provides that damages may not be awarded where there is a failure to comply with the equal access requirements with regard to membership of a pension scheme. The declaration of entitlement to membership is in substitution for the right to damages. He submits that under the Equal Pay Act, once a breach of the equality clause is established in a claim relating to wages, the tribunal is obliged to make full recompense for the loss sustained. That being so, it would follow that once a breach of the equality clause is established in a claim relating to access to a pension scheme, that requirement to give full recompense can only be satisfied by making a declaration.

146. I do not accept Mr Cavanagh's interpretation of the compensatory provisions of the Equal Pay Act. Indeed, apart from section 2(5), which limits the award of compensation to the two year period immediately preceding the commencement of proceedings, there is nothing in the Act which touches upon how compensation is to be calculated, from which I can only conclude that, the cause of action being a breach of the equality clause implied into the contract of employment by section 1(1), the normal rules with regard to the assessment of damages for breach of contract apply. That would include, as Miss McNeil concedes, the possibility of an award of purely nominal damages. It is clear from Regulations 12(2) and (3) that once a declaration is made the employer is required to pay into the pension scheme the resources necessary to fund the applicant's pension which suggests

that, if Mr Cavanagh is right, it would not be possible to make the declaratory equivalent of an award of nominal damages.

147. Mr Cavanagh further submits that as on the second occasion where the word *'may'* appears in Regulation 12(1), it plainly means *'shall'*, that strongly implies that it has the same meaning when it first appears. To require the tribunal on making the declaration to insert in it that the entitlement to membership shall take *"...effect from such date...as it may specify"* is a nonsense if read literally as a declaration without a date is meaningless. The provision only makes sense if read as imposing a requirement on the tribunal to insert a date. In my judgment, that submission is based on a misunderstanding of the quoted words. Quite clearly, once a declaration is made, it must include a date or dates, but the words in question cannot be read as giving the tribunal a discretion whether or not to include a date. If one adds the next few words to the quotation: "*as it may specify, not being earlier than*" it is clear that the tribunal has a discretion to exercise, not as to whether a date is to be inserted, but as to which date is to be inserted. As there is nothing in the Regulation requiring the date in the declaration to be the starting date of the period of exclusion, on the second occasion of its use, *'may'* therefore clearly means *'may'*.

148. Mr Jeans and Mr Paines rely on the plain words of the Regulation. Mr Jeans submits that everything points to the careful choice of words by the draftsman with *'shall'* and *'may'* being used, not interchangeably, but in deliberately different circumstances where different outcomes are required. The cross heading of the Regulation, by the use of the word "*power*" in connection with the employment tribunal and "*duty*" in connection with the employer, by itself demonstrates this proposition. The remainder of the Regulation accords with the scheme suggested by the cross heading with the tribunal being given powers which are, ex hypothesi, discretionary, which, once exercised, impose obligatory duties on the employer. Mr Jeans drew my attention to other modern legislative provisions where the meaning of similar wording is not in doubt. Section 189(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (which deals with protective awards) provides that if the tribunal is satisfied that the employer has failed to consult as required, it "*shall*" make a declaration to that effect but "*may*" make a protective award. Section 24 of the Employment Rights Act 1996, which is in that part of the Act which deals with unlawful deductions from wages and which replicates the previous Wages Act 1986, gives the tribunal no discretion as it provides that where a tribunal finds that an unlawful deduction has taken place, it "*shall*" make a declaration to that effect and "*shall*" order the employer to pay compensation.

149. Mr Cavanagh places considerable reliance on ***Sheffield Corporation -v- Luxford*** *(1929) KB 180.* He draws my attention to a passage in the judgment which, at first reading, supports his position. (Talbot J at page 183 to 184):-

> *""May" always means may. "May" is a permissive or enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to*

exercise it. One of those cases is where he is applied to- to use the power which the Act gives him in order to enforce the legal right of the applicant. I think this is such a case. On the information before us, the legal right of the plaintiffs, the landlords, was complete as soon as the notice to quit had expired, and the tenant's right to remain in occupation of this house had absolutely ceased. I think it is true to say, as was said by the learned Counsel for the appellants, that all that induces the landlord to resort to the County Court is by the ministry of the court to give effect to his right of possession by force ..."

150. As Mr Cavanagh submits, there are many parallels between what appears to be the ratio of the decision in ***Luxford*** and the matter under consideration in test issue 5.4. However, Mr Cavanagh did not draw my attention to the specific statutory language in question in ***Luxford*** and once one examines it, those parallels immediately evaporate. The statutory provision in question was section 138 of the County Courts Act 1888 which empowered the court to grant orders for possession. Having first laid down that compliance with the conditions of the Act was necessary for the making of the order, the section provided that "*...the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff either forthwith or on or before such day as the Judge shall think fit to name*". Quite clearly, that statutory provision required the judge to act in one of two ways. The appeals succeeded in ***Luxford*** (and in the case of ***Morrell*** being heard at the same time) because in both cases the order of the judge reflected neither of the options available to him. In those circumstances, it is scarcely surprising that the court construed the provision as requiring the judge to exercise his discretion in one of the two ways prescribed by the section, although he plainly retained a discretion albeit one limited to the two alternatives prescribed. This demonstrates the wisdom of the words of Lord Selborne in ***Julius*** when he said [at p. 235]:

"The question whether a Judge...to whom a power is given by such words, is bound to use it upon any particular occasion, must be solved aliunde, *and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."*

Regulation 12 of the 1976 Regulations does not fetter the judge's discretion in the same way as section 138 of the 1888 Act.

151. It seems to me to be nothing to the point, as Mr Cavanagh further submits, that the Regulations when read as a whole give no indication of how any discretion is to be exercised. Unless the Regulations were in some way cutting down those matters which are normally weighed in the balance when judicial discretion is exercised, or prescribing that matters not normally weighed in the balance were to be weighed, one would not expect such a provision to be present.

152. So far as domestic law is concerned, in my judgement it is not possible to read Regulation 12 as requiring a tribunal to grant a declaration upon being

satisfied that there is a breach of the equality clause. I am therefore satisfied that under domestic law I have a discretion which is to be exercised judicially in accordance with the usual principles.

153. Mr Cavanagh then submits that if I am against him on the interpretation of domestic provisions, under European law following ***Marshall -v- Southampton and South West Area Health Authority (No 2)*** *(1993) ICR 893 ECJ*, I am obliged to give a real and effective remedy which enables the loss and damage actually sustained by the applicant to be made good which can only be achieved if Regulation 12 is interpreted so as to make the granting of a declaration mandatory. In reply, Mr Jeans drew my attention to the wording of Regulation 10 of the 1995 Regulations which were introduced for the express purpose of bringing UK law into line with Community law following the judgments of the European court in ***Vroege*** and ***Fisscher*** and which repealed the 1976 Regulations. The wording of Regulation 10 is, for all practical purposes, identical with Regulation 12 in the 1976 Regulations and preserves the discretion. There has been no previous suggestion that the discretionary grant of declaratory relief would breach the provisions of Article 141 or the ***Marshall*** principle and as discretionary declaratory relief is well established in other branches of European law, there is no warrant for suggesting that its use in these circumstances is illegitimate. The fact that declaratory relief is discretionary allows the tribunal to reflect those cases where the breach is merely technical and no loss flows, the equivalent of the power to award nominal damages for breach of contract. I accept that submission.

154. I would therefore answer test issue 5.4 as follows:
An applicant is not entitled to a declaration of entitlement to access to the pension scheme as of right upon establishing a breach of the equality clause, but only in the exercise of the tribunal's discretion.

155. In terms of Miss McNeill's reversal of test issue 5.1, that gives the unsatisfactory answer "*possibly*". In an attempt to be of greater assistance to the parties, the point having been argued in full, and given that it is common ground that, discretionary or obligatory, an applicant is not entitled to a declaration in the absence of a breach of the equality clause, and given that neither the applicants nor the other respondents accept the validity of Mr Randall's concession on behalf of Halifax plc, and in the light of the answer which I have given to issue 5.4, the new issue that arises (which for the sake of convenience I will call 5.1(b)) can be conveniently formulated thus. **In what circumstances is there a breach of the equality clause in respect of that period of an applicant's claim which predates her becoming eligible to join the scheme, if she failed to join the scheme upon becoming eligible.**

156. At the heart of issue 5.1(b) lies the submission of the respondents that there can be no breach of the equality clause in the absence of less favourable treatment and there is no less favourable treatment if an applicant would not have opted into the scheme even if permitted to do so. It would therefore be helpful if at this juncture we paused to explore precisely what is meant by that which is rather loosely described in this decision, and which has been equally loosely described

during the hearing, as an applicant's Article 141 rights. It is common ground that Article 141 does not give rise to free-standing rights of action (***Biggs -v- Somerset County Council*** *(1996) ICR 364 CA*). Community provisions which are of direct effect, such as Article 141, are given effect to by disapplying provisions of domestic law which conflict with them. The domestic legislation, prior to amendments consequent upon ***Vroege*** and ***Fisscher***, was predicated on the basis that complaints in respect of equal pay, which includes the right of access to occupational pension schemes, could only be brought in cases of direct discrimination. Article 141 also creates the right to equal pay where the inequality in pay arises as a result of indirect discrimination (***Bilka-Kaufhaus GmbH -v- Weber Von Hertz*** *(case 170/84) (1987) ICR 110 ECJ*). UK domestic law must therefore be interpreted in conformity with Article 141 (by disapplying it to the extent necessary to allow it to be so interpreted) and be deemed to extend to cases where the inequality of pay is consequent upon indirect discrimination. That is the extent of an applicant's Article 141 right.

157. Under domestic law indirect discrimination occurs where there is a requirement or condition which cannot be justified on grounds unrelated to sex, (in this case the requirement or condition of working full-time) with which a considerably greater proportion of women than men cannot comply, or which is to the detriment of a considerably greater proportion of women than men, and is to the applicant's detriment. In European law the requirement is that the applicant be afforded equal treatment. As I understand it, the parties accept that analysis and agree that a mere difference in treatment is insufficient.

158. In the context of this case the comparison to be made to determine whether there is less favourable treatment is between part-time workers and full-time workers. The respondents submit that there is no detriment or less favourable treatment in the exclusion of an applicant from a pension scheme if she would not have joined the scheme had she been afforded the opportunity to do so. Indeed, given that all of the pension schemes in question are contributory, membership of a scheme may be regarded in some circumstances as a burden rather than a benefit, particularly if one is low paid and has more immediate calls on one's limited income. Therefore, not to require an applicant to be a member of a scheme may be giving them more favourable treatment than someone who is compulsorily in the scheme and who would prefer not to be. In reply, Mr Cavanagh submits that that is a false comparison. Whether or not an applicant had wished to be in the scheme, had she been treated on a par with full-time colleagues who, like it or not, were obliged to be in the scheme, upon retirement she would be in receipt of a pension to which the employer as well as she had contributed. She has received less favourable treatment through not having received a portion of the pay received by her full-time colleagues, namely the employer's contribution to the pension scheme, and being deprived of the deferred pay which that pension would eventually become.

159. In my judgement, Mr Cavanagh must be right. The comparison, as I have said, is between the pay received by part-time employees and the pay received by their full-time comparators. During any period of time when membership of an

employer's occupational pension scheme was obligatory for full-timers and part-timers were totally excluded, that is had no right to opt in because of their part-time hours, the applicants were treated less favourably than their full-time comparators and there is therefore a breach of the equality clause. Whether or not they subsequently expressly declined the opportunity to join the scheme when it became open to them and whether or not they were heartily thankful that they did not have to make the contributions that their full-time colleagues were making, does not make their treatment less favourable: they have still suffered the financial losses which I have identified. There is, therefore, a breach of the equality clause for any period of time during which part-time employees were excluded from a pension scheme whilst their full-time comparators were obliged to be members of that scheme.

160. Since the 6th April 1988, by virtue of section 15(1)(a) of the Social Security Act 1986, any rule in an occupational scheme making membership obligatory for any category of employee is void. Some pension schemes may have abolished obligatory membership prior to that date. By no means all pension schemes abolished or reduced the requirement for minimum qualifying hours coincidentally with the abolition of compulsory membership. The periods of claim of many applicants therefore are likely to include a time when they were excluded from membership by virtue of the scheme rules but their full-time comparators had the opportunity to opt out of the scheme if they wished to do so. The questions which arise here are more closely related to the issue in 5.2(a) and I will deal with them there.

161. There remains one outstanding question touched on only by Mr Jeans in his skeleton argument and that is where an applicant is excluded from membership of a pension scheme but membership of the scheme is obligatory for her full-time comparators and there is therefore a breach of the equality clause during that time, is it nonetheless inappropriate for the tribunal to grant a declaration in favour of the applicant if her subsequent conduct makes clear that had she been offered the opportunity to join the scheme she would have rejected it. I have heard no arguments on this point (other than by way of extrapolation, or application in the alternative, of the submissions on detriment and the equality clause), but I am invited by all of the parties to give an indication of the factors which a tribunal should take into consideration when determining whether or not to grant a declaration in such cases based on the facts of ***Croucher-v- Seeboard Retail Plc***.

162. Mrs Croucher commenced employment with Seeboard as a sales assistant on the 8th September 1980. Until May 1982 she worked for 14 hours a week and thereafter, until the end of July 1988, for 13½ hours a week. On the 1st April 1988, the rules of the electricity supply pension scheme changed in two respects, firstly, by abolishing the requirement that membership of the scheme was obligatory for full-time employees (other than in respect of a group described as industrial staff who had joined the industry before the 1st April 1975, although I understand that Mr Jeans accepts that for practical purposes the scheme is to be treated as obligatory). Also on the 1st April 1988, the qualifying hours threshold was removed and Mrs Croucher became eligible to join the scheme. She did not do so, and on

the 18th July 1988 signed a form formally electing not to become a member. She subsequently changed her mind and joined on the 28th October 1991.

163. Her claim therefore encompasses two distinct periods in respect of which different considerations arise; the period September 1980 to the 1st April 1988; and the period 1st April 1988 to October 1991(which I will deal with under issue 5.2(a)). Mrs Croucher has been interviewed by the legal officer of UNISON, her trade union, and appears to have no recollection of having signed not to opt into the scheme. Equally, she has no recollection of any reason why she would not have opted into the scheme in 1988. She went on to confirm that if she had been eligible for membership of the scheme at the commencement of her employment, she would have become a member at that time. Given that her employment started in 1980 and she did not sign the form until 1988, that statement is not as inconsistent with her failure to recollect signing the opting out form or claiming to have no reason for signing it, as it at first sight might appear.

164. As I am only asked to give guidance and have heard no formal arguments, my views about Mrs Croucher's entitlement to a declaration deserve no better description than that of thinking out loud. But given that she has been deprived of a valuable right purely by virtue of working part-time, which her full-time colleagues have enjoyed, even if against their wishes; given the respondents' concession that the requirement to work full-time in order to gain access to a pension scheme did have a disproportionate impact on women; and given that the declaration is not a windfall and that Seeboard is not obliged to make contributions to the scheme unless she also makes the contributions she would have made had she been a member of the scheme for the period the subject of the declaration, (***Fisscher***); on what basis, one asks rhetorically, could she legitimately be refused the declaration that she seeks.

Issue 5.2(a).

165. The applicants in these cases did not opt into the pension scheme on becoming eligible to do so and in some cases have never opted in. Although this issue arises in all sectors, the lead has been taken by the Royal College of Nursing and I am grateful to Miss Findlay, who appears for the RCN supported applicants, for her submissions on this point. However, rather than confine my answers on this issue to the specific circumstances of the NHS scheme, I have applied Miss Findlay's submissions to a general comparison of the position of full-time and part-time employees where their routes for gaining access to a pension scheme at any point in time were different. The purpose of the comparison is to determine whether these differences could be said to be less favourable treatment of the part-timers and therefore give rise to a breach of the equality clause. The relevant comparisons are between full-timers for whom membership of a scheme was compulsory and part-timers who could opt into the scheme: and where membership for both was voluntary, but full timers automatically became members unless they opted out, whereas part-timers were required to opt in. In this second comparison I draw no distinction, as none seems to be necessary, between full-timers for whom membership of a scheme had been obligatory but who subsequently gained the right to opt out, and newly appointed full-timers who,

unless they opted out on appointment, automatically became members. For the avoidance of doubt, it is not suggested that the mere requirement to opt in can, of itself, be a detriment or less favourable treatment: the test issue assumes that an applicant's full-time comparator gained access to the scheme by a means other than opting in.

166. Miss Findlay submits that, irrespective of an applicant's reasons for not opting in, or the length of time which elapsed between her becoming eligible for membership of the scheme and opting in, she is still entitled to succeed in respect of that part of her claim which post-dates her eligibility, because there continued to be a breach of the equality clause in that the requirement to opt in is necessarily less favourable treatment than the treatment afforded to full-time comparators who were either members of the scheme compulsorily, or unless or until they opted out. She submits that it is not open to me to make a value judgement on whether the ability to opt in is less favourable than the requirement to be in, as the matter is determined for me by Regulation 10 of the 1976 Equal Access Regulations. Miss McNeill, on behalf of the electricity and banking sector employees, elaborated Miss Findlay's submissions and pointed to the problems which could arise when one was required to opt in and which form the subject matter of issues 5.2(b) and 5.2(c), as proof of the proposition that opting in was less favourable than being a member of the scheme unless one opted out.

167. Mr Oudkerk, for North Manchester Health Authority, submits that the facts of one of the test cases, that of Mrs Tyrell, demonstrates just how valuable being able to choose whether to join a scheme can be. Mrs Tyrell expressly declined to opt in because, when given the opportunity to do so, she could not afford it. The respondents collectively rely on the unreported case of ***Lynn -v-Rokeby School and others*** *(EAT/86/99)* which they also claim answers the question for me but in their favour, EAT having held that the requirement to opt in was not discriminatory. They also submit that to allow an applicant who has not opted in, a fortiori one who has positively elected not to opt in, to succeed in her claim, would itself be a breach of Article 141 by giving them preferential treatment over their full-time comparators. Full-time employees who were members of a scheme prior to 6th April 1988 and who opted out after that date, and new recruits who opted out on appointment, could, under the rules of all of the schemes the subject of the test cases, only opt back in at a later date with effect from that later date. They could not claim entitlement to retrospective admission to the scheme. Applicants who did not opt in and who therefore could be regarded as having expressly opted out, albeit sub silentio, and applicants who did expressly opt out by signing the appropriate form, are inviting the tribunal to order the employers to grant them retrospective membership of the scheme.

168. Miss Findlay's argument, although at first sight attractive, is ultimately, in my judgement, wrong. The Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 were made under certain provisions of the Social Security Pension Act 1975, for our purposes section 53. So far as material, this provides:-

> *"(1) The provisions of sections 54 to 56 below shall have effect with a view to securing that the rules of occupational pension schemes conform with the equal access requirements.*
>
> *(2) Subject to subsection (3) below, the equal access requirements in relation to a scheme are that membership of the scheme is open to both men and women on terms which are the same as to the age and length of service needed for becoming a member and as to whether membership is voluntary or obligatory."*

169. Regulation 10, which has the cross-heading *"Modification in relation to the equal access requirements of the provisions of the Equal Pay Act as to equality clauses"*, provides, so far as material:-

> *"(1) ...the Equal Pay Act shall be so modified, in its application to the equal access requirements, as to have effect as if there were substituted, for references to less favourable terms of a contract and less favourable terms and conditions of employment, references to*
>
> > *(a) terms ... which do not enable persons to have access to membership of a scheme (as compared with terms ... which do enable persons to have such access) and*
> >
> > *(b) terms ... which enable persons to have access to membership of a scheme at a higher age or ... lower maximum age, after a greater length of service or on a voluntary (as compared with an obligatory) basis."*

170. There are some saving or transitional provisions to which I will return in a moment. Miss Findlay submits that within the paired comparisons in Reg.10(a) and 10(b), it is clear that not having access to membership; the ability to enter a scheme only at a higher minimum age or a lower maximum age or after greater length of service or on a voluntary basis, are regarded as less favourable than having access to a scheme; being able to enter at a lower minimum age or at a higher maximum age or after a shorter length of service or on an obligatory basis. She acknowledges that the Regulations are aimed only at cases of direct discrimination where what she would describe as the more favourable conditions are available only to men and the less favourable only to women, but submits that in order to give effect to Article 141 it must be deemed to have equal application in cases where the terms are applied in a way which is indirectly discriminatory.

171. It seems to me that there are two principal objections to Miss Findlay's submission. The first is that in 1988, obligatory membership of pension schemes was outlawed by legislation passed in 1986 (Social Security Act 1986 section 15). If Miss Findlay is correct, that is a diametric change of political opinion in 10 years (something which is by no means impossible) which, if it does nothing else, illustrates that the question of whether obligatory membership is more favourable than voluntary membership is not free from doubt. Much more compelling,

however, are what have been described as the transitional arrangements in Regulations 9, 10(3) and 10(4) of the 1976 Regulations themselves. They create an exception from the equal access requirements in respect of employees who were in post on the 5th April 1978 under the aegis of a voluntary pension scheme, for whom membership of the scheme could continue to be voluntary for so long as the employee remained in the employment of that employer, even if the scheme was replaced by another scheme. That transitional provision could therefore have lasted for between 40 and 45 years, being the working lifetime of a young woman starting work on the 5th April 1978 who remained with her first employer.

172. I accept the submission of the respondents that Regulation 9, read with Regulation 10, in fact demonstrates the reverse of the proposition for which Miss Findlay contends, namely that whilst abolishing direct discrimination by requiring the employer to make pension terms the same for both male and female employees, it recognised the value of the ability not to be a member of a scheme and therefore preserved the voluntary nature of existing schemes for existing employees, who, on Miss Findlay's analysis of the reasoning behind the Regulations, must be presumed to be largely female. The point becomes all the clearer when one sees that the regulations were made on the 3rd February 1976 but did not come into effect until the 6th April 1978 and that the qualifying date for retaining the right to voluntary membership was the 5th April 1978 not the 2nd February 1976. Ultimately then, these Regulations cannot be presumed to be anything more than what they claim to be on their face – equalising – and it would be wrong to conclude that in equalising terms of access they are necessarily making value judgments.

173. I am equally unpersuaded that the question is answered for me by ***Lynn-v-Rokeby School.*** Dr Lynn was a male teacher who objected to the fact that as a part-timer he was required to opt into the Teachers Pension Scheme whereas membership for full-timers was automatic. The complaint was brought under several heads including a breach of the Equal Pay Act. Dr Lynn was unrepresented. His complaint failed because [transcript para. 17]:

> *"He identifies no female part-time comparator who does not have to opt in if she wishes to be in the Teacher's Pension Scheme. He could point to a full-time person who does not have to opt in, but that person would not be a comparator by reason of not going exactly the same work – one being part-time, one being full-time – and he identifies no less favourable treatment of male part-timers than of female part-timers."* [emphasis in the original]

It is not for me to say whether that conclusion was correct in the case of Dr Lynn, but it plainly cannot be correct in these cases as it is contrary not merely to the concessions made by the respondents at the start of this hearing, but to the very foundation of the entire litigation, namely that the correct comparison is between the pay of full-timers (which included membership of their employers pension scheme) and the pay of part-timers (which did not).

174. I must therefore approach the question from first principles, which requires me to make the very value judgment which the applicants insist I must not make. It is of course possible that the imposition of a requirement for part timers to opt in could be a detriment as all of the respondents acknowledge. Making opting in conditional on buying back past years of service on payment of a lump sum for example; having to undergo a medical examination which a full-time employee would not have to undergo, or facing the possibility that one's application could be rejected; would all be circumstances which would make it less favourable to have to opt in. None of those exist in any pension scheme covered by the test cases. I do not accept Miss McNeill's submission that because opting in may prove to be problematic in practice in a minority of cases, the requirement to opt in is seen to be potentially less favourable in all cases. It seems to me that Miss Tether is correct when she submits that the fact that something may go wrong when an applicant attempts to exercise the right, doesn't change the either the nature or value of the right. She points to the remedies available to applicants who have encountered such difficulties and submits that they cure that apparent defect. This point is developed below under issues 5.2(b) and (c).

175. In all the lead sectors, all that an applicant was required to do to opt into a scheme was to tick a box on a form, or do something equally simple, and sign it. Having done so, entry into the scheme was automatic. Post April 1988, full-timers who wished to opt out either had to do precisely the same, or had to write a letter to their employers to the same effect. In the case of the electricity supply industry, every single employee was sent a similar form, whether they were in the opting in or the opting out category. In my judgement, in such circumstances, it is quite impossible to say that the mere difference between being required to opt in and having the ability to opt out amounts to less favourable treatment of part-time employees. It seems to me in addition, that where the comparison is with a full-timer who may opt out, but having opted out may not opt back in retrospectively, the respondents submission that the remedy of retrospective admission to a scheme which the applicants are seeking in these proceedings would itself be in breach of Article 141 and therefore impermissible, must be right.

176. During any period of time when the full-time comparator was obliged to be a member of the scheme and could not opt out, the requirement on eligible part-timers to opt in could not be less favourable treatment given Miss McNeill's concession, which is plainly right, that some people do not want to join a pension scheme. Part-timers were to that extent at an advantage because opting in gave them a genuine freedom of choice denied to the full-timers. If, contrary to my principle view, the need to opt in could be construed potentially as a detriment, the method employed, of filling in an extremely simple form, was *de minimis*. In neither case therefore was there a breach of the equality clause. This conclusion produces what at first sight looks like an anomaly in the case of a scheme (such as the NHS scheme) where membership for full-timers was compulsory, membership for part-timers who worked more than a certain number of hours was voluntary, but membership for part-timers who worked less than those hours was unavailable. A part-timer in the first category who did not opt in, prima facie has no claim, while her colleague who worked fewer hours has a claim even if she would not have

opted in had she had the chance. Unsatisfactory though that outcome may appear, it seems to me to be the inevitable (and in my view correct) consequence of the fact that while in both cases the comparator is the full timer, the circumstances of the two part-timers with whom she is being compared are different.

177. I would therefore answer **test issue 5.2(a)** as follows:
Where an applicant was always eligible to join a pension scheme but did not do so, or did not do so after becoming eligible to join, she has no cause of action in the employment tribunal beyond the date on which she became eligible to join as the requirement to opt into the scheme did not breach the equality clause.

178. ***Lount -v- South Devon Healthcare NHS Trust (1); Secretary of State for Health (2)*** is the health sector test case on issue 5.2(a). On the 6th June 1974, Mrs Lount commenced work with Torbay Health Authority working 20 hours a week rising to 30 in June 1977. She joined the NHS pension scheme on the 1st January 1989. However, she had always been eligible to join the scheme because her hours were never less than half full time hours. Sometime in the mid to late 1970's, the date cannot now be ascertained, she signed a form expressly choosing not to opt into the scheme. Her complaint must fail because the requirement to opt in was not less favourable treatment even during the period when full-timers were automatically admitted to the scheme. There was, therefore, no breach of the equality clause.

179. Returning to the case of **Mrs Croucher**, her complaint in respect of her non-membership of the electricity supply scheme between the 1st April 1988 and the 28th October 1991 also fails because the requirement between those dates to opt into the scheme was not a breach of the equality clause.

180. I must now briefly deal with those cases which fall between test issues 5.1(b) and 5.2(a), that is applicants whose claims include periods when they remained excluded from the scheme by virtue of their part-time hours but membership of the scheme was not obligatory for full-timers. In these cases, the applicants' failure to join the scheme upon becoming eligible to do so, or only after a significant delay (any applicant can, I think, be afforded a period of grace to make up her mind which would not jeopardise her earlier claim but in respect of which, as the scheme rules no longer excluded her, a claim would not lie) may be highly relevant in determining whether there has been a breach of the equality clause. Here I think the respondents are right when they submit that there has been no less favourable treatment, or the applicant has not suffered a detriment if, although excluded from membership by the rules of the scheme, she would not have joined even if she had been given the opportunity. But even if I am wrong about the legal analysis and there remains a breach of the equality clause, the applicant's failure to subsequently join the scheme must be highly relevant to the exercise of the tribunal's discretion to grant her a declaration for the period of exclusion by virtue of the rules. To do so would be akin to affording her the luxury of changing her

mind. But in my judgement, the better view is that there is no breach of the equality clause in the first place.

181. The burden of proof is of course, as in all civil proceedings, on the applicant and it will therefore be for an applicant who did not opt in on becoming eligible to do so, or who positively opted out when invited to join, to satisfy the tribunal that she would nonetheless, have joined during the period of exclusion had she been able to. If she can satisfy the tribunal that she would have joined, she will have established a breach of the equality clause. It is not difficult to think of circumstances which might well persuade a tribunal that there had been a breach of the equality clause. For example, because of her exclusion from the scheme the applicant had made alternative private arrangements and membership of the employer's scheme was no longer either relevant or available to her; or, by the time she became eligible to join the scheme; the applicant was so close to retirement that it was not worthwhile contributing. I hasten to emphasise that those reasons would not entitle her to succeed in respect of that part of her claim which falls after the date on which she became eligible for membership; it can only ever be of relevance to that part of the claim during which she was excluded from membership by the scheme's rules.

182. I will not burden this decision by reciting the numerous examples which might well not persuade a tribunal that there had been a breach of the equality clause. Ultimately, any applicant who did not opt into the scheme or did not opt into it for a significant period after becoming eligible to do so and who wishes to pursue her claim in respect of the period during which she was excluded from membership by the scheme rules, must be able to satisfy the tribunal on the balance of probabilities that had she been eligible to join the scheme during that period of exclusion, she would have joined it. This will necessarily involve an explanation of why she did not join when she became eligible to do so.

183. I would therefore answer **test issue 5.1** as follows.

1. An applicant's claim in respect of a period of exclusion from a scheme will not fail merely because she did not join the scheme upon becoming eligible to do so.

2. There is a breach of the equality clause, in respect of which an applicant will normally be entitled to a declaration of right of access to membership of the scheme, for any period of claim during which the applicant was excluded from membership because of her part-time hours and her full-time comparator was obliged to be a member of the scheme. Whether the applicant did or did not join the scheme on becoming eligible to do so, or only joined after a significant delay, is irrelevant.

3. There is no breach of the equality clause for any period of claim during which an applicant was excluded from membership of the pension scheme because of her part-time hours but membership of the scheme for her full-time comparator was <u>not</u> obligatory, where an applicant did not join the scheme on becoming eligible to do so, or only joined after a significant delay, unless the applicant can satisfy the tribunal on the balance of

probabilities that she would have joined the scheme during the period of exclusion, had she been eligible.

Issues 5.2(b) and (c)

184. These issues involve applicants who, for reasons which can loosely be attributed to the fault of the employer, did not join the scheme after the eligibility rules changed. The respondents submit that the tribunal has no jurisdiction to entertain any of these claims because there ceased to be a breach of the equal treatment rule as soon as the offending qualifying hours threshold was removed or lowered so as to allow an individual applicant to join. An employer who, in effect, obstructs an applicant from exercising her newly won right in one of the ways described in issues 5.2(b) and 5.2(c) is in breach of the term implied into the contract of employment by the House of Lords in ***Scally -v- Southern Health and Social Services Board*** *(1991) ICR 771 HL* to the effect that where there are rights under a scheme which have not been negotiated directly between the employer and the employee and the employee could not reasonably be expected to know of them, the employer is obliged to inform the employee of the existence of the right. Where an employer is in breach of the ***Scally*** implied term, the applicant is not without remedy, having a right of action in respect of that breach (although one which by this time might arguably be statute barred) but which would not in normal circumstances be justiciable before an employment tribunal.

185. Miss Findlay and Miss McNeill do not meet the ***Scally*** argument directly. Whilst acknowledging that applicants in these circumstances might have a ***Scally*** claim, it would, they say, arise independently of their claim for breach of the equality clause. A breach of the equality clause arises in the circumstances envisaged in 5.2(b) and 5.2(c) in precisely the same way that it arises in the circumstances envisaged in 5.2(a), namely that the requirement to opt in is by itself a detriment sufficient to breach the equality clause. As I am against the applicants on that point, that seems to leave them virtually without an argument on 5.2(b) and 5.2(c) as Miss McNeill accepted my comment that they regarded issues 5.2(a), 5.2(b) and 5.2(c) as links in the same chain. I accept Miss Tether's submission that merely because one of the circumstances envisaged in issues 5.2(b) and 5.2(c) arises in a particular case, if the requirement to opt in is not a detriment per se, it does not thereby become a detriment because the applicants have a remedy elsewhere. I do not, however, accept Mr Randall's submission that if I am with the respondents on 5.2(a), I must be with them on 5.2(b) and (c), the imagined factual circumstances of which do not change the basic contractual relationships.

186. I must confess to finding these two issues the most difficult of all that I have been asked to deal with and I am not persuaded that ***Scally*** supplies the complete answer. In ***Scally***, certain employees of the health service in Northern Ireland who had joined the Service too late to complete the 40 years service required to earn full pension, were given the right (by Statutory Instrument) to purchase added years to make up the shortfall. But the right had to be exercised within 12 months of the date of the coming into force of the Regulations or of the commencement of the employment if later. If the right was not exercised within that period, it could be

exercised thereafter but only on less favourable terms. The plaintiffs complained that they had not been informed by the employing authority of the right to purchase the added years and their complaint was upheld on the basis of a breach of the implied term to which I have already referred.

187. The reason that I am not persuaded that ***Scally*** is the full answer to these points is that it is unconnected with the principle of equal pay, whose starting point is a rather different term implied into contracts of employment by statute and which did not fall for consideration in ***Scally***. Whilst it may well be that at least some of the applicants who fall into the scope of issues 5.2(b) and 5.2(c) would have ***Scally*** claims, it does not follow that they do not also have claims for breach of the equality clause if the facts relied on to found the ***Scally*** claim also demonstrate a breach of the equality clause. This is the jurisprudential justification for a point which I raised in argument with Mr Paines in response to the respondents' collective submissions on this point, and which I will elaborate in a moment. In addition to disagreeing with me, he submitted that my proposition was in fact an attempt to interpret Article 141, which was a matter for the European Court and not for me. I suggested to Miss McNeill that if she wished to adopt my point, it was preferable to refer it to the European Court. She indicated that if I was against her (which I am) on her principal submission then she did wish to adopt it but submitted that there was no need to remit the matter to the European Court because the proposition fell squarely within domestic law.

188. Put shortly, the proposition is this. There is a continuing breach of the equality clause and therefore a right of action before the employment tribunal where, notwithstanding the change in the rules of the scheme, an applicant's continued inability to gain access to the scheme **i** is directly referable to her status as a part-time employee; **ii** the circumstances do not apply to full-time employees and **iii** is to her detriment. I pause here only to emphasise that this is not a development of the opting in argument, but is in fact a corollary of the respondents' concession that the exclusion of part-time employees from the pension scheme had a disproportionate impact on women. Thus, under issue 5.2(b), a woman who was excluded from the pension scheme because her hours were below the qualifying threshold, remains, for all practical purposes, excluded from that scheme for that reason if her employer does not bring to her attention the fact that she is no longer excluded. If her exclusion from the scheme before the removal of the qualifying threshold was a breach of the equality clause, applying the three stage test which I have suggested above, (assuming of course that the employer is not equally keeping full-time employees in the dark about their pension rights, which is possible where new recruits have to positively opt into a scheme) that breach continues until the change in the threshold is brought to her attention. To hold otherwise would plainly be to fail to give effect to the principle of equal pay enshrined in Article 141. The fact that it may also be a breach of the ***Scally*** implied term is irrelevant.

189. Similarly, perhaps a fortiori, a woman who believes that she may have the right to join the pension scheme is misled, intentionally or unintentionally, by her employer into believing that she does not have that right, or who is simply met with

a flat denial that she has the right, continues to be excluded by virtue of her part-time status just as effectively as if the scheme rules had not changed and there continues for that reason to be a breach of the equality clause.

190. However, I do not think the same necessarily applies in the other two situations contemplated by issue 5.2(c). Where an applicant merely acts on bad advice given by the employer, or allows herself to be talked out of exercising her rights, it is much more difficult to say that this amounts to a breach of the equality clause, for two reasons; it is not obviously a direct consequence of her part-time status as the employer is not denying the existence of the right and full time comparators who may either opt out of, or are similarly required to opt into, the scheme, could be equally susceptible to the employer's blandishments. There would, however, be a continuing breach of the equality clause – and here I adopt a subsidiary submission of Miss Findlay's which she made in a rather different connection – if the evidence pointed to a policy by the employer to discourage part-timers from becoming members of the scheme. However, not only would the employer's actions have to be confined to part-timers, they would have to be such as to amount, in practice, to a denial of the right of membership. A concerted campaign of misinformation or the imposition of unjustifiable conditions such as a requirement to buy back past years on exercising the option to join are two fairly obvious examples which would amount to a continuing breach of the equality clause.

191. On further reflection, I do not believe, contrary to my first impressions, that this proposition depends upon an interpretation of European law. Rather it depends, as Miss McNeill submits, on an interpretation of domestic law in the light of the undoubted principle of equal pay enshrined in Article 141.

192. I would therefore answer **test issues 5.2(b) and (c)** as follows:

1. There is a continuing breach of the equality clause, and therefore an applicant's cause of action continues beyond the date on which she became eligible to join her employers pension scheme, if, after the removal of any qualifying hours threshold with which she could not comply, an applicant's continued failure to join, or inability to gain access to, the scheme (a) is directly referable to her status as a part-time employee; (b) the circumstances do not apply to full-time employees and (c) is to her detriment.

2. This would be the case where an applicant, on becoming eligible to join a pension scheme, did not do so because she was unaware of her right to join because of her employer's failure to inform her of the right: or where an applicant who believed she might have the right to join was misled by her employer, intentionally or unintentionally into believing that she did not have the right, or whose employer denied that she had the right.

3. There would not be a breach of the equality clause if on seeking to join the scheme an applicant was either discouraged or dissuaded from joining, unless this was as a result of a policy of the employer, aimed at part-timers

and involved the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or otherwise amounted in practice to a denial of the right to membership of the scheme.

193. I am conscious that this answer begs a number of questions. I suspect those questions can only be resolved on a case by case basis (something which I had hoped to avoid but which, in the light of this ruling seems inevitable). However, I venture to suggest some of the principles which will apply. Clearly, the burden of proof is on the applicant, not merely to establish the facts but that they amount to a breach of the equality clause which continues throughout the period of claim. Mr Randall seemed content to accept that there would be a breach of the ***Scally*** principle if, despite an employer's best endeavours, an applicant remained in ignorance of the change in the eligibility rules of the scheme. I doubt that the same holds true for a breach of the equality clause. It would certainly not hold true if an applicant in fact became aware of the change by any means, even if not directly from the employer. Whilst it might hold true if an applicant genuinely remained in ignorance of the change, despite the employer's best endeavours, it may well be that she would have something of an evidential mountain to climb to satisfy the tribunal that the ignorance was genuine if, for example, the employers had extensively publicised the new eligibility rules and significant numbers of her colleagues had joined in response.

194. Equally, an applicant who on making tentative enquiries about the possibility of joining the scheme was met with a less than enthusiastic response, even a non-committal response, could not establish a breach under 5.2(c). She might also have difficulties in establishing a breach where she appeared to have received a definitive refusal from a low tier of management but she did not pursue the matter further, despite believing the response from management to be wrong. I can go no further than this because of the wide range of circumstances which might be prayed in aid under 5.2(b) and (c), each of which will, regretfully, have to be considered on its own merits.

195. So far as **test issue 5.3** is concerned, as I understand it, the parties agree that it does not call for a separate answer provided I am satisfied that the tribunal may, in appropriate circumstances, insert dates in a declaration which are not co-extensive with either the period of claim or the period during which the equality clause was breached. That must follow from my reasoning above and I would answer issue 5.3 accordingly.

196. I will now deal with the test cases on issue 5. In the banking sector, both Miss McNeill and Mr Randall invite me to give decisions in the cases of both Evans and Mace. **Mrs Evans** began work for the Birmingham Building Society on Monday the 9th November 1981. The Birmingham Building Society ultimately became the Birmingham Midshires Building Society which was in due course acquired by the respondent. Mrs Evans presented her complaint on the 3rd January 2001 and the period of claim runs from the date of her commencement of employment up to and beyond January 2001 as she never joined the pension scheme. Until the 1st July 1988, she was excluded from the scheme because of

her part-time hours. Mr Randall has already conceded that her claim is entitled to succeed for that period.

197. In her witness statement she says that if she had been given the option to join before that date, she almost certainly would have opted in. Mrs Evans claims that when the rules of the scheme changed, although she did not personally receive information about the changes direct from her employers, she learned about them from memos or newsletters which were sent to all branches of the Society in June or July of 1988. She did not join the scheme at that time because it was her understanding that in order to join, not only did she have to pay the monthly contributions but had to provide an unspecified lump sum of backdated contributions. Her witness statement gives no indication of the source of that understanding and in particular does not even imply that her employers were the source. The only conclusion that I can draw is that this was merely an assumption on her part. That is plainly not a breach of the equality clause and therefore her claim must fail in respect of the period 1st July 1988 onwards.

198. I note a passing reference in her statement to being told some 5 or 6 years later when she attempted to change her mind that at 47 she was too old to join the scheme. I simply do not have any information upon which I could conclude that that might amount to a breach of the equality clause. In order to be capable of being a breach of the equality clause, Mrs Evans would have to demonstrate not only that the conversations of which she complains had taken place and that they effectively amounted to an obstacle placed by the employers to prevent her gaining access to the pension scheme, but that a similar age barrier would not have been placed in the way of a newly appointed full-time employee seeking to opt in at that time, or, if the advice was erroneous, that the full-time employee would not have been given the same advice. None of those allegations are made and as I am invited by Miss McNeill to deal with the matter on the basis of the witness statement, I can only conclude that there was no breach of the equality clause at any time after the 1st July 1988.

199. I therefore declare that Mrs Evans is entitled to be admitted to membership of the Birmingham Midshires Building Society pension scheme between the 9th November 1981 and the 1st July 1988. The claim in respect of the period of time beginning with the 1st July 1988 fails as there was no breach of the equality clause thereafter.

200. **Mrs Mace** presented her complaint in 1995, on a date which now appears to be lost, making a claim in respect of the period 1st December 1980 to the 7th September 1992. She too had been excluded from the right to become a member of the scheme by virtue of her part-time hours until the 1st July 1988 and Mr Randall has conceded her entitlement to a declaration in respect of that period. She claims not to have joined on the 1st July 1988 because she was not made aware of her entitlement to join and remained in ignorance of this right until she became a full-time member of staff on the 7th September 1992. By that time, she had made alternative private arrangements and decided not to join. I do not have sufficient information to be able to conclude whether or not there was a breach of

the equality clause from the 1st July 1988 onwards. That question is therefore remitted to an employment tribunal at Manchester to be dealt with in accordance with the principles which I have set out above.

201. There is an added complication in Mrs Mace's case when it comes to remedy. Even if she succeeds in demonstrating a breach of the equality clause, the problem of her private pension arrangements must be overcome. If my understanding is correct, if the tribunal were to make a declaration in her favour for the period of time after she took out her own pension, she would not merely have to cease to pay contributions into her own scheme, but in some way unscramble her private pension in order to take advantage of that declaration. It would appear that she has suffered a loss (again assuming a breach of the equality clause or a breach of the ***Scally*** implied term) because she has not had the benefit of the contributions the employer would have made to her scheme, but the tribunal has no power to award her damages.

202. **Savage -v- Secretary of State for Health (1) Southampton Community NHS Trust (2).** Mrs Savage returned to employment in the NHS after a 7 year break in April 1976 as a bank staff nurse working part-time. She did not become permanent until the 1st November 1977. I am not clear whether the period between April 1976 and the 1st November 1977 is included in her claim but if it is, it may well give rise to the question of whether or not she was in a stable employment relationship with the respondent rather than employed by them under a continuous contract. If she was only working intermittently with the respondents, even if it did amount to a stable employment relationship, it would seem that time began to run in respect of that period from the 1st November 1977 when she became permanent but still part-time.

203. On becoming a permanent staff nurse, she attempted to rejoin the health service pension scheme and spoke to the hospital secretary about it. It is alleged that he told her that she was not eligible to join and she accepted that at face value. However, within a very short time she learned that that may not have been the case and on making further enquiries discovered that she was eligible and joined the scheme on the 1st February 1978. I have of course heard no evidence from the respondent, nor have I seen a statement from anyone they might wish to call as a witness. If what Mrs Savage was told by the hospital secretary amounted to a denial of the existence of her right to join the scheme, prima facie there was a breach of the equality clause. Whether there was such a breach, and whether in consequence a declaration should be granted, is remitted to a full tribunal at Southampton for determination after hearing evidence.

204. **Tyrrell -v- Secretary of State for Health (1) Greater Manchester Health Authority for and on behalf of North Manchester Primary Care Trust (as successor to North Manchester Health Authority (2).** Mrs Tyrrell worked full-time in the health service between 1971 and 1984, during which time she was a member of the NHS pension scheme. She then changed her hours and her job, becoming a part-time health visitor, with effect from the 1st June 1984. She noticed in her next pay slip that the superannuation contributions which she had been used

to making had ceased and she telephoned the salary and wages department to enquire why. She claims that she was told that it was the policy of the health authority that superannuation contributions could not be paid by part-time staff. She claims that thereafter she made no further enquiries and remained unaware that she could have elected to rejoin the scheme until some time in 1989.

205. It seems to me that these facts are capable of amounting to a breach of the equality clause. However, I have only an outline of the factual circumstances from the applicant and nothing from the respondent and accordingly Mrs Tyrrell's complaint is remitted to the employment tribunal at Manchester to hear evidence and to determine whether there has been a breach of the equality clause and if so whether the applicant is entitled to a declaration.

206. **Thomas -v- Secretary of State for Health (1) Portsmouth Hospitals NHS Trust (2).** Mrs Thomas commenced her career in the NHS on the 30th January 1978 when she became an auxiliary nurse at the Queen Alexandra Hospital at Cosham, Portsmouth working part-time. On the 22nd April 1979 she became a student nurse and on the 30th December 1982 a staff nurse. Throughout, although part-time, she was eligible to join the pension scheme because she worked more than half of full-time hours. However, she claims that at no stage during her career was it brought to her attention that she could have opted into the pension scheme and she only discovered her eligibility to join the scheme some months after taking out her own private pension in August 1988.

207. Again, the applicant's account of her experience is in my judgement capable of amounting to a breach of the equality clause but I do not have sufficient evidence before me to deal with it and in particular I have heard nothing from the respondent. The matter will therefore have to be remitted to the employment tribunal at Southampton. Amongst the things that that tribunal will be concerned to know is whether Mrs Thomas' experience was an isolated one or whether others in her position at the same time also received no information about entitlement to join the scheme. If the latter was the case, this might suggest a breach of the equality clause. If the former is the case, then the tribunal will firstly want to satisfy itself that she had in fact been wholly unaware of her right to join the scheme, notwithstanding that her contemporaries were aware of their rights; that this resulted from some failure on the respondent's part; and that this failure amounted not only to a breach of the ***Scally*** implied term, but also a breach of the equality clause.

Issue 6. <u>Stable employment relationship.</u>
What factual circumstances give rise to a stable employment relationship?

208. This, like the opters, is an issue which cannot, in strict terms, be said to give rise to test cases. At best, guidance can be given as to what a stable employment relationship is and where its parameters lie. But, given the view which I have formed on the arguments advanced on behalf of the applicants, I am able to say with some confidence when a stable employment relationship does *not* arise and to a lesser extent when it does. Although I hope that this will resolve the great

majority of cases, there will inevitably remain a minority, hopefully small, where a tribunal will have to determine the issue after hearing evidence.

209. The representatives have kindly acceded to my request to identify a handful of cases which are representative of the wider picture and illustrative of both a broad spectrum of working patterns, and of the reasons for them. I am once again grateful for their industry. Four of the ten cases selected for this test issue have already been considered in respect of other issues, and I therefore need not re-rehearse their facts. They are: ***Johnson-v-North Yorkshire County Council and others: Gardner –v-Herefordshire Hospitals NHS Trust and others: Richardson –v- Nottinghamshire County Council and another: Fox –v- East Riding County Council (as successor to Humberside County Council) and others:*** The other six test cases, with a brief introductory summary of their facts are as follows (where necessary I will consider the facts in more detail after I have determined the principles to be applied).

(a) ***Leeson –v- Basildon & Thurrock General Hospitals NHS Trust (1) Secretary of State for Health (2).*** Mrs Leeson presented her IT1 on the 2nd July 2001. She had been employed at the first respondent hospital pre and post its translation into independent Trust status, since 24th July 1978 apart from a period of 11 months in 1983 when she resigned in order to resolve some matrimonial problems and, presumably having resolved them, re-applied for employment. Her case raises the question of whether the single break of 11 months in a career of over 20 years can be ignored for the purposes of section 2(4) with the lengthy periods of employment either side giving rise to a stable employment relationship so that time did not run against her, even in respect of the period of employment prior to the break, until her employment finally ended.

(b) ***Cockrill-v-Wolverhampton Metropolitan Borough Council (1) Secretary of State for Education (2).*** Mrs Cockrill presented her IT1 on 19th December 1994. She had been employed by Wolverhampton at all material times, first as a supply and temporary teacher between February 1985 and November 1987 (the period of claim), thereafter in a full time pensionable teaching post. During the period of claim, she has identified fourteen separate assignments of varying durations, between which there were some gaps, not exclusively because of school holidays. Mrs Cockrill's case raises two questions: first, was there a stable employment relationship in existence during the period of claim; secondly, if so, did it come to an end, and therefore cause time to run for the purposes of section 2(4), when she took up the full time, pensionable, position.

(c) ***Jones-v-Stockport Metropolitan Borough Council (1) Secretary of State for Education (2).*** Mrs Jones presented her IT1 on the 4th December 1994. She has been a home tutor since April 1977, excluded from the pension scheme until August 1993 when the basis on which she was paid changed from hourly to a proportion of full-time salary. She worked a varying number of hours on assignments of varying length during school term time only. The respondent's say there is no stable employment relationship because there was no obligation on Mrs Jones to accept the assignments offered to her and because the hours and days of

work and the subjects taught varied week by week: despite the superficial appearance of consistency and stability, the relationship was essentially one of casual, ad hoc employment.

(d) ***Light-v-Birmingham City Council (1) Secretary of State for Education (2).*** Mrs Light was employed by Birmingham for two periods: between September 1975 and July 1987 and again from 1991. Her complaint, presented on the 17th December 1994, originally included both periods but has now been withdrawn in respect of the first. No explanation for the four year gap appears to be available and no explanation for the withdrawal has been offered. During the second period she worked during term times only for between 30 and 35 weeks a year and for between three and 13 hours a week. She was admitted to the pension scheme on 1st May 1995. She is the paradigm of the teacher employed on a succession of termly (or, by analogy, sessional, that is academic yearly) contracts.

(e) ***Kilburn-v-Lancashire County Council (1) Secretary of State for Education (2).*** Mrs Kilburn presented her IT1 on 4th January 2001. She was employed by Lancashire as a part-time supply teacher from 1967 (although the period of claim is of course limited to service after 8th April 1976). She worked in term time with some gaps and, at least once, during the summer holiday. She then took a permanent, pensionable position. Two questions arise: did the pattern of her part-time supply teaching create a stable employment relationship and if so did it survive the change to pensionable employment?

(f) ***Bunyan –v- Hereford College of Technology (1) Secretary of State for Education (2) Worcestershire County Council (as successor to Hereford and Worcester County Council) (3) and Hereford Sixth Form College (4).*** Mrs Bunyan presented her IT1 on 8th December 1994 claiming that she was denied access to the Teachers Pension Scheme between 15th September 1980 and 13th June 1984 when she was a part-time psychology lecturer employed by the County Council to work at the Technical College. Since September 1984 she has been in full time pensionable employment initially at the Technical College and from 1st September 1992 at the Sixth Form College. Both colleges became independent Further Education Colleges from the 1st April 1993. Mrs Bunyan's case raises three issues: was there a stable employment relationship during the period of claim: did it survive her translation to full time pensionable employment: if so, did it survive the change of college in 1992.

210. Before I can deal with the test cases themselves I must consider the principles to be applied. The origin of the concept of the stable employment relationship is to be found in Community law ***(Preston (No.1))***, but it is for the domestic courts to determine whether the relationship exists in any given situation. Miss Booth submits, perhaps surprisingly in view of her principal submissions on this issue, that general pronouncements of the European Court won't necessarily help me to resolve the mixed questions of fact and law which that exercise entails. I do not agree. The starting point for any attempt to pin down the essentials of the concept and to formulate them in such a way that they may be of general application, must, in my respectful view, begin with the judgment of the European

Court seen against the backdrop of the submissions made to it and the judgements of the courts below.

211. Mr Cavanagh submits that the basis on which the court found that section 2(5) breached the principle of effectiveness sheds light on the meaning of section 2(4) and, in consequence, the potential breadth of the stable employment relationship exception to it. He further submits that stable employment relationships were held by the European Court to be outside what he describes as the full rigour of section 2(4) because applying it in its undiluted form made it impossible for employees in certain circumstances to recover their full loss. Neither submission in my view is correct. He further submits, this time I think correctly, that the court encompassed within its ruling not merely employment under a regular succession of contracts, but employment of a more intermittent nature. However, I differ from him in the conclusions to be drawn from that submission.

212. Work of an intermittent nature was expressly discussed (his group (c)) by Lord Slynn [***Preston (No.1)*** at p. 236 B]; was advanced on behalf of the applicants merely as one example of the range of employment patterns at which their submission was directed; and, apparently, treated as such in paragraph 65 of the court's judgement. The fact that it is mentioned neither in the ruling nor in paragraph 69 is unhelpful but possibly explicable by the European legal tradition of verbal economy. The reference in paragraph 68 to *"...successive short term contracts of the kind referred to in the third question..."* which mentioned only contracts *"...covering defined periods of time with intervals between (them)"* at first sight suggests that intermittent employment was not included, but ultimately remains ambiguous. I am content, in the absence of an express rejection of the possibility by the European Court, to accept that the stable employment relationship exception to section 2(4) is apt to encompass a succession of intermittent contracts as well as those, to borrow Mr Cavanagh's phrase, of metronomic regularity. It follows that to the extent (which I have to admit is unclear) that the respondents submit that the stable employment relationship exception encompasses only applicants employed on sessional or termly contracts (Lord Slynn's groups (a) and (b)) but not applicants who work intermittently (Lord Slynn's group (c)), I reject that submission.

213. I think it must therefore follow that Mr Cavanagh's submission that the court did not limit its ruling to a narrow range of factual issues and that it is possible to extrapolate from its judgment, answers to related questions such as those arising from the test cases on this issue, is also correct, but only to the extent that whereas groups (a) and (b) were self-defining and therefore self limiting, group (c) was not.

214. In developing his submission that the court's ruling on section 2(5) throws light on the interpretation of section 2(4) and the stable employment relationship exception to it - the principle proposition on which his remaining submissions, (or the conclusions to be derived from them) depend - Mr Cavanagh relies heavily on

the submission of the Commission, recorded at paragraph 66 of the judgement which I have not yet set out.

> *"In its written observations, the Commission maintains that the application of [sec 2(4)] to actions brought by such workers is incompatible with the principle of effectiveness in two respects.....Secondly, such a rule precludes inclusion of all past service of the workers concerned in the calculation of their retirement benefits even where such service formed part of a continuous employment relationship. Any such workers who brought their first legal actions within the six months following the end of their last contract would be deprived of the possibility of having service under their previous contracts recognised."*

It is, he submits the same argument which succeeded in respect of section 2(5) which is why it assists us to understand section 2(4). I disagree.

215. It is of course true that the basis of the Commission's submission is the same in both cases; that the application of time limits and an *a priori* limit on the period to which a remedy can apply, breach the Community law principle of effectiveness. But, in respect of question 3, the thrust of the Commission's submission is either much narrower than in respect of section 2(5) or can be read as being in the alternative. Section 2(5) was said to breach the principle of effectiveness *per se*. In respect of section 2(4), the objection was confined (as the use of the words *"Any such workers..."* implies) or directed in the alternative, to *"service (which) formed part of a continuous employment relationship"* which must be read as being synonymous with stable employment relationship.

216. Mr Cavanagh further submits that his suggested approach to the origin and meaning of the stable employment relationship exception is supported by comparing the Opinion of, and in particular the answer to question 3 proposed by, the Advocate-General, with the answer actually given by the court. At paragraph 133 of his Opinion, the Advocate-General says that he does not share the view of the Commission. In paragraphs 135 to 139 (which I trust I may be forgiven for not setting out in full) he concludes that to permit the exceptions to section 2(4) contended for by the applicants and the Commission would breach the fundamental principle of legal certainty because *"...it is impossible to determine precisely the time at which (the) employment relationship ends. Correspondingly, it becomes impossible to ascertain precisely the starting point of the period within which legal proceedings must be brought."* [para. 138]

217. Mr Cavanagh submits that the court's rejection of the Advocate-General's proposed answer to the question and their adoption, by implication, of the Commission's submission, means that legal certainty must give way, when one seeks to interpret the meaning of stable employment relationship, to the need to provide a remedy for all past service. He submits that the respondents' submissions in their skeleton arguments are merely a re-run of the arguments which failed in the European Court in ***Preston (No.1).***

218. Section 2(5) was disapplied by the court in its entirety; section 2(4) was disapplied (if at all) only to the limited extent contemplated by the stable employment relationship exception. I say *"if at all"* because, if I accept the respondents' submissions, the better view is that the stable employment relationship is not an exception to section 2(4) but, by interpretation, encompassed by it. As Miss Booth submits, it is clear from para. 34 of its judgment that the European Court was alive to, and accepted as inevitable, the possibility of the loss of part (as well as the whole) of a claim as the result of the application of section 2(4) as it had been interpreted by the UK courts. It is also clear from paragraph 33, (which, together with para. 34 is in that part of the judgment dealing with the general applicability of section 2(4)) that this flowed directly from the reaffirmation by the court of the fundamental principle of legal certainty. Nonetheless, the court held section 2(4) not to be incompatible with Community law. Because this principle was re-iterated in paragraph 67 which is in that part of the judgment dealing with question 3, the court was clearly not rejecting the basis of the Advocate-General's submission.

219. Miss Tether's submission on behalf of certain of the Further Education Colleges (to which Mr Paines added his usual helpful footnotes), is, in my judgement, unquestionably correct. Paragraphs 68 and 69 of the judgement read together provide the answer. The difference between the Advocate-General and the court is not one of principle but merely of degree or perhaps fact. In the Advocate-General's view, the only interpretation of section 2(4) consonant with the fundamental principle of legal certainty is that held to be correct up to that point by all the UK courts and contended for by the respondents, namely that time must run from the end of each contract, that being the only occasion when the starting point for the limitation period could be identified with certainty. The court noted that this made the exercise of the rights conferred by Art 141 extremely difficult, but concluded that, still consonant with the fundamental principle of legal certainty, that could be rectified in those cases (and only in those cases) where a stable employment relationship had existed and had ended because *"...it is possible to fix a precise starting point for the limitation period"* [judgement para. 69].

220. Understood in that way, it is not the respondents who are attempting to re-fight in the domestic courts battles already lost in Luxembourg, but the applicants, particularly if the view that the submission of the Commission was expressed in the alternative, is correct, the court clearly having rejected the suggestion that section 2(4) be disapplied in any circumstances other than when a stable employment relationship exists.

221. This view of the law helps to explain why I found such difficulty with Mr Cavanagh's submission that intermittent contracts and those of metronomic regularity had to be approached differently, the interpretation of the former being informed by the need to avoid the problem highlighted in the Commissions submission – in effect the deferred pay argument. Whilst there are of course instances where the proposition which gives rise to the creation of an exception also defines or helps to define its parameters, given the almost limitless permutation of working patterns which might conceivably be categorised as

intermittent, that clearly could not be so here. That there was a fatal flaw in Mr Cavanagh's submission became apparent when he conceded that although within the possible range of working patterns there would of course be some which fell on the wrong side of the dividing line, he was unable to offer any guidance as to where that dividing line might be. The only conclusion to be drawn therefore is that the Commission's submission offers no assistance whatever in identifying those intermittent working patterns which create, or might create, a stable employment relationship.

222. It now becomes clear why references to intermittent working patterns disappear from the court's judgment after paragraph 65. They are neither the victim of accidental omission nor of the European legal tradition of verbal economy. Nor has intermittency been excluded from the main proposition of regularity. On the contrary, it has disappeared through merger with the regular interval contracts, a process of absorption into a single proposition. It must follow therefore that what is said by the court in paragraphs 69 and 72 about contracts concluded at regular intervals applies equally to work which is intermittent.

223. That conclusion finds support in the speech of Lord Slynn in ***Preston (No.2)*** when he said [para 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."*

224. It is immediately apparent that this gives rise to very considerable practical difficulties as both linguistically and conceptually, 'regular' and 'intermittent' are contradictory, perhaps incompatible. An analysis of the essential ingredients of the stable employment relationship which are to be found both in the judgment of the court and propositions derived from it, will throw such light as can be generated onto the problem.

225. I accept the submission of all of the respondents, made most forcefully by Miss Tether and Mr Paines, that the precept that it must be possible to fix the start of the limitation period is vital. That necessarily follows from the concluding phrase of para. 69 of the judgment and to hold otherwise would be inconsistent with the fundamental principle of legal certainty to which the stable employment relationship is subject. However, as Mr Cavanagh has demonstrated, that proposition, plainly right though it is, is not without its difficulties. When, in the interval between the last contract and the next anticipated contract, does time begin to run? This problem does not, contrary I think to what Mr Cavanagh implies, diminish the importance of the need to be able to identify the start of the period; rather it demonstrates the equally fundamental importance of the other elements of the relationship which assist in that process of identification, in particular the

periodicity, perhaps preferably, predictability, of the next anticipated contract in the sequence.

226. The starting point (see my reasoning on test issue 3(a)(ii) is to recognise that between one sessional contract and the next, the relationship remains in being. Time therefore does not begin to run until either one of the parties renders future performance impossible (such as by taking permanent employment elsewhere) or informs the other that the new contract will either not be offered or not accepted if offered, or the next contract in the sequence fails to materialise. Time will therefore run, at the latest, from the date on which the periodicity of the relationship suggests the new contract should have started. This highlights the difficulty in reconciling 'intermittent' and 'regular', as in the case of the former the starting date of the next anticipated contract may be impossible to ascertain in advance.

227. Mr Paines' submission that paragraph 69 yields four of the essential ingredients of the relationship is also correct. They are: succession of short term contracts; regular intervals: the same employment: the same pension scheme. Mr Cavanagh's submission that a continuous contract is even more stable for this purpose than a broken series of contracts is to play with words. The stable employment relationship concept was devised to ensure that, consistent with the fundamental principle of legal certainty, a limited class of employees who did not have a single contract could enforce their Article 141 rights: therefore where a single contract exists, the stable employment relationship concept is otiose.

228. Mr Cavanagh's submission that a stable employment relationship can survive a move from one employer to another provided both are subject to the same pension scheme is, in my respectful view, unarguable. For the reasons which I trust I have demonstrated above, any submission based on the apparent difference between *"the same employer"* and *"the same employment"* is at best opportunistic; at worst, disingenuous. I entirely accept Mr Paines' submission that whether or no the two employers are subject to the same pension scheme is wholly beside the point. We are concerned with contracts of employment and the time limit for commencing proceedings in respect of an alleged breach of a term implied into them by law, issues which are entirely unrelated to en employers pension arrangements. Indeed, it is manifest from para. 69 of the judgement that the existence of *"the same pension scheme"* is an additional hurdle for an applicant to cross on the way to establishing that a stable employment relationship exists. It cannot be read as cutting down the requirement for all of the contracts to have been with the same employer if two (or presumably more) different employers happen to be in the same pension scheme.

229. It is also clear both from the wording of question 3, the Order for Reference (see in particular paragraph 8 of the facts) and the submissions made to the court, that the breaks in service must arise either because of the nature of the work being done (as in the case of supply teachers or home tutors) or because of the nature of the contract offered by the employer to do the work (as in sessional or termly contracts). Quite clearly, termination of employment by the employer because of

redundancy or for disciplinary reasons would cause time to start running. But Mr Cavanagh submits that the concept of a stable employment relationship is apt to cover breaks at the employee's instigation, particularly those which would not be regarded as breaking the employment relationship in the case of a full time employee, and those which would not break continuity of service for certain statutory purposes. None of the test cases raise these issues precisely. Where an absence was due to childbirth, it appears to be common ground that each applicant was absent for longer than the statutory maternity leave period. Where the absence was similar in length to that which might be afforded a full time employee on a career break, it is common ground that no career break had been arranged with the employer. No test case applicant claims to have had a contract whereby her employer expressly agreed to treat an earlier period of employment as being continuous with a new period. I therefore express no view on any of these points other than to note that in order for them to be compatible with a stable employment relationship they would have to interrupt a series of regular short term contracts, not a continuous contract.

230. Mr Cavanagh submits that it may be relevant in determining whether a stable employment relationship exists to consider whether the employment would be regarded as continuous for certain statutory purposes and he refers to ***Ford-v-Warwickshire County Council*** *[1983] ICR 273 HL.* ***Ford*** and the other cases on this topic are concerned with continuity of employment where the length of the period of continuous employment is of relevance either to determine entitlement to bring a complaint of unfair dismissal or qualification for a redundancy payment, or the amount of the latter or the amount of the basic award of compensation in the former. The cases lay down no statement of general principle but are concerned with the interpretation of specific statutory provisions which are now to be found in Part XIV Chapter I of the Employment Rights Act 1996, which begins at section 210, sub-section (1) of which provides:

> *"References in any provision of this Act which refers to a period of continuous employment are...to a period computed in accordance with this Chapter."*

These proceedings do not arise out of a provision of that Act. Accordingly the decisions in ***Ford*** and the related cases, which are concerned with a self contained statutory scheme, are not in point and can be of no assistance in determining the meaning of a wholly new and only loosely related concept.

231. I also accept Mr Paines' submission that such an approach would be inimical to the fundamental principle of legal certainty in that it would be quite impossible to tell not only at the time of the break in service but for some time, perhaps many years, afterwards, whether, in the light of ***Ford,*** service was or was not to be deemed continuous at any given moment and therefore whether or not time had run for the purposes of section 2(4) from the beginning of the break in service. That question must be determinable at the time and not with the benefit of hindsight.

232. It must therefore follow that an employment relationship interrupted by breaks can only be stable if the breaks arise from the nature of the work or the nature of the contracts offered by the employer.

233. Mr Cavanagh submits that the European Court does not say that the terms and conditions of the succeeding contracts have to be the same or similar. That is true, but both the Report for the hearing and the applicant's submissions are predicated on that basis and it must therefore be assumed that the court ruled on that basis. Again, it is simply inconsistent with the nature of a stable employment relationship that the fundamentals of the succeeding contracts should vary. Such would point to the arrangement being ad hoc or casual.

234. Miss Booth submits that the stable nature of the relationship must be discernible from the outset, that it cannot evolve, and the question whether a stable employment relationship exists is wholly or very largely objective. All of the respondents submit, and I do not understand Mr Cavanagh to dissent, that although it is not necessary that at the conclusion of a contract in the series there should be an obligation that the next contract will be both offered and accepted, there must exist an expectation, shared by both parties, that that will happen. To a large extent I accept all of those submissions.

235. It will be apparent from the accumulation of indicia of the existence of a stable employment relationship that the difficulty in applying them equally to intermittent and regular work patterns is as real as it is apparent. Intermittent work patterns all seem to fall foul of one or more of the essential criteria. Yet given what I have held to be the effect of the ruling of the European Court and given Mr Paines' concession that some intermittent work patterns can be stable employment relationships, it must follow that to the extent that they do fall foul of them, the criteria must be modified to accommodate them, consistent with the overall concept of the stable employment relationship and consistent, of course, with the principle of legal certainty and therefore the ability to identify the date from which the limitation period begins to run. Some of the criteria cannot of course be altered. The breaks between work must be a reflection of the employers demand for work, not the demands of the employee's private life. The Order for Reference, (facts para. 8(3)) refers to *"Part-time teachers who, **by reason of the nature of their jobs**, worked intermittently."* [emphasis added]. The work must be for the same employer and be broadly the same throughout; that is it will be supply teaching though not necessarily at the same schools, or the same subject at the same key stages; or home teaching, but not necessarily the same subjects, or to the same pupils.

236. It is for this reason that I have only partially accepted the last of the respondents' submissions. With employment as regular as sessional or termly teaching, subject to the need for the second contract to materialise after the first predicted interval, it will be apparent from the outset that the work pattern is of such regularity as to give rise to a stable employment relationship. With regular work patterns the respondents' submissions appear to be correct. With intermittent work patterns I do not think they are. It seems to me that to accommodate the

differences between 'regular' and 'intermittent' working patterns whilst preserving the fundamentals, some prioritisation of the criteria is required. Moreover, although I recognise the dangers inherent in this argument, it will be necessary to import a measure of subjectivity into the analysis and to recognise that where the work is intermittent, a stable employment relationship may evolve over a rather longer period than the beginning of the second contract in a regular series.

237. I pause here to assert that I draw these distinctions not out of a desire to see justice done in deserving cases, but the need to reconcile on an intellectually sustainable basis that which at first sight is irreconcilable but which must be reconciled to the extent necessary to accommodate the ruling of the court and Mr Paines' concession.

238. In my judgement, the need for there to be a predictable cycle of periods of being in and out of contract must assume a lesser degree of importance when one is considering intermittent work. If this was not to be so it would, because of the very nature of the work in question, by itself preclude the possibility of a stable employment relationship ever arising in such cases. That is not to say, however, that it assumes no importance. It is replaced as the key criteria by the expectation (in the sense of intention rather than hope) of the parties. Thus, if, when asked by the officious bystander whether it was their intention that work would be offered and would be accepted when offered, at intervals consistent with the pattern of work in question, for the foreseeable future, the parties were able to answer with a testy *"of course"*, then a stable employment relationship would exist so long as that intention remained mutual, surviving even severe periodic downturns in work, so long as they arose *"by reason of the nature of (the job)"*. The fundamental principle of legal certainty is safeguarded because time will not run until the parties expectation changes, a matter of which, by virtue of the nature of the relationship, they are likely to be aware.

239. Perhaps if I may put it colloquially, the way to approach this extremely difficult question is to ask, despite the fact that she was not employed under a permanent contract, did the applicant and her employr both regard her as a member of the first team; part of the furniture of the home tuition or supply teaching service, rather than someone who could be turned to if the need arose. Merely being on a list of those to whom work is offered from time to time would be insufficient. In practice, this is likely to exclude all supply teachers and home tutors other than those who embark upon the work as a career or who do it long term on a regular (in the non-metronomic sense of the word) basis.

240. I now turn to the individual test cases which I will deal with in roughly ascending order of difficulty.

241. ***Light –v- Birmingham City Council and another.***
By the concession of the applicant, the first part of the claim is abandoned. I would have dismissed it in any event as Mrs Light's unexplained absence of more than four years unquestionably interrupted the periodic nature of the work and thus caused time to run against her. By the concession of the respondents, she

succeeds in respect of the second period of claim. I would have upheld her claim in respect of this second period as she worked on an unbroken succession of term time only contracts from the date on which she re-entered the employment of Birmingham in September 1991 until she presented her claim. She was admitted to the pension scheme on 1st May 1995. Therefore subject to any representations within 28 days of the promulgation of this decision I propose to issue a declaration of her entitlement to membership of the Teachers Pension Scheme between 1st September 1991 and 30th April 1995.

242. ***Leeson-v-Basildon and Thurrock General Hospital and another***
Mrs Leeson presented her complaint on the 30th June 2001 claiming for the whole of her service as a nursing auxiliary since 24th July 1978 during which time she had been continuously employed at the hospital save for a period of eleven months in 1983 when she resigned for personal reasons. When she left she had expressed the hope that if she wished to return the hospital might accommodate her to which no reply was given. When she left, the answers to the questions whether she might return and if so when could only be guessed at. But because she did not work under a series of short term contracts the stable employment relationship argument is unavailable to her to bridge that gap in her employment in any event. Her claim in respect of the period of service which ended in January 1983 must fail as time ran against her when she resigned and the claim is now time barred. The claim is however dismissed in its entirety because she was at all times eligible to join the pension scheme but elected not to do so.

243. ***Richardson-v-Nottinghamshire County Council and another***
(a) Mrs Richardson commenced proceedings in May 2001 in respect of three periods of employment with Nottinghamshire, the last of which ended in October 1985. The claim must fail because between January and December 1986 she worked for Derbyshire County Council. That was a voluntary move on her part which caused time to run against her in respect of her preceding service, and by May 2001 her claim was 15 years out of time.

(b) But in my judgement that preceding service did not disclose the existence of a stable employment relationship anyway, which meant that time ran against her in respect of each period of employment as it ended.

(c) Her first period of claim is in respect of April 1976 to December 1978 but she then left the employment of Nottinghamshire to bring up her family and did not return until March 1983, some four and a half years later.

(d) She then worked in pensionable employment as a part-time supply teacher until December 1983 and then appears to have done no more work until the autumn of 1984 when she did a small amount of home teaching and supply teaching in each of the last three months of the year.

(e) She then worked intermittently throughout 1985 doing both supply and home teaching before moving to Derbyshire, the mix of contractual and working types being contraindicative of a stable employment relationship. Also, from the limited

information available it is plain that she did not work every week even in months which were all or largely term time; for example only three days in the September and six in the December.

244. ***Gardner-v-Hereford Hospitals NHS Trust (as successor to Coventry, Warwickshire, Herefordshire and Worcestershire Health Authority) and others***
Mr Cavanagh invites me to treat Mrs Gardner as a stable employment relationship test applicant to the same extent as, and for the same period of time as, she has been treated as an over-arching pension scheme applicant. It must follow that I would have dismissed her claim to the same extent. Her peregrination from hospital to hospital was anathema to the existence of a stable employment relationship.

245. ***Johnson-v-North Yorkshire County Council and others***
Mr Cavanagh invites me to deal with Mrs Johnson in the same way as Mrs Gardner. Plainly her voluntary move to East Sussex caused time to run against her in respect of her first period of service with North Yorkshire, which is also the entire period of claim and accordingly her claim must fail.

246. ***Fox-v-East Riding County Council (as successor to Humberside County Council) and others***
I have already dealt with Mrs Fox under statutory novation and its relationship with the stable employment relationship. It follows that I reject Miss Tether's submission that the change of employer on 1st April 1993 caused time to run in respect of any claim which Mrs Fox had against the local authority. Instead, liability in respect of her past service at the Grimsby College under a stable employment relationship passed to that college, and her service under a stable employment relationship at Hull College passed to that college. Miss Tether concedes that if she can make good the facts set out in her statement in respect of her service with the respective colleges after that date, then the stable employment was maintained and Mrs Fox will succeed. The claim in respect of her employment at the Grimsby Adult and Basic Education Unity between 1987 and 1989 is abandoned. The question of whether a stable employment relationship existed in respect of either college and if so its extent, is remitted for determination on the facts to the employment tribunal at Hull.

247. ***Bunyan-v- Worcestershire County Council (as successor to Hereford and Worcester County Council and others***
(a) Between 15th September 1980 and 13th June 1984 Mrs Bunyan worked part-time as an hourly paid lecturer employed by the County Council at the Herefordshire College of Technology. The respondents concede for the purposes of this hearing that throughout that period, which is the period of claim, Mrs Bunyan was in a stable employment relationship with the County Council. They submit however, that this came to an end and time accordingly began to run, by, at the latest, 1st September 1984 when she embarked on a new fixed term, temporary, full time pensionable contract to teach psychology which after a year became permanent.

(b) They alternatively submit that time began to run on the 6th July 1984, the date of offer of the new contract, on which date it became clear that the sequence of periodic part-time contracts which had given rise to the stable employment relationship had ended.

(c) Mr Cavanagh submits that the stable employment relationship continued into and through the subsequent full-time contracts and time did not therefore run against Mrs Bunyan until those contracts came to an end. Mr Paines submits that this is wrong. A stable employment relationship requires as one of the essential ingredients prescribed by the court, that the work should be the same employment. This was plainly not the same employment. The letter of appointment makes clear that the full time job was 'a newly created post'. I agree with Mr Paines.

(d) The concept of the stable employment relationship was devised to reconcile the need for legal certainty in the running of time limits with the excessive difficulty caused to employees employed under a series of short term contracts in enforcing their rights under Art 141. But with the ending of the series of short term contracts, that difficulty, and with it the need for the added protection of the stable employment relationship, ended. The ending of the sequence of short term contracts, albeit by their replacement with a full-time fixed term contract (a fortiori when that in turn became permanent a year later) caused time to run against Mrs Bunyan. The claim against the County Council is therefore time barred and must fail.

(e) The claims against the Secretary of State and the Technical College fail for the same reason. The claim against the Sixth Form College also fails because there was no liability capable of being transferred to it.

(f) If it had been necessary to do so, I would have held that Mrs Bunyan's subsequent move to the Sixth Form College in 1992 also broke the chain down which liability was passing. From the documents it seems clear that this was not a move imposed upon her but one to which she agreed and for which she negotiated a change in her terms and conditions from those of a teacher in further education to those of a school teacher.

248. ***Kilburn-v-Lancashire County Council and another***

(a) Mrs Kilburn worked for Lancashire initially full time until June 1973 and then from October 1974 at various locations as a supply teacher until entering full time employment from 1st September 1979 as a primary school teacher. The respondents submit that none of her work demonstrates a stable employment relationship.

(b) For the same reason that time began to run against Mrs Bunyan when she took up her full time appointment, it must also run against Mrs Kilburn when she took up hers. Her right to complain to an employment tribunal therefore expired in March 1980 and her claim must be dismissed.

(c) But it would also be instructive to examine her work pattern prior to that to see if it was capable of giving rise to a stable employment relationship. She worked full time for Lancashire between August 1969 and June 1973 and then as a part-time supply teacher between October 1974 and January 1975. She resumed part-time supply teaching at the end of March 1976.

(d) The first two periods are not only outside the permissible period of claim which begins on 8th April 1976, but, more importantly, are also so remote in point of time from the beginning of the third period that they cannot be considered as being part of any continuing employment relationship.

(e) The little information available about the third period suggests that between March 1976 and the end of that year she may have done a small number of days supply teaching at Walton High School. That clearly could not give rise to a stable employment relationship.

(f) Then from 11th January 1977 to August 1979 she worked intermittently at Nelson and Colne College as a part-time teacher of English as a second language. Her first assignment seems to have ended at the end of May 1977 and she did not resume teaching at the College until September 1977.

(g) Thereafter she appears to have worked regularly for 8 hours a week until July 1978. Work resumed again in September 1978 until June 1979. Her hours appear to have fluctuated during this time as she was teaching six separate courses, four of which appear to have lasted the whole year but two of which appear to have lasted only two weeks.

(h) As I understand the European Court's judgment, her work between September 1977 and June 1979 would be regarded as regular rather than intermittent despite the fact that within the regular termly cycle, her hours varied. Had this pattern continued, a stable employment relationship would have arisen and a claim could have been made in respect of it, but it was of course broken when she took up her full-time post in September 1979.

(i) She also claims in respect of the period 29th August 1978 to 31st August 1979 when she says that she worked as a supply teacher at Holmefield Teaching Centre. The only information I have about this is that Mrs Kilburn worked there regularly, she believes usually on 5 days a week. If that is right, it would appear to be capable of creating a stable employment relationship and, but for my finding about the effect of her translation to fulltime pensionable employment from the 1st September 1979, I would have remitted the matter to the employment tribunal at Manchester to make the necessary findings of fact.

(j) But a cautionary note must be added. There appear to be no extant records of her employment at Holmefield and if what I have set out above of the history of her work there represents the limits of her recollection, as it must be presumed to do being taken from a statement prepared by her for this hearing, her claim would appear doomed to failure. The burden is on an applicant to satisfy the tribunal on

the balance of probabilities not merely of the basic facts of a working pattern, but of the other matters needed to translate that pattern into a stable working relationship.

249. ***Cockril -v- Wolverhampton Metropolitan Borough Council and another***
(a) Mrs Cockrill's claim covers, or appears to cover, 3 separate periods of time. The first period of claim covers the short interval between the 5th February 1985 and the end of March 1985 when she worked as a supply teacher at various schools.

(b) Between the 15th April 1985 and the 31st May 1987, she worked on temporary contracts, frequently full-time, at a number of infant and junior schools. All of that employment was pensionable.

(c) The second period of claim covers another very short period from the 2nd June 1987 to the end of the term in July when she worked as a supply teacher at a junior school.

(d) The third period of claim begins on the 15th September 1987 when it appears that she worked for a few days in that week at the Wodenfields Junior School before moving to Dovecotes Junior School on the 22nd September where she stayed until half term, presumably towards the end of October..

(e) On the 2nd November 1987, she began work at Ettingshall Infants' School and the agreed statement of facts says that in 1988 that post became permanent and "*Since that time my employment has been treated as pensionable for the purposes of the scheme*". It is not clear whether there was a brief period from the 2nd November 1987 until such time in 1988 when the post became permanent which was not at that time treated as pensionable, but the submissions made to me have proceeded on the basis that the last period of claim ends with the autumn half term of 1987 when she ceased to supply teach at Dovecotes Junior School.

(f) As in the case of Mrs Bunyan and Mrs Kilburn the change of status from part-time temporary to permanent and pensionable, must break any stable employment relationship that then existed. But once again an examination of whether any such relationship was in being at that time would be helpful.

(g) Mr Paines submits that if the succession of pensionable contracts between the 15th April 1985 and the 31st May 1987 had not emerged, it would not have been possible from the previous pattern of work to identify a moment from which time began to run for limitation purposes, other than at the end of each individual contract. In other words, no stable employment relationship had been created. In my judgement that must be right as a more detailed analysis of the working pattern reveals.

(h) The first of this succession of brief placements began on the 5th February 1985 and lasted, in Mrs Cockrill's own words, "*for a few days*" at the St Paul's Church of England Junior and Infant School. She then worked for one day only on the 25th February at the Manor Junior and Infant School. In each of the 5 weeks beginning

on the 25th February and ending on the 29th March, she worked Thursdays only at the Eastfield Junior School. Finally, in the week commencing 25th March she worked at West Park Infant School, although her statement and the schedule accompanying it gives no indication of how many days this placement lasted.

(i)The period in question was far too brief and the work far too spasmodic to be capable of creating a stable employment relationship and I therefore accept Mr Paines' submission that time ran from the end of each of the individual contracts giving rise to each of the individual placements.

(j)Mr Paines makes the same submission in respect of the 6 or 7 weeks at St Stephen's Church of England Junior and Infant School at the end of the summer term in 1987; the *"few days"* in the week commencing the 15th September at Wodensfield Junior School and the 4 or perhaps 5 weeks at Dovecotes Junior School from the 22nd September 1987 until the autumn half term break. For the same reasons, I accept that submission.

(k) Time therefore ran in respect of each of the contracts giving rise to the individual placements from the ending of that placement. It must follow that Mrs Cockrill's complaints are all time barred and must be dismissed.

250. ***Jones -v- Stockport Metropolitan Borough Council and others***
(a) Mrs Jones worked for the Respondents as a home tutor from March 1977 to December 2001. Until August 1989, none of her work had been pensionable but from then until August 1993 the part of her work based at the Pendlebury Centre, a home tuition centre, was pensionable. However, alongside that work she continued with other home tuition work which was paid on an hourly basis and was not pensionable. This ended in 1993 when that part of her work became remunerated as a proportion of full-time pay, rather than hourly and was therefore eligible for contributions to the pension scheme.

(b) Away from the Pendlebury Centre, her work was organised on the basis of a freshly created contract for each child who was in need of home tuition. It appears to be common ground that although Mrs Jones was free to refuse any assignment offered to her, she never did so.

(c) Initially, the contracts were open-ended, i.e. no duration was stated in the letter of appointment, but latterly the contracts appear to have been for a defined period of time. It also appears to be common ground that the obligations of the Council were coextensive with those of Mrs Jones in that they were not obliged to offer work to her. However, it seems clear that they did so on a regular (in its non-metronomic sense) basis.

(d) This case, in common with many of the part-time worker pension cases, is bedevilled by the absence of detailed information about Mrs Jones' working pattern, due no doubt to the loss of records over the years. The Council has produced a list of 27 contracts between the 9th March 1977 and the 6th January

1986 and a further contract with a partial date. The Council do not assert that this is even a complete list for the years in question and Mrs Jones asserts that it is not.

(e) A search of the payroll records held by the Council between 1979 and 1993 is more helpful, but the picture remains incomplete. The whole of the year 1980/1981 appears to be missing and no payslips have been found for January or February 1988. 1989/1990 is also incomplete. However, the records are sufficient to reveal how consistently (at least on a month to month basis) Mrs Jones worked for them

(f) Apart from October 1982 (the pay records are monthly in arrears), possibly March 1985 and June 1992, it seems that she did at least some work in every month of the year, other than each August, which is, of course, the only month which is entirely school holidays. But given that the hours claimed vary from as little as 21½ to as much as 144½ (however, this is the figure for April 1985 and may therefore represent two months which would explain the absence of a separate record for March), it seems likely that in some months she would not have worked each week (and would certainly not have worked weeks of school holiday) although the figures suggest that she is likely to have worked in most weeks and, in some months, most, if not all, days.

(g) Mr Paines submits that I must inevitably reach the same conclusion in the case of Mrs Jones as in the case of Mr Cockrill. Mrs Jones' case, despite the frequency and non-metronomic regularity for which she worked for Stockport, still does not, in Mr Paines' submission, fit the essential criteria of being able to identify a precise starting date from which time begins to run. There was, as he put it, no periodicity but to the extent that there was it was interrupted on the three occasions (other than August) when the records show that no hours were worked in a particular month. Although Mr Paines does concede that intermittent patterns of working may give rise to a stable employment relationship, the facts of this case do not do so. Mr Cavanagh submits that if a stable employment relationship does not arise in the case of Mrs Jones, no home tutor or supply teacher can succeed.

(h) Paragraph 8(3) of the facts in the Order for Reference is concerned with those who work intermittently because of the nature of the work. Given that Stockport does not claim that Mrs Jones ever declined work when offered, it would seem to follow that the intermittent nature of her working pattern was due exclusively to the nature of the work. Mrs Jones asserts in her statement, and the respondents have not suggested otherwise, that she was a career home tutor. She does not use those words but says "*From 1977 I recommenced working on a part-time basis in order to reconcile my childcare responsibilities with my work*". She was still working on the same basis (although this time under the aegis of the pension scheme) when she presented her originating application in December 1994 and, as far as I know, did so until she retired.

(i) This seems to me to be pre-eminently one of what I suspect will be a fairly rare instance of a pattern of intermittent working which is capable of being a stable employment relationship. Where such occurs, the expectations, in the sense of intention rather than hope, of the parties is of paramount importance. The

question of whether Mrs Jones and Stockport had the necessary expectations of each other to create a stable employment relationship is remitted for hearing by a full tribunal at Manchester.

251. I would therefore answer **test issue 6** as follows:

1. A stable employment relationship arises (and only arises) when an employee is employed - by the same employer - on a succession of contracts - punctuated by intervals without a contract - on the same or broadly similar terms - to perform essentially the same work - under the same pension scheme – provided that the sequence of contracts and the pattern of intervals between them is dictated either by the nature of the work itself or the employers requirements for employees to perform it - and (subject to 2 below) the contracts and the intervals between them are sufficiently regular for it to be apparent without the benefit of hindsight to determine when the sequence is broken, that being the moment from which time begins to run.

2. Where the sequence is intermittent rather than regular, the intention of the parties both as to the inception and the cessation of the working arrangement which is said to give rise to the stable employment relationship, outweighs the absence of a pattern of strict regularity. Where a stable employment relationship has arisen in such circumstances it remains in being until the parties intend otherwise, notwithstanding changes in the frequency of the work, provided that any such changes arise exclusively from the nature of the work.

3. A stable employment relationship ceases and time for commencing proceedings therefore begins to run when:

- **(a) A party indicates that further contracts will either not be offered or not accepted if offered**
- **(b) A party acts inconsistently with the continuation of the relationship**
- **(c) a further contract is not offered when the periodicity of the preceding cycle of contracts indicates that it should have been offered**
- **(d) a party ceases to intend to treat an intermittent relationship as stable**
- **(e) the terms of the contract or the work to be done under it alters radically; e.g. a succession of short term contracts is superseded by a permanent contract.**

4. The burden of proving, not merely the pattern of work but also any of the other factors necessary to demonstrate the existence of a stable employment relationship is upon the applicant.

Epilogue

252. I trust I may be forgiven for concluding this decision with a plea. It is now 7½ years since the part-time worker pension case flood began and 6½ years since I gave my decision on the preliminary issues. In the public sector, the cases seem no nearer resolution. The unions who have been represented before me act on

behalf of many but by no means all of the public sector applicants. It seems more than likely that many of those applicants will have good claims, at least for part of the periods of their exclusion from the various pension schemes concerned. Many have retired since the litigation began, some have died. None, it would appear, can have their claims resolved until at least this batch of test cases has exhausted the appeal process and the few remaining issues (largely of remedy) which I have yet to hear, have done likewise. Many of the arguments advanced on behalf of the applicants, both in their skeleton arguments and orally before me, have been met, not without some justification, by the respondents with such epithets as misconceived, sophistry and, most frequently, bizarre. The length of this decision is due in part to my desire to demonstrate as clearly as I can the justification for those descriptions. I appreciate that the problem may not be as one sided as my comments might suggest, and also that it is perhaps none of my business, but nonetheless I feel it would be wrong if I did not conclude this decision by urging the trade unions and those who advise them to think very long and hard about the extent to which they are prepared to pursue some or all of their arguments on appeal in the knowledge that their attempt to cast the net as widely as possible and to include within the scope of any settlement as many people and as many periods of claim as possible, may now be becoming counter productive and working against the interests of perhaps the majority of their members and non-member applicants, at least in respect of the major part of their claims.

.....
Chairman Nottingham
2nd August 2002

DECISION SENT TO THE PARTIES ON
Sth August 2002
AND ENTERED IN THE REGISTER
.....
FOR SECRETARY OF THE TRIBUNALS

Case Nos: 507497/95 and others
Mrs S Preston & others -v- Wolverhampton Healthcare NHS Trust & others (No. 3)

PART-TIME WORKER PENSION CASES
SCHEDULE 1 - DECISIONS IN RESPECT OF INDIVIDUAL TEST CASES

HEALTH

(507497/1995)
S Preston v
1. **Wolverhampton Healthcare NHS Trust**
2. **Secretary of State for Health**

Liability for Mrs Preston's exclusion from the NHS pension scheme between the 5th June 1978 to the 1st April 1994 passes, by virtue of sec. 26 of the National Health Service and Community Care Act 1990, to the First Respondent.

(3202439/01)
L Leeson v
1. **Basildon & Thurrock General Hospital NHS Trust**
2. **Secretary of State for Health**

1. The complaint in respect of the period 24th July 1978 to January 1983 is out of time and is dismissed.

2. The complaint in respect of the period from December 1983 onwards is dismissed as the Applicant was always eligible to join the pension scheme.

(2304361/01)
T Gardner v
1. **Hereford Hospitals NHS Trust**
2. **Royal Bournemouth & Christchurch NHS Trust**
3. **Royal West Sussex NHS Trust**
4. **Frimley Park Hospital NHS Trust**
5. **Secretary of State for Health**

1. The complaints against the First, Second and Third Respondents are out of time and are therefore dismissed.

2. The Applicant can succeed as against the Fourth and Fifth Respondents in respect of her service with the Fourth Respondent only if that service was under either a contract of employment or a stable employment relationship which was in existence at the time the proceedings were commenced or had ended not earlier than six months prior to the commencement of the proceedings. The complaints against the Fourth and Fifth Respondents are therefore remitted to an employment tribunal at London South to determine whether on the facts her complaint against the Fourth Respondent is in time.

(1702374/01)
J Lount v
1. **South Devon Healthcare NHS Trust**
2. **Secretary of State for Health**

There being no breach of the equality clause, the complaint fails and is dismissed.

(3100458/00)
P Savage v 1. Secretary of State for Health
2. Southampton Community NHS Trust

The complaint is remitted to a full tribunal at Southampton to determine whether there was a breach of the equality clause and if so whether the applicant is entitled to a declaration.

(508551/95)
S Tyrrell v 1. NHS Pensions Agency
2. Secretary of State for Health
3. Greater Manchester Health Authority for and on behalf of North Manchester Primary Care Trust (as successor to North Manchester Health Authority)

The complaint is remitted to a full tribunal sitting at Manchester to determine whether there was a breach of the equality clause and if so whether the applicant is entitled to a declaration.

(3104640/00)
J Thomas v 1. Secretary of State for Health
2. Portsmouth Hospitals NHS Trust

The complaint is remitted to a full tribunal at Southampton to determine whether there was a breach of the equality clause and if so whether the applicant is entitled to a declaration.

EDUCATION

(509968/1995)
J Cockrill v 1. Wolverhampton Metropolitan Borough Council
2. Secretary of State for Education

The complaints are out of time and therefore fail and are dismissed.

(507817/1995)
A Jones v 1. Stockport Metropolitan Borough Council
2. Secretary of State for Education

The complaint is remitted to a full tribunal at Manchester to determine whether the Applicant and the First Respondent had the necessary expectations of each other to create a stable employment relationship.

(504275/1995)
R Light v 1. Birmingham City Council
2. Secretary of State for Education

1. The complaint in respect of the period 8th April 1976 to July 1987 is dismissed on withdrawal by the Applicant.

2. By consent, the claim in respect of the period September 1991 to the 30th April 1995 succeeds. Subject to any representations to the contrary within 28 days, Mrs Light is entitled to a declaration that she be admitted to membership of the teachers' pension scheme between those dates.

(513886/1995)
F Fox v
1. **Secretary of State for Education**
2. **East Riding County Council (as successor to Humberside County Council)**
3. **Grimsby College**
4. **Hull College**

1. The complaint against the First and Third Respondents succeeds in respect of the Applicant's exclusion from the pension scheme during the contract of employment which transferred to the College on the 1st April 1993 and in respect of any previous contracts to work at Grimsby College which, together with that contract, comprised a stable employment relationship.

2. The claim against the First and Fourth Respondents will succeed to the same extent if the Applicant was employed at Hull College under either a continuing contract or a stable employment relationship on the 1st April 1993.

3. The applicant also succeeds against both colleges in respect of the period 1st April 1993 to 1st June 1995 (when she was admitted to the pension scheme) if she remained in a stable employment relationship with them throughout this period.

4. The question of whether a stable employment relationship existed between the applicant and the third and fourth respondents is remitted to an employment tribunal at Hull for determination on the facts.

3. The complaint in respect of the Applicant's employment at the Grimsby Adult and Basic Education Unit between 1987 and 1989 is dismissed on withdrawal by the Applicant.

4. The complaints against the Second Respondent are out of time and therefore fail and are dismissed.

(2400332/01)
P Kilburn v
1. **Lancashire County Council**
2. **Secretary of State for Education**

The complaint is out of time and therefore fails and is dismissed.

(502279/1995)
C Bunyan v
1. **Hereford College of Technology**
2. **Secretary of State for Education**
3. **Worcestershire County Council (as successor to Hereford and Worcester County Council)**
4. **Hereford Sixth Form College**

1. The complaints against the First, Second and Third Respondents are out of time and are dismissed.

2. The complaint against the Fourth Respondent is dismissed as no liability passed to it.

(2601994/01)
Richardson v 1. Nottinghamshire County Council
2. Secretary of State for Education

The complaints against both Respondents are out of time and therefore fail and are dismissed.

LOCAL GOVERNMENT

(513343/1995)
S Johnson v 1. North Yorkshire County Council
2. Secretary of State for Transport, Local Government and the Regions
3. Guidance Enterprises Group Ltd

1. The complaints against the First and Second Respondents are out of time and are dismissed.

2. The complaint against the Third Respondent is dismissed as no liability passed to it.

ELECTRICITY SUPPLY SECTOR

(525907/1995)
V Burroughs v 1. Powerhouse Retail
2. Southern Electric

1. The complaint against the First Respondent is dismissed as no liability passed to it.

2. The complaint against the Second Respondent is out of time and therefore fails and is dismissed.

(525903/1995)
K Bartlett v Midlands Electricity

The complaint is out of time and therefore fails and is dismissed.

(525812/1995)
D Carey v Powerhouse Retail

The complaint is dismissed, no liability having passed to the Respondent.

(525798/1995)
A Sheen v Powerhouse Retail

The complaint is dismissed, no liability having passed to the Respondent.

(526175/95)
P Croucher -v- Seeboard

1. The complaint in respect of the period 8th September 1980 to the 1st April 1988 succeeds. I declare that the Applicant is entitled to be admitted to membership of the electricity supply pension scheme between those dates.

2. The complaint in respect of the period 1st April 1988 to the 28th October 1991 fails as there was no breach of the equality clause.

BANKING SECTOR

(524901/95)
C P Mace -v- Halifax plc (Birmingham Midshires Building Society)

1. By consent, the complaint in respect of the period 1st December 1980 to the 1st July 1988 succeeds. I declare that the Applicant is entitled to be admitted to membership of the Birmingham Midshires Building Society pension scheme between those dates.

2. The complaint in respect of the period from 1st July 1988 is remitted to an employment tribunal at Manchester to determine whether the breach of the equality clause continued after that date and if so for how long and whether the Applicant should be granted a declaration in respect of any such breach.

(1400003/01)
D M Evans -v- Halifax plc (Birmingham Midshires Building Society)

1. By consent, the complaint in respect of the period 9th November 1981 to the 1st July 1988 succeeds. I declare that the Applicant is entitled to be admitted to membership of the Birmingham Midshires Building Society pension scheme between those dates.

2. The complaint in respect of the period from 1st July 1988 fails as there was no breach of the equality clause.

Case Nos: 507497/95 and others
Mrs S Preston & others -v- Wolverhampton Healthcare NHS Trust & others (No. 3)

PART-TIME WORKER PENSION CASES
SCHEDULE 2
EXECUTIVE SUMMARY OF ANSWERS TO THE TEST CASE ISSUES

Issue 1

Where a respondent does not admit that the qualifying hourly threshold for admission to the pension scheme has a disproportionate impact on women, is the burden of proof on the applicant to prove disproportionate impact or upon the respondent to disprove disproportionate impact?

On the concession of the respondents to the test cases, the qualifying hours threshold does have a disproportionate impact on women. Respondents who have taken this point in their Notice of appearance but who are not bound by the concession are required to show cause why that part of their Appearance should not be struck out.

Issue 2

Can a male applicant succeed in any event or only where a female applicant in the same employment has previously succeeded?

In the absence of a test case with a male applicant, the Secretary of State makes the following concession which, (subject to the point identified in paragraph 2) is accepted by the unions involved in the test cases:

1. A male part-time worker can maintain a claim in respect of his exclusion from a pension scheme in the following circumstances:

(1) he can identify as a comparator a female part-time worker doing work equal to his: and

(2) he can demonstrate that his comparator herself had a right, under her equality clause, to be admitted to the scheme in respect of a period encompassing the period for which he claims:

2. That involves the man showing that the woman in turn had a male comparator doing work equal to hers who was entitled under the rules of the scheme to be admitted to it in respect of that period, and that the scheme rules governing access were either directly sex-discriminatory or had a disproportionate impact upon women and were not objectively justified. [the unions do not accept the need for the woman to be able to identify a male comparator, a question which is the subject of a reference to the European Court of Justice in ***Allonby –v- Accrington and Rossendale College and others*** *[2001] IRLR 364 CA,* all part-time worker pension cases raising this issue being stayed pending the outcome of ***Allonby***]

3. If the male claimant can establish these matters, his claim can succeed without it being necessary that his female comparator brings any proceedings.

Case Nos: 507497/95 and others
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Issue 3 Transfers of undertakings
Where there has been either a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) [hereinafter 'TUPE'] or a statutory novation under section 6 of the National Health Service and Community Care Act 1990 or under section 26 of the Further and Higher Education Act 1992 or under any other relevant statutory provision:

a) **does the transferor's liability transfer to the transferee –**
i. **in the case of a transfer under TUPE;**
By concession of the applicants, (subject to the right to pursue the point further on appeal) liability does not transfer to the transferee under TUPE.
ii. **in the case of a statutory novation;**
In the case of a statutory novation, liability passes to the transferee in respect of employment which subsisted on or straddled the transfer date in respect of all of the past service of the employee in question, where either the employee was employed under a continuous contract or under a broken series of contracts which gave rise to a stable employment relationship with the transferor. Employment straddles the transfer date for this purpose whether, on the transfer date, an employee who had a stable employment relationship with the transferor was in contract or out of contract, provided that after the transfer the employee entered the employment of, and the factors giving rise to the stable employment relationship continued with, the transferee.

b) **If the transferor's liability does not transfer to the transferee, does time run as against the transferor from the date of the transfer.**
Time runs as against the transferor under a TUPE transfer (and in the case of a transfer under a statutory novation, in respect of any liabilities which do not pass to the transferee under test issue 3(a)(ii) from the date of the transfer. Therefore, the tribunal has no jurisdiction to entertain a complaint of exclusion from an occupational pension scheme brought in respect of a period of employment prior to the transfer of an undertaking unless the proceedings were commenced within 6 months of the date of the transfer

c) **if neither the Regulations nor the statutory provisions stop time running as against the transferor, is time nonetheless prevented from running if the applicant had a stable employment relationship with the transferor which continued with the transferee;**
The question is misconceived. As a matter of law, where there is a transfer of an undertaking the applicant's relationship with the transferor and the transferee is deemed always to have been a relationship with one employer, the transferee. The existence or otherwise of a stable employment relationship is irrelevant, and therefore the legal analysis which led to the conclusion on issue 3(b) applies equally to issue 3(c). Therefore time is not prevented from running "*if the applicant had a stable employment relationship with the transferor which continued with the*

transferee" and complaints must be brought to the tribunal within six months of the date of the transfer.

d) what principles are to be applied when construing an Originating Application so as to ascertain whether or not a person or body has been named as a respondent;
[see under 3(e)]

e) on what principles may an applicant be granted permission to amend her Originating Application so as to name a different respondent?
These issues no longer arise for decision in the test cases. To the extent that they may arise in other cases, the guidance given in ***Cocking -v- Sandhurst (Stationers) Ltd*** [1974] ICR 650 NIRC is to be followed.

Issue 4 Overarching pension scheme

4.1 Where an applicant has voluntarily changed employer but both employers are covered by the same pension scheme, does time run as against the first employer (and any subsequent employer) from the date the applicant left their employment, or does time begin to run against all of the employers only from the date on which the applicant left the last in such a series of employments?
Where an applicant has voluntarily changed employer but both employments are covered by the same pension scheme, time runs as against the first employer (and any subsequent employer) from the date on which the applicant left their employment. The running of time is not postponed until the date on which the applicant left the last in the series of such employments.

4.2 Having regard, inter alia, to Regulation L4 of the NHS Pension Scheme, do the rules with regard to stable employment relationships apply equally to changes of employment under an overarching pension scheme as they do to a series of contracts of employment with the same employer?
The rules with regard to stable employment relationships have no application where there is a change of employment under an overarching pension scheme.

Issue 5. Opting in

5.1(a) Will a claim brought by an applicant who had been excluded from membership of her employer's pension scheme because she worked less than the minimum qualifying hours threshold, necessarily fail merely because she did not join the scheme at the earliest possible moment after qualifying to do so?

5.1(b) In what circumstances is there a breach of the equality clause in respect of that period of an applicant's claim which predates her becoming eligible to join the scheme, if she failed to join the scheme upon becoming eligible to do so.

1. An applicant's claim in respect of a period of exclusion from a scheme will not fail merely because she did not join the scheme upon becoming eligible to do so.

2. There is a breach of the equality clause, in respect of which an applicant will normally be entitled to a declaration of right of access to membership of the scheme, for any period of claim during which the applicant was excluded from membership because of her part-time hours and her full-time comparator was obliged to be a member of the scheme. Whether the applicant did or did not join the scheme on becoming eligible to do so, or only joined after a significant delay, is irrelevant.

3. There is no breach of the equality clause for any period of claim during which an applicant was excluded from membership of the pension scheme because of her part-time hours but membership of the scheme for her full-time comparator was not obligatory, where an applicant did not join the scheme on becoming eligible to do so, or only joined after a significant delay, unless the applicant can satisfy the tribunal on the balance of probabilities that she would have joined the scheme during the period of exclusion, had she been eligible.

5.2 Where an applicant was always eligible to join a pension scheme but did not do so, or did not do so after becoming eligible to join, can her cause of action in the employment tribunal extend beyond the date on which she became eligible to join where

(a) she did not opt into the scheme;

Where an applicant was always eligible to join a pension scheme but did not do so, or did not do so after becoming eligible to join, she has no cause of action in the employment tribunal beyond the date on which she became eligible to join if she failed to opt into the scheme because the requirement to opt into the scheme did not breach the equality clause.

(b) her reason for not opting into the scheme was because of her employer's failure to alert her to the possibility of doing so;

(c) she attempted to opt into the scheme but was either discouraged from doing so, persuaded not to do so or continued to be denied the opportunity to do so.

1. There is a continuing breach of the equality clause, and therefore an applicant's cause of action continues beyond the date on which she became eligible to join her employers pension scheme, if, after the removal of any qualifying hours threshold with which she could not comply, an applicant's continued failure to join, or inability to gain access to, the scheme (a) is directly referable to her status as a part-time employee; (b) the circumstances do not apply to full-time employees and (c) is to her detriment.

2. This would be the case where an applicant, on becoming eligible to join a pension scheme, did not do so because she was unaware of her right to join

because of her employer's failure to inform her of the right: or where an applicant who believed she might have the right to join was misled by her employer, intentionally or unintentionally into believing that she did not have the right, or whose employer denied that she had the right.

3. There would not be a breach of the equality clause if on seeking to join the scheme an applicant was either discouraged or dissuaded from joining, unless this was as a result of a policy of the employer, aimed at part-timers and involved the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or otherwise amounted in practice to a denial of the right to membership of the scheme.

5.3 In what circumstances, if any, may the remedy ordered by the tribunal involve a declaration of access to the pension scheme which applies in respect of any period after the date on which an applicant became eligible to join the scheme?

This question has been answered in the answers to the rest of test issue 5. For the avoidance of doubt, the tribunal may, in appropriate circumstances, insert dates in a declaration which are not co-extensive with either the period of claim or the period during which the equality clause was breached.

5.4 If an applicant can establish a breach of the equality clause, is she entitled to a declaration of access to the scheme as of right or only in the exercise of the tribunal's discretion?

An applicant is not entitled to a declaration of entitlement to access to the pension scheme as of right upon establishing a breach of the equality clause, but only in the exercise of the tribunal's discretion.

Issue 6 <u>Stable employment relationship</u>

What factual circumstances give rise to a stable employment relationship?

1. A stable employment relationship arises (and only arises) when an employee is employed - by the same employer - on a succession of contracts - punctuated by intervals without a contract - on the same or broadly similar terms - to perform essentially the same work - under the same pension scheme – provided that the sequence of contracts and the pattern of intervals between them is dictated either by the nature of the work itself or the employers requirements for employees to perform it - and (subject to 2 below) the contracts and the intervals between them are sufficiently regular for it to be apparent without the benefit of hindsight to determine when the sequence is broken, that being the moment from which time begins to run.

2. Where the sequence is intermittent rather than regular, the intention of the parties both as to the inception and the cessation of the working arrangement which is said to give rise to the stable employment relationship, outweighs the absence of a pattern of strict regularity. Where a stable employment relationship has arisen in such circumstances it remains in being until the parties intend

otherwise, notwithstanding changes in the frequency of the work, provided that any such changes arise exclusively from the nature of the work.

3. A stable employment relationship ceases and time for commencing proceedings therefore begins to run when:

(a) A party indicates that further contracts will either not be offered or not accepted if offered
(b) A party acts inconsistently with the continuation of the relationship
(c) a further contract is not offered when the periodicity of the preceding cycle of contracts indicates that it should have been offered
(d) a party ceases to intend to treat an intermittent relationship as stable
(e) the terms of the contract or the work to be done under it alters radically; e.g. a succession of short term contracts is superseded by a permanent contract.

4. The burden of proving, not merely the pattern of work but also any of the other factors necessary to demonstrate the existence of a stable employment relationship is upon the applicant.

Case Nos: 507497/95 and others
Mrs S Preston & others -v- Wolverhampton Healthcare NHS Trust & others (No. 3)

PART-TIME WORKER PENSION CASES
SCHEDULE 3 - LIST OF REPRESENTATIVES

For the UNISON, UNIFI, ATL, NASUWT, NATFHE, NUT represented Applicants:

Mrs S Preston
Mrs L Leeson
Mrs S Johnson
Mrs A Jones
Mrs R Light
Mrs M Richardson
Mrs K Bartlett
Mrs A Sheen
Mrs C Mace
Mrs J Cockrill
Mrs F Fox
Mrs D Evans
Mrs P Kilburn
Mrs C Bunyan
Mrs V Burroughs
Mrs D Carey
Mr P Croucher

MR J CAVANAGH QC AND MISS J McNEILL QC

For:

Mrs T Gardner (RCN in this case only)
MR J CAVANAGH QC

For the RCN represented Applicants:

Mrs J Lount
Mrs S Tyrrell
Mrs P Savage
Mrs J Thomas

MS L FINDLAY

For the Secretaries of State

Health; Education; Transport, Local Government and the Regions
MR N PAINES QC AND MR R HILL

For:

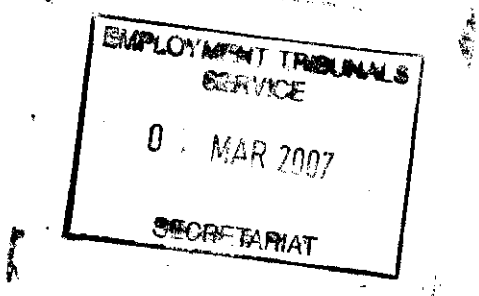
Wolverhampton Metropolitan Borough Council
Birmingham City Council
Lancashire County Council
Frimley Park Hospital NHS Trust
Royal West Sussex NHS Trust
Stockport Metropolitan Borough Council
North Yorkshire County Council
North East Lincolnshire County Council
Suffolk County Council
East Riding County Council (formerly Humberside County Council)
Worcestershire County Council (formerly Hereford & Worcester County Council)

MISS C BOOTH QC AND MR C LEWIS

Case Nos: 507497/95 and others
Mrs S Preston & others -v- Wolverhampton Healthcare NHS Trust & others (No. 3)

For:

Coventry Warwickshire Herefordshire & Worcestershire Health Authority (Hereford Hospitals NHS Trust)
Basildon & Thurrock General Hospital
South Devon Healthcare NHS Trust
Southampton Community NHS Trust
Portsmouth Hospitals NHS Trust
Wolverhampton Healthcare NHS Trust
MISS M TETHER



For:

Greater Manchester Health Authority for and on behalf of North Manchester Primary Care Trust (formerly North Manchester Health Authority)
MR D OUDKERK

For:

Grimsby College
Hereford College of Technology
Hull College
Hereford Sixth Form College
MR C JEANS QC AND MISS M TETHER

For:

Powerhouse Retail
Seeboard
Midlands Electricity
MR C JEANS QC AND MR J COPPELL QC

For:
Halifax plc (formerly Birmingham Midshires Building Society)
MR N RANDALL