RESERVED DECISION

Case **Number** 507497/95 and others

THE INDUSTRIAL TRIBUNALS

BETWEEN

Applicant		**Respondent**
Mrs S A E Preston and others	and	1. Wolverhampton Healthcare NHS Trust 2. Secretary of State for Health and others

DECISION OF THE INDUSTRIAL TRIBUNAL

HELD AT Birmingham **ON** 15th -17th and 20th -22nd November 1995

CHAIRMAN Mr- JK Macmillan

RESERVED DECISION

The decisions of the tribunal are set out in the schedule annexed hereto.

FULL REASONS

A The Background

1. I have before me a number of test cases on a variety of preliminary points arising out of a very large number, not less than 40,000, of applications to Industrial Tribunals by part time workers, complaining of, in broad terms, unlawful exclusion from occupational pension schemes, qualification for membership of which was dependent upon the number of hours an employee worked in a week. They have been prompted by publicity in the media in general and in particular by a concerted campaign among their members by several Trade Unions, following two judgements of the European Court of Justice delivered on the 28th September 1994 in Cases C-57/93 and C-128/93 (VROEGE -v- NCIV INSTITUUT VOOR VOLKSHUISVESTING B.V. and FISSCHER -v- VOORHUIS HENGELO B.V [1994] ICR 635 ECJ). A brief explanation of the reasoning behind the use of the procedure which has been adopted to bring these test cases to trial may be of assistance to those who will, inevitably, have to consider my decisions in due course.

2. Not surprisingly, the facts of the individual applications cover an enormous spectrum. Claims were received from the public and private sectors (and from areas which on the current state of the law might be arguably either); from those excluded from contributory and from non-contributory schemes; from those long since retired and those still in employment; and from those claiming exclusion over many years which is still continuing to at least one person claiming in respect of a few days in the late 1970s. Whilst the vast majority of claimants are women, some claims have been lodged by men. In one sector, the retained fire-fighters, the great majority of, if not all, claimants are men.

3. Such an agglomeration of circumstance presented a major problem of case management. It was therefor decided to adopt a three phase approach. At phase one, the Preliminary Points. a Chairman sitting alone would consider, under the provisions of Rules 6 and 13(2)(d) of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993, points of universal application such as time limits, how far claims might be back dated, and related matters. Test cases were selected which demonstrated the points which are agreed to be of universal application. They are the cases before me. Once the Preliminary Points have completed their appellate progress all applicants whose cases fall at one or other preliminary hurdle will be asked to show cause why their applications should not be dismissed or struck out as the case may be. The Preliminary Points are therefore of the highest importance.

4. Once they have been decided the next phase is consideration of Common Points. This will involve hearings throughout the UK when points common to a particular respondents pension scheme will be determined. These are likely to be centered around the issue of whether the exclusion of part time workers from the scheme was objectively justifiable on grounds other than sex. . That is plainly not susceptible for determination as a preliminary point as the answer may well differ from one pension scheme to another depending on the circumstances of the employer. The final phase will involve the determination of individual complaints that have survived the first two stages but which have not been settled. They are likely to be concerned with such matters as the determination of the basic facts of the employment where, as appears to be frequently the

case, contemporary records have not survived, and determining the sums which either party is required to pay into the pension fund to achieve equality.

5. To ensure that the widest spread of representation was achieved a system of lead representatives by sector was devised, the various groups within each sector being encouraged to use the same team of Barristers. Thus, applicants from the Health, Education and Local Government (public statutory and quasi statutory) sectors, from the electricity supply (private, contributory) and banking (private non-contributory) sectors, have all been represented by Mr James Goudie QC, Mr John Cavanagh (except banking) and Miss Jane McNeil (banking). The Respondent employers, other than in the Health Sector (where the NHS Trust in the test case declined to take part) and the Local Government employers, have all been represented by Mr Patrick Elias QC, Mr Jason Coppell and Miss Melanie Tether.
The Local Government employers have all been represented by Miss Genevra Caws QC and Mr Tim Kerr and Mr Clive Lewis. The three Secretaries of State, Health, Education and Environment, have been represented by Mr Nicholas Paines and Mr Raymond Hill. I am most grateful to them all for their Written and oral arguments which have been of the highest order. I am also grateful to the many solicitors involved for the immense burden which they have shouldered uncomplainingly in meeting the strict timetable which I felt it necessary to impose in order to bring the test cases to an early hearing.

B The Preliminary Points
6. The points which were deemed appropriate for preliminary determination as being of universal application were agreed between the parties as follows.

1. To determine whether claims falling within one or more or all of the following categories are out of time and generally to determine time limits.

(a) employment with last employer against whom a claim is made ended more than 6 months prior to the commencement of proceedings;
(b) employment still continuing (or ended less than 6 months before commencement) but the period in respect of which the claim is made ended

i. more than 3 but less than 6 months
ii. more than 6 but less than 12 months
iii. more than 12 months
before commencement of proceedings

(c) the claim is otherwise is in time but there has been a break in the continuity of employment,

i whether periods of employment prior to the break may form the basis of a claim and
ii in the case of teachers. lecturers and non-academic support staff employed on term or academic year contracts, whether continuity was broken by intervening periods of holiday.

(For the avoidance of doubt, arguments on whether claims lie under Article 119 of the Treaty of Rome, one or more Directives, the Sex Discrimination Act 1975 or the Equal Pay Act 1971, and the extent of the Tribunals jurisdiction accordingly, were deemed to be encompassed by Preliminary Point 1)
2. Whether a claim lies in respect of:-

(a) periods of service prior to 8th April 1976;
(b) periods of service prior to 13th May 1986;
(c) periods of service more than two years prior to the date of claim (by analogy with section 2(5) Equal Pay Act and or the Occupational Pension Scheme (Equal Access to Membership) Regulations 1976 SI i42

3. Whether part time male employees are eligible to bring claims -
4. In health sector cases, whether time should be regarded as running against all NHS employees past and present from 1st April 1991, the date upon which all employees became eligible to join the scheme and if so whether all claims in that sector are now time barred.
5. Whether an applicant is entitled to bring proceedings in respect of periods of service during which they were not members of the pension scheme where their non-membership is attributable to any reason other than failure to cross the qualifying hours threshold, including allegedly wrong advice by employers.

6. Whether the Secretary of State for the Environment is a proper Respondent in these proceedings.
7 Where a claim is not defeated by time limits or other procedural points, given the overarching nature of the education sector pensions scheme, what is the position of an applicant with adjoining periods of service with different local authority or college employers?

7. As I understand it, for reasons which I shall touch upon briefly in due course, it is common ground that service prior to 8th April 1976 cannot give rise to a claim (point 2(a)). It is also common ground (subject to the applicants subsidiary argument that the procedural rules enshrined in the Sex Discrimination Act apply, a point not taken by the Respondents) that claims brought within 6 months of the ending of the employment about which complaint is made (point I (a)) are in time. A common position with regard to point 5 evolved during the hearing, namely that, at least insofar as the Industrial Tribunal is concerned, a claim would only lie in respect of such a period if the reason for the applicants continued exclusion was itself, directly or indirectly, an act of sex discrimination. I t also emerged during the hearing that point 4 is of much wider application than the health sector, as hourly qualifying conditions had been removed from the pension schemes in the banking, electricity supply and local government sectors at different times, the most recently being local government in 1993. Another potential preliminary point which will fall to be determined at another time is what liability Colleges of Further Education inherited in respect of these claims from their Local Education Authority predecessors under the provisions of sections 23 and 26 of the Further and Higher Education Act 1992.

C The Law

8. That the exclusion of part time workers from employment rights is indirectly discriminatory against women was established in R -v- SECRETARY OF STATE FOR EMPLOYMENT ex parte EOC [1995] AC 1 HL and that the exclusion of the female applicants from access to occupational pension schemes is indirectly discriminatory is conceded by all the respondents. It is common ground that sections 6(1A)(a) and (b) of the Equal Pay Act and section 118 of the Pension Schemes Act 1993 (the equal access requirements) when read together have the effect of prohibiting only direct discrimination between the sexes with regard to the provision of access to occupational pension schemes and consequently of excluding the applicants from the protection of the equality clause to be implied into every contract of employment by virtue of section 1 (1) of the Equal Pay Act.
The applicants thus have no right of action under UK law in respect of their exclusion from schemes prior to the -31st May 1995 when the offending provisions was removed by _sections 62 and 63 of the Pensions Act 1995.

9. It is also common ground that the exclusion of the female applicants from occupational pension schemes breaches the provisions of Article 119 of the Treaty of Rome, the principle of equal pay for equal work, and that following DEFRENNE -v- SABENA (No 2) [1976] ECR 455 ECJ, with effect from 8th April 1976, the provisions of that Article being of direct effect the applicants have a cause of action under European law. But there consensus ends.

10. The jurisprudence of the inter-relationship between European law and the laws of the Member States is still evolving. In their skeleton argument Counsel for the applicants cite three alternative approaches: that the relevant domestic law applies subject to the disapplication of provisions which conflict with European law: that European law gives rise to free-standing rights of action onto which are en grafted the time limits and other procedural matters from the nearest analogous domestic law right: that free-standing European rights have, in the absence of limitations created under Articles 100 to 102 and 235 of the Treaty,
Of, with specific reference to European law rights, by the Member States themselves, no time limits or, presumably other procedural limitations. To the extent that this latter point was developed in argument I understood it to have been modified to the extent that in the absence of specific legislative limitations, time and other procedural bars were for the creation Judiciary. Mr Goudie QC conceded however that because of the judgement of the Employment Appeal Tribunal in Scotland in RANKIN -v- BRITISH COAL CORPORATION [1995] ICR 774 and in England in RASTALL -v- MEB (unreported 30th August 1995) he could not pursue his third alternative before me. Had he done so I should have unhesitatingly rejected it as being utterly inimical to the fundamental principles of legal certainty and social cohesion which underpin the Treaty. Although, in a slightly different context, Mr Goudie rightly warned me against the dangers of deceiving myself that I see anomalies in European law because I am looking through the eyes of a Common lawyer, I cannot believe that any legal system could contemplate what would be akin to the return of the legal Dark Ages prior to Lord Mansfield L.C.

11. Of the remaining two propositions it is agreed that I must adopt the first as I am bound by the recent judgement of the-Employment Appeal Tribunal in BIGGS-v-SOMERSET COUNTY COUNCIL [1995] ICR 811 which reviewed and rejected earlier EAT decisions to the contrary. I should add (perhaps rashly as at the time of preparing this decision the Court of Appeal have yet to deliver their verdict on BIGGS) that were I free to follow either of the two propositions, I would have opted for the first as being both consistent with authority both domestic and European and with principle. However, in the context of these cases there is likely to be no difference in the final analysis whichever route is adopted.

D The Appropriate Domestic Legislation

12. Which is the domestic law by means of which the applicants may attain their European law rights? VROEGE and FISSCHER make it clear that the right of part time employees to join an occupational pension scheme is a right to equal pay under the provisions of Article 119. That being so, the domestic law by which they seek access to that right must relate to equal pay. Mr Goudie advances for consideration both the Equal Pay Act, with which the respondents agree, and the Sex Discrimination Act, with which they do not.

13. Although I do not understand Mr Goudie to be placing any great faith in the appropriateness of the Sex Discrimination Act, I must deal with the point, albeit briefly. Section 6 of the Act provides:

> "(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her -
> (a) in the way he affords her access to ...any... benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them
> (4)Subsections ...(2) do not apply to provisions in relation to death or retirement ...except (the exceptions being immaterial for present purposes)
> (6) Subsection (2) does not apply to benefits consisting of the payment of money when the provision of those benefits is regulated by the woman's contract of employment"

Section 8 is cross headed "Equal Pay Act 1970" (the Act itself, as amended by Part 1 of Schedule 1 being appended thereto as Part 11 of Schedule 1 [section 8(6)]). Subsection (5) provides:

> "An act does not contravene section 6(2) if-
> (a) it contravenes a term modified or included by virtue of an equality clause..."

that is to say by virtue of section 1 (I) of the Equal Pay Act.

14. Regulation 10 of the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 SI 1976/142 cross headed "Modification, in relation to the equal access requirements, of the provisions of the Equal Pay Act as to equality clauses" provides:

> "(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 access),
>
> (5) The Equal Pay Act shall be further modified, in its application to the equal access requirements, so as to have effect as if for the references in section 1 (2) to treating a contract as including a term there were substituted references to treating a contract as so modified as to include a term."

15. Whilst noting that section 6(6) of the Act may not be entirely in point to the extent that the right to access to an occupational pension scheme may not be a provision regulated by a woman's contract of employment but by an ancillary contract, in my judgement those extracts make the scheme of the legislation clear. Claims in respect of pay, and in particular access to occupational pension schemes as an aspect of pay, lie under the terms of the Equal Pay Act and not the Sex Discrimination Act. The latter is therefore not the appropriate domestic law, whether one approaches the matter by reference to the "disapplication" route as postulated in BIGGS or the "nearest analogous" route. I propose to say no more about it.

E The Appropriate European Instrument

16. Unarguably, Article 119 of the Treaty is appropriate; but Mr Goudie seeks also to rely on two Directives, 75/117/EEC, the Equal Pay Directive, and 76/207/EEC the Equal Treatment Directive. His reason for relying upon and enthusiasm for the latter are less apparent than for the former. If he can bring the former into play he can rely, he submits, on both the EMMOTT principle (EMMOTT -v- MINISTER FOR SOCIAL WELFARE [1993J ICR 8 ECJ) to which I will turn in a moment, and the direct effectiveness of the Directive in respect of employees in the public sector and of other emanations of the state.

17. As with the Sex Discrimination Act, Mr Goudie can only invoke the Equal Treatment Directive if it is concerned with pay. In my judgement, manifestly it is not as is evident from its preamble;

> "The Council of the European Communities, having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof.. "

18. Article 235 of the Treaty provides

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community *and this Treaty has not provided the necessary powers*, the Council shall take the appropriate measures." (emphasis added)

In the case of matters relating to equality of pay, the Treaty has provided the necessary powers at Article 100 (see the preamble to the Equal Pay Directive).

19. Returning to the preamble:

> "Whereas the Council, in its resolution of 21 January 1974 concerning a social action programme, included among the priorities action for the purpose of achieving equality between men and women as regards access to employment and vocational training and promotion and as regards working conditions, including pay;
> Whereas, *with regards to pay, the Council adopted on 10 February 1975 Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principal of equal pay for men and women*
> Whereas Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working conditions *also appears to be necessary*
> Whereas the definition and progressive implementation of the principle of equal treatment in matters of social security should be ensured by means of subsequent instruments." (emphasis added in each case)

20. The emphasised words make it clear, in my judgement, that the Equal Pay Directive deals with matters of pay whilst the remaining aspects of the social action programme, other than those relating to matters of social security, are dealt with by the Equal Treatment Directive. I accept the submission of Mr Elias QC that the reservation of matters relating to social security to future instruments (79/7/EEC and 86/378/EEC) makes the point a fortiori as occupational pension schemes, access to which being undoubtedly a question of pay for the purposes of Article 119, are also regarded as being an aspect of social security. I am accordingly satisfied that it is not open to the applicants to rely on the Equal Treatment Directive. I do not propose to consider it further.

F The Relationship Between Treaty Articles and Directives

21. I am conscious that here I perhaps risk straying into matters which are strictly within the province of the European Court of Justice. But I am not invited to refer a question to the Court and it has not been suggested that it is a matter beyond the competence of the judiciary of the United Kingdom to decide. In any event, at least in the way in which the matter arises for determination in these cases, I am satisfied that the answer is acte claire and no reference is therefore necessary.

22. Mr Goudie, for the reasons which I have already adumbrated, anticipating perhaps that he may not escape the limitation and other procedural provisions of the Equal Pay Act if he is compelled to rely exclusively on Article 119 of the Treaty, seeks to persuade me that the applicants may alternatively rely upon the Equal Pay Directive. He submits that the United Kingdoms failure to provide a remedy in domestic law for persons excluded from occupational pension schemes as a result of indirect discrimination demonstrates a failure to properly transpose the provisions of Articles 2 and 6 of the Directive. Accordingly, in respect of all applicants except those in the banking sector, the banks not being emanations of the state, time did not begin to run until 31st May 1995 when the solecism was rectified. All such applications are therefore in time. He takes as a subsidiary and closely related point that in any event, the EMMOTT principle also applies where a right created by a Treaty Article is not transposed into domestic law or, perhaps more accurately, is apparently excluded by domestic law. I will deal with the points separately.

23. The starting point of his submission is that the Equal Pay Directive has direct effect. He cites no authority to support that proposition but submits that as the Equal Treatment Directive was held to have direct effect in MARSHALL -v- SOUTHAMPTON AND SOUTHWEST HAMPSHIRE AREA HEALTH AUTHORITY (No.1) [1986] ICR 335 ECJ and as the terms of the Equal Pay Directive are similarly unconditional and sufficiently precise, it too has direct effect. The latter is the test of direct effectiveness, not whether the Directive does or does not overlap with a provision of the Treaty. Even though the discrimination complained of by these applicants was a breach of Article 119 it was also clearly a breach of the Directive. The fallacy of the Respondents contrary argument, he submits, is that where the Treaty and a Directive overlap, the Directive, in effect, ceases to exist. Moreover, if the Respondents are correct, the Community was wasting its time in adopting the Directive. The thrust of the judgement in EMMOTT is that where a Directive imposes an obligation on a Member State to bring certain measures into effect, the state cannot take advantage of its failure to do so by seeking to invoke time and other procedural limitations. Although Article 119 imposed no obligation on the Member States to introduce implementing measures, the Directive plainly did and accordingly, the state cannot be permitted to take advantage of its failure to do so by insisting that the applicants are only entitled to rely on Article 119.

24. In support of his submission he cites two authorities which he says dealt with the point and are binding on me. The first in point of time is CANNON -v- BARNSLEY METROPOLITAN BOROUGH COUNCIL [1992] ICR 698 EAT in particular at 702 A to C and F to G.

> "Secondly, where there is legislation in a member state Which is discriminatory in a manner contrary to the requirements of Article 119 ... and the Equal Pay Directive. ...there is the possibility of enforcement by a national of the state concerned, notwithstanding the absence of a right in the domestic legislation, because Community law on the subject takes precedence and is capable of conferring a right where the national law does not. We say a possibility because in relation to claims under Directives, as opposed to a direct claim under Article 119, it is clear that the direct right is only available against a government emanation."

and:

> "We are satisfied that the employee's estate is thus entitled, because it seems to us clear that the provision for discriminatory treatment was an infringement of the Equal Pay Directive, *as well incidentally as Article 119* there is in the circumstances of this case, where the employee is employed by an emanation of the state, a right vested in her and now her estate." (emphasis added)

25. It is not, I think, impertinent to note that the Respondent council was unrepresented at the appeal and the appellant represented by someone from the Free Representation Unit. From the details of the grounds of appeal set out at 699 G to 700A it is clear that the issues involved a resolution of the conflict between domestic law and Community law generally. The question of whether it was permiissible for a claim to be brought under the provisions of the Directive as well as or in stead of Article 119 was not before the Court. In those circumstances, Miss Caws QCs description of the emphasised words as a throwaway remark is plainly right. In my judgement CANNON is not binding upon me and I derive no assistance from it.

26. The second case upon which Mr Goudie relies is R -v- SECRETARY OF STATE FOR EMPLOYMENT Ex parte EQUAL OPPORTUNITIES COMMISSION and Another [1994] ICR 317 HL in particular a passage from the judgement of Lord Keith at 325 D to F:

> "It is convenient first to consider whether Mrs Day "(the 'Another' of the title to the action)" is properly joined in the present proceedings… Redundancy pay is 'pay' within the meaning of Article 119 of the Treaty… if the discriminatory measures in the (Employment Protection (Consolidation)) Act of 1978 are not objectively justified, Mrs Day has a good claim for redundancy pay against her employers ...under Article 119, which by virtue of section 2(1) of the (European Communities) Act of 1972 prevails over the discriminatory provisions of the Act of 1978. She would also have a good claim under the Equal Pay Directive and the Equal Treatment Directive, which are directly applicable against her employers as being an emanation of the state ... "

27. Those observations, are, Mr Goudie submits, part of the ratio of the decision relating to Mrs Day and therefore binding upon me. I do not agree. The ratio of the decision is that Mrs Day had a private law claim which therefore prevented her from applying successfully for judicial review, the relief sought. It may have been part of the ratio to identify the forum in which that claim lay, the Industrial Tribunal, as indeed may have been the identification in broad terms of the nature of that remedy and its source, But it was not, in my judgement necessary for Lord Keith to reach his decision that she had a private law remedy to do more than that, nor did he do so. It was, for example, not necessary for him to determine whether the private law claim would have succeeded, nor to consider whether it might have failed because of procedural provisions which could not be disapplied or because of weaknesses in the facts. Amongst those procedural provisions would be the question whether a claim lay under the Directive as well as the Article. That would plainly be a matter for the Industrial Tribunal having heard argument upon it, As I understand it, no argument was specifically directed to the point before their Lordships and Lord Keith was not purporting to determine it, That is hardly surprising. As in CANNON, the question before me was not directly in issue.

28. In response the respondents have drawn my attention to a number of authorities of the European Court of which I propose to mention only three. Their starting point is JENKINS -v- KINGSGATE (CLOTHING PRODUCTIONS) LTD [1981] ICR 592 ECJ (to which I shall need to refer again in connection with other matters) in particular at page 614 paragraphs 21 and 22:

> "The provisions of article 1 of that Directive are confined, in the first instance, to restating the principle of equal pay set out in Article 119 of the Treaty and specify, in the second paragraph, the conditions for applying that principle where a job classification system is used for determining pay. It follows, therefore that article 1 of Council Directive (75/1 17/EEC) which is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty in no way

> alters the content or scope of that principle as defined in the Treaty."

That passage was also quoted by Mr Goudie in his skeleton argument as supporting his submissions.

29. In MURPHY -v- BORD TELECOM EIREANN [1988] ECR 673 ECJ the Irish High Court referred the following questions to the European Court for determination:

> "(1) Does the Community law principle of equal pay for equal work extend to a claim for equal pay on the basis or work of equal value..."
> (2) If the answer to Question 1 is in the affirmative is that answer dependent on the provisions of Article 1 of (the Equal Pay Directive)?"
> (3) If so, is Article 1 of the said Directive directly applicable in Member States?

30. The European Court answered the questions thus:

> "12... the reply to the first question must be that Article 119 of the EEC Treaty must be interpreted as covering the case where a worker relies on that provision to obtain equal pay within the meaning thereof is engaged on work of higher value than that of the person with whom a comparison is to be made.
> 13. It follows from the foregoing that the proceedings before the High Court of Ireland are capable of being resolved by means of an interpretation of Article 119 of the Treaty alone. In those circumstances it is unnecessary to reply to the second and third questions concerning the interpretation of (the Equal Pay Directive)"

31. Several other judgements to the like effect were drawn to my attention. However, as I pointed out to Mr Elias, the issue I have to determine is not whether it is necessary or relevant to refer to the Directive in such circumstances, but whether it is permissible. He agreed but could refer me to no authority which said precisely that. He nonetheless invited me to conclude that that was in fact the only proper construction to be put upon those judgements. The authority which comes closest to saying that reliance on the Directive is impermissible -indeed in my judgement, so close that it is not open to me to find otherwise – is MACARTHYS LTD -v- SMITH [I98I] 1QB 180 ECJ. Mrs Smith was seeking to claim equal pay for equal work using as her comparator her predecessor who had left the employers employment four months before she was appointed to his former post. The Court of Appeal referred four questions to the European Court.

> "1. Is the principle of equal pay for equal work, contained in Article 119 of the EEC Treaty and Article 1 of (the Equal Pay Directive) confined to situations in which men and women are contemporaneously doing equal work for their employer.
> 2. If the answer to question (1) is in the negative (two alternative propositions were advanced for consideration)
> 3. If the answer to question (2)(a) or (b) is in the affirmative, is that answer dependent upon the provisions of Article 1 of the Directive?
> 4. If the answer to question (3) is in the affirmative, is Article 1 of the Directive applicable in the member states?"

32. In his opinion Advocate General Capotorti advised the Court (page 188 C) that it should answer the third question thus:

> "In the case of "equal work" the affirmative answers to the preceding questions are based upon Article 119 of the Treaty *and are not dependent upon the provisions of Article 1 of Council Directive (75/117/ECC)*" (emphasis added)

In its judgement the Court said:

> "9. According to the first paragraph of Article 119 the member states are obliged to ensure and maintain 'the application of the principle that men and women should receive equal pay for equal work'
> 10. As the Court indicated in DEFRENNE -v- SABENA [1976] ICR 547, that provision applies directly, and without the need for more detailed implementing measures *on the part of the Community or the member states*
> 13. Thus the answer to the first question should be that the principle that men and women should receive equal pay for equal work, enshrined in Article 119 ... is not confined to situations in which men and women are contemporaneously doing equal work for the same employer.
> 17. From the foregoing it appears that the dispute brought before the national court may be decided within the framework of an interpretation of Article 119 of the Treaty alone. In those circumstances it is unnecessary to answer the questions submitted in so far as they relate to the effect and to the interpretation of Council Directive (75/117/EEC)"

(emphasis added)

The emphasised words seem to dispose of Mr Goudie's point that if the respondents submissions are correct, the Directive was a waste of the Communities time. At least insofar as the creation of an enforceable right is concerned, it was indeed unnecessary.

32. I also note the answer given by the European Court in DEFRENNE to the third question posed to it:

> "3. Council Directive No 75/117 does not prejudice the direct effect of Article 119 and the period fixed by that Directive for compliance therewith does not affect the time-limits laid down by Article 119 of the EEC Treaty and the Accession Treaty."

33. I am therefore constrained by authority to reject the applicants submissions that they may rely on the Equal Pay Directive in parallel with or in stead of Article 119. But I would also do so by reference to general principles. The primary instrument of Community (or should one now say Union) law is the Treaty of Rome. Article 119 created a right to equal pay for equal work requiring no further action either by the Community or the member states to perfect it. From the 8th April 1976 (date of judgement in DEFRENNE) individual citizens of the Community could rely upon it in claims against their employers. Even if I were to accept Mr Goudie's proposition that it was not until 28th September _1994 (date of judgement in VROEGE and FISSCHER and in BESTUUR van het ALGEMEEN BURGERLIJK PENSIOENFONDS -v- BEUNE [1994] ECR 1-4471) that it became apparent that Article 119 applied to at least some of the pension schemes in the test cases, the situation is unaltered. The European Court does not make the law in its judgements, it merely enunciates it (AMMINISTRAZIONE delle FINANZE dello STATO -v- DENKAVIT ITALIANA [1980] CMLR 1205). Thus since 8th April 1976, Article 119 has provided a complete cause of action to part time workers excluded from occupational pension schemes, subject to the time and other procedural limitations which, it is common ground, apply to Treaty rights. That being so, it would be quite extraordinary if a piece of what I might describe as secondary legislation which, it is accepted, neither alters the content or scope of the principle as defined by the Treaty could, because of EMMOTT rather than anything in the Directive itself, supersede, in effect, the operation of the Treaty. It seems to me that the picture painted by Miss Caws of the damage to the principle of legal certainty which would ensue if that were the case, is unanswerable. Are long dead claims suddenly to be resurrected? Worse, can claims which have already failed because they offended against limitAtion provisions, be brought back before the Courts?

34. The only European instrument upon which the applicants can rely is, therefore, Article 119 of the Treaty. In consequence, employees in all sectors, public, private and indeterminate, are in the same position and there is no longer the need for a further preliminary hearing on whether the colleges of further education (and indeed the electricity supply employers) are or, at any material time were, emanations of the state.

G The Application of the Principle in EMMOTT to Treaty Provisions

35. The ruling in EMMOTT was that:

> 24. Community law precludes the competent authorities of a member state from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred on him by article 4(1) of Directive (79/7/EEC) on national procedural rules relating to time limits for bringing proceedings so long as that member state has not properly transposed that Directive into its domestic legal system."

Mr Goudie submits that the same principle applies, indeed having regard to the superior nature of Treaty as against Directive rights, applies a fortiori, where a member state retains in its domestic legislation, provisions which offend against those rights. If he is right, time did not begin to run against any applicant until 31st May 1995.

36. In their original skeleton, Counsel for the applicants submitted that, by the same token as in EMMOTT. "state authorities cannot hide behind the state's failure to give effect to Article 119 in order to avoid liability for an infringement of Article 119." That basic proposition was developed in argument and in their written reply to the respondents oral and written submissions. Mr Goudie submitted that the principle on which EMMOTT is founded is that of legal certainty. Until a Directive is implemented it is impossible for an individual to know what the law is and until their rights and obligations have crystallised, as it were, by the full transposition of the Directive, time does not run against them. Where a member states laws contain a provision which is contrary to a Treaty right, a similar uncertainty is created and therefore, in reliance on the same principle, time does not run until the uncertainty is resolved by the removal of the offending provision. This is the more so in those cases where, as here, the decisions of the European Court are all the time expanding the scope of the Treaty provision creating rather than removing, uncertainty as to its true meaning. Finally, it is submitted, there is nothing in EMMOTT itself to suggest that it is not equally applicable to Treaty provisions.

37. Although I understand why it is necessary for the point to be taken on the applicants behalf. I have to agree with Counsel for the respondents that the submission is misconceived, both by reference to principle and EMMOTT itself. The key to the misconception is to be found in the brief extract from the skeleton

argument which I have quoted. Unlike a Directive, there is no obligation - indeed no need - for a member state to "give effect to Article 119." It became effective in the United Kingdom through the joint operation of the Treaty of Accession, section 2(1) of the European Communities Act and the judgement of the Court in DEFRENNE. As the state was not called upon to do anything further to give effect to it, ex hypothesi it has no failure in that regard behind which to hide. Moreover Directives " shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." (Treaty Art 189) Unlike provisions in the Treaty, Directives create neither rights nor obligations between individuals (MARSHALL No.2). In other words, Treaty provisions are law; Directives are requirements that laws be made. Until laws are made in response to them there is uncertainty as to what form the law will take. The same, self evidently, cannot be said of Treaty provisions.

38. In answer to my query about the quoted extract from the skeleton argument, Mr Goudie submitted that pursuant to Article 5 of the Treaty, there was an obligation on the United Kingdom to take no action which would have the effect of creating uncertainty as to the extent of Article 119 and to take positive action to identify and promote its meaning and scope. I find those arguments wholly unpersuasive as I do the suggestion that the evolution of the scope of the Article discernible from the judgements of the European Court creates an uncertainty to which the EMMOTT principle can be applied. They are quite inadequate to overcome what I regard as the insurmountable obstacle in the applicants path in this respect - the fundamental difference between Treaty provisions and Directives.

39. These points of principle find clear echoes in the judgement in EMMOTT itself (page 13)

> "16. As the court has consistently held it is for the domestic legal system of each member state to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law.
> 17. Whilst the laying down of reasonable time limits which, if unobserved, bar proceedings, in principle satisfies the two conditions mentioned above, account must be taken of the particular nature of Directives.
> 18. According to the third paragraph of Article 189 a Directive is to be binding, as to the result to be achieved, on each member state to which it is addressed, but it is to leave to the national authorities the choice of forms and methods...
> 19. In this regard it must be borne in mind that the member states are required to ensure the full application of Directives in a sufficiently clear and precise manner so that, where Directives are intended to create rights for individuals, they can ascertain the full extent of those rights...
> 21. So long as a Directive has not been transposed into national law, individuals are unable to ascertain the full extent of their rights
> 22. Only the proper transposition of the Directive will bring that state of uncertainty to an end...
> 23. It follows that until such time as a Directive has been properly transposed, a defaulting member state may not rely on an individuals delay in initiating proceedings...

40. In my judgement, those extracts, in particular the short phrase which I have emphasised, make it clear beyond argument, that the application of the EMMOTT principle is confined to Directives. Accordingly, time is running against the applicants in accordance with the normal provisions of Community law. Before I go on to consider what those provisions are, and to examine their application to these cases, it is necessary to determine the nature of the remedy the applicants seek as it has considerable bearing on one element of the issue of time
Limits namely from when does time begin to run

H The Nature of the Applicants Claim
41. Under United Kingdom law, the remedies available to the applicants, and in consequence the nature of their claim, seem clear. The Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 provide:

> "11. **Damages not to be awarded for failure to comply with the equal access requirements.** The Equal Pay Act shall be so modified that there shall be no power for a court or an industrial tribunal to award damages in respect of any failure to comply with the equal access requirements.
> 12. **Power for court or industrial 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 industrial tribunal finds that there has been a breach of an equality clause which relates to membership of a scheme or where it makes an order declaring the right of any employee to admission to membership of a

> scheme in pursuance of the equal access requirements, it may declare that the employee has a right to be admitted to the scheme in question with effect from ... whichever is the later of the following dates, namely-
>
> > (a) 6th April 1978; and
> > (b) the date two years before the institution of the proceedings in which the order was made"

42. Both VROEGE and FISSCHER raised the question, answered in the affirmative, whether the right to join - that is to gain access to membership of - an occupational pension scheme fell within the scope of Article 119. In FISSCHER, the consequences of a workers claim retroactively to join such a scheme were dealt with.

43. Largely, I think, in anticipation of possible defeat on the two year retroactivity point contained in both section 2(5) of the Equal Pay Act and in Regulation 12 of the 1976 Regulations, Mr Goudie sought to argue in the alternative that the applicants claims could be properly regarded as claims for benefits under the schemes, compensation for the loss of which was recoverable as damages. Thus in all cases time had not begun to run as, for those still in work the pension was not yet payable in any event and for those retired on no or no adequate pensions, the loss was a continuing one. I trust I do justice to an argument which I do not profess to entirely understand. Perhaps this is not surprising as at pages 39 and 40 of their original skeleton argument Counsel for the applicants state "If the applicants' remedy lies in damages (which is not accepted)..." That position seemed to lose some of its' strength as argument progressed but, if I may say so with respect, the contrary proposition was not developed in an entirely coherent way.

44. I am satisfied that the applicants only remedy is a declaration as to their rights of access to the appropriate pension scheme. If the two year retroactivity provision is valid under European law then section 2(5) as modified by Regulation 12 cannot be dissapplied. Even if it is invalid, the applicants claim is still one for a declaration, but with the two year limitation removed. Neither these tribunals nor another court has power to grant damages. Nothing has been drawn to my attention to suggest that in selecting access to membership of a scheme as the appropriate remedy rather than compensation or damages, the United Kingdom is in breach of its' Treaty obligations. The question of the adequacy of that remedy arises for consideration later in this judgement.

I Time Limits under European Law

45. Subject to Mr Goudies' possible wish to pursue his third proposition on the nature of European right.5 elsewhere, that time limits apply to causes of action derived from European law is common ground. As a basic proposition, the nature of the time limit is also agreed. Its application to these cases is not. The principle was first enunciated in COMET BV -v- PRODUKTSCHAP voor SIERGEWASSEN [1976] ECR 2043.

> "In the absence of any 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 the same right of action on an internal matter. The position would be different only if those rules made it impossible in practice to exercise rights which the national courts have a duty to protect."

46. Then came REWE -ZENTRALFINANZ -v- LANDWIRTSCHAFTSKAMMER fur das SAARLAND [.1976] ECR 1989, to which I will return for its facts in a moment. The European Court ruled:

> 1. In the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground it is incompatible, with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.
> 2. The fact that the Court has given a ruling on the question of infringement of the Treaty does not affect the reply given to the first question."

47. Although the last sentence in the ruling in COMET was not repeated, it is not in doubt that the limitation provision contains two elements: (i) not less favourable than those relating to similar actions of a domestic nature and (ii) not rendering it impossible in practice to exercise European law rights. There are no Community rules. The time limit affecting similar actions of a domestic nature is set out in section 2(4) of the Equal Pay Act:

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

The phrase 'referred to an industrial tribunal' relates to the commencement of proceedings by way of presentation of an Originating Application in form ITI (ETHERSON -v- STRA THCL YDE REGIONAL COUNCIL [1992] ICR 579 EAT). Claims are in time only if presented within the period of six months beginning with the date upon which the employment ended.

48. As that is the time limit for which the respondents contend in these proceedings, they submit that it is unarguable that the first of the two COMET conditions is not satisfied as the time limit is the same as that for the 'same right of action of an internal nature' or (REWE) 'similar actions of a domestic nature.' I would go slightly, but I think importantly, further. Under the dissapplication principle of BIGGS, the domestic time limits are the European time limits, Article 119 being accessible only via the Act. The first half of the COMET/REWE test is therefore satisfied.

49. Mr Goudies submission that the second half is not satisfied is an extension of the argument he has deployed unsuccessfully to persuade me that the EMMOTT principle is applicable to Treaty rights. He submits that until VROEGE, FISSCHER and BEUNE it was impossible for the applicants in at least the wholly statutory schemes to know that they fell within Article 119 and that the application of the section 2(4) time limit to those who have left the employment would mean in effect that they had lost the right to claim before they knew it existed. That being so, ex hypothesi the exercise of their European law rights was rendered impossible. It is no answer to that proposition, he submits, that they could have pursued claims on the off chance that they might have succeeded. It was clear from the course which other claims had taken that recourse to the House of Lords or European Court of Justice would have been necessary. The costs would have been prohibitive for the ordinary applicant who cannot be expected to have the fortitude of a Miss Marshall or Mlle Defrenne. If that answer was to succeed then in practice one could never establish that the exercise of European rights had been rendered impossible by a time limit as, in theory, access to the European Court was always open to an applicant. The mere existence of UK legislation which, in tenns, said that they had no right of complaint, (particularly when coupled with the slowly evolving, and therefore confusing, interpretation of Article 119 by the European Court, which meant that it was entirely reasonable for the applicants to believe they had no claim until BEUNE etc.) prevented them exercising rights of which they could not be aware. There is no presumption in European law that one is deemed to know ones Treaty rights. The simultaneous revelation of the existence of the right and the imposition of a time limit which prevented its exercise, was the clearest possible infringement of the second COMET/REWE test.

50. I cannot accept those submissions either in principle or in the light of the authorities. In my judgement, the now very familiar sequence of cases in the European Court which culminated in VROEGE, FISSCHER and BEUNE should have alerted applicants representatives such as the trade unions sponsoring these cases, to the existence of the right to claim. That was plainly the view of the European Court in VROEGE and FISSCHER. In the earlier case of BARBER -v- GUARDIAN ROYAL EXCHANGE ASSURANCE GROUP [1990] ICR 616 ECJ the European Court when considering the unequal treatment arising from the setting of different retirement ages for the two sexes in the context of Article 119, imposed a temporal limitation preventing any employee who potentially benefited from the ruling from claiming retrospectively unless at the date of the judgement they had already commenced legal proceedings or raised an equivalent claim. The reason for this temporal limitation is spelled out at paragraph 43 of the judgement (at page 672 F)

> "In the light of those provisions, the member states and the parties concerned were reasonably entitled to consider that Article 119 did not apply to pensions paid under contracted -out schemes and that derogations from the principle of equality between men and women were permitted in that sphere".

51. In both VROEGE and FISSCHER the second question before the Court, the first being, in terms whether the right to equal pay under Article 119 included a right to join an occupational pension scheme, was in essence the same:

> "(2) If question (1) is answered in the affirmative, does the temporal limitation imposed by the Court in BARBER for pension schemes such as those considered in that case ('contracted -out schemes') apply to the right to join an occupational pension scheme such as that at issue in this case, from which the plaintiff was excluded because she was a married woman?" (FISSCHER)

52. The judgement of the Court on this question makes the applicants position on time limits, in my judgement. untenable;

> "24. It follows, in particular, from the foregoing that the limitation of the effects in time of

> the BARBER judgement concerns only those kinds of discrimination which employers and pension schemes could reasonably have considered to be permissible owing to the transitional derogations for which Community law provided and which were capable of being applied to occupational pensions.
> 25. It must be concluded that, as far as the right to join an occupational pension scheme is concerned, *there is no reason to suppose that the professional groups concerned could have been mistaken about the applicability of Article 119.*
> 26. It has indeed been clear since BILKA-KAUFHAUS G.m.b.H. -v- WEBER von HARTZ [1987] ICR 110 that a breach of the rule of equal treatment committed through not recognising such a right is caught by Article 119." (emphasis added)

As Mr Paines put it in argument, what is sauce for the goose is sauce for the gander. I agree. The professional groups concerned who could not have been mistaken about the applicability of Article 119 must be taken to include trade unions, solicitors and others who advise would be applicants. Any other view would put applicant employees into a more advantageous position than their employers or, worse still, non-union member employees in a better position than their union member colleagues. In my judgement, if it were a question of weighing competing injustices, which I do not think it is, that injustice would outweigh any perceived injustice to applicants who were previously unaware of their right to bring claims.

53. The view of the European Court that the position with regard to access to pension schemes was well settled, is clearly justified from the authorities. In DEFRENNE it was held that Article 119 applied directly to acts of direct discrimination in matters of pay, In JENKINS that was extended to acts of indirect discrimination. JENKINS concerned inequality of treatment between full time and part time employees. In BILKA-KAUFHAUS it was extended again to cover indirect discrimination which operated to exclude part-time female employees from a contractual pension scheme. BARBER made it clear that at least in so far as benefits were concerned (and therefore of necessity access) Article 119 applied to British model occupational pension schemes. Although NEWSTEAD -v- DEPARTMENT OF TRANSPORT [1988] ICR 332 ECJ at first sight perhaps supports the applicants, I do not accept Mr Goudies submission that it held that the Principal Civil Service Pension Scheme (and therefore by analogy other statutory and quasi-statutory schemes) was outside the ambit of Article 119. In NEWSTEAD the complaint related to the deduction of a small percentage from the gross pay of an unmarried male civil servant to fund a widows pension. The matter appears to have fallen outside the scope of Article 119 only because both male and female civil servants received the same gross pay for the same work. Certainly by the time of BEUNE it was not a case of whether such a scheme was within the scope of European law relating to equal pay, but only whether it was covered by the Article or one of the Directives. I entirely accept Mr Elias's submission that at the very latest by the time of BARBER to the extent that there could have been any doubt in the matter, any potential applicant was likely to have been advised that the runes were more than favourable and success was highly likely. Against that background, in my judgement. it is scarcely arguable that until VROEGE and FISSCHER it was impossible for the applicants to have exercised their European law rights because they could not have been aware of them.

54. But even if such an argument could be sustained, I accept Mr Elias's submission that it is of no avail to the applicants. This is the argument based on principle. Article 119 has had direct effect from 8th April 1976 (DEFRENNE). It is the duty of the national Courts to give effect to directly effective European law rights by disapplying conflicting domestic provisions. In AMMINISTRAZIONE dell FINANZE dello ST A TO -v- SIMMENTHAL [1978] 3 CMLR 263 the court held (head note):

> "The provisions of the EEC Treaty and the directly applicable measures of the Comnlunity institutions render automatically inapplicable any conflicting provisions of current national law Consequently, a national court which is called upon within the limits of its jurisdiction, to apply provisions of Community law, is under a duty to give full effect to those provisions, if necessary by refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently; it is not necessary for the court to request or await the prior setting aside of the national provision by legislative, judicial or other constitutional means."

That is not only European law; it is also the domestic law of the United Kingdom (European Communities Act 1972 section 2(1)). Article 119 was therefore always available for the present purpose before an industrial tribunal. The judgements of the European Court do not make the law, they merely state what the law has always been (DENKA VIT) In that respect the court performs the same role as the House of Lords in the United Kingdom. In a context in which the European Union did not exist, had the House of Lords newly interpreted the Equal Pay Act so as 10 admit claims such as these, that interpretation being contrary to a long line of established authorities of lower courts, it would not have been open to the applicants to argue that the time limits in the Act did not apply to them because they could not have' known of their rights until the House of Lords had pronounced upon the matter. Why should matters be different merely because there is a European context? I am satisfied thatin the light of the principles which I have endeavoured to set out that there is no difference, Mr Goudies strictures not to look at Europe through the distorting mirror of the Common law notwithstanding.

55. If there is any doubt in the matter, which I am satisfied there is not, those doubts are entirely dispelled by the facts of REWE. I paraphrase from 1976 CMLR 536" In 1968 Rewe paid certain charges in respect of the

import of French apples. Under German law the time limit for appealing against the charge was just 30 days. Rewe did not appeal. Subsequently they applied to the European Court for a ruling that the charges were contrary to Article 13 of the Treaty, a point not previously established. The Court ruled that the charges were contrary to Article 13. The date of the judgement was 11th October 1973. In the meantime in February 1973, that is before it could have know that the European Court would hold that Article 13 had been breached, but over three years after the limitation provision under German law for challenging the levy had expired Rewe applied to the Landwirtschaftskamrner to annul the decision imposing the charges and to refund them with interest. The claim was dismissed on the grounds that it was out of time. Appeals failed as far as the Federal Administrative Court which referred the following questions to the European Court:

> "1.Where an administrative body in one State has infringed the prohibition on charges having an effect equivalent to customs duties has the Community citizen concerned a right under Community law
>
> > (a) to the annulment or revocation of the administrative measure;
> > (b) and/or to a refund of the amount paid even if under the rules of procedure of the national law the time-limit for contesting the validity of the administrative measure is past?
>
> 2. Is this the case at least if the European Court of Justice has already ruled that there does exist an infringement of the prohibition contained in Community law?"

56. The answers to those questions I have already set out at paragraph 46 above. They can be summarised as meaning that domestic time limits apply to such claims even if the European Court has not previously said that the payment, repayment of which is claimed, was illegal under European law and therefore recoverable. With the necessary substitution of the right to equal pay under Article 119 for the right not to be required to pay a levy in the nature of an import duty under Article 13, the facts of these cases are indistinguishable from REWE.

57. The answer to the first of the preliminary points must therefore be that section 2(4) of the Act does not make the exercise of the applicants European law rights impossible (nor any of the other similar phrases in the authorities which have been drawn to my attention) A claim is therefore only in time if brought not later than the end of the period of six months' beginning when the employment which gives rise to the complaint ended.

J The Two Year Retroactivity Limitation

58. Section 2(5) of the Equal Pay Act provides:

> "A woman shall not be entitled, in proceedings brought in respect of a failure to comply with an equality clause (including proceedings before an industrial tribunal) to be awarded any payment by way of arrears of remuneration or dali1ages in respect of a time earlier than two years before the date on which the proceedings were instituted"

That provision is of course modified in these cases by Regs 11 and 12 of the 1976 Regulations (see paragraph 41 supra) so that the right to award compensation or damages is replaced by the granting of a declaration of entitlement to admission to the scheme but subject to the same two year limitation period.

59. Mr Goudie takes a number of points in an attempt persuade me that sec 2(5) as modified must be disapplied or interpreted in such a way as to avoid the apparent blanket limitation of two years. I should say that to the extent that any of his submissions depend on an application of the second limb of the COMET/REWE test, for the reasons which I have set out above, I reject them. I can deal with his first two points very briefly.

60. Mr Goudie submits that section 2(5) as modified is clearly in conflict in BILKA-KAUFHAUS as applied in FISSCHER, and he cites paragraph 27 at ICR p 668:

> "the direct effect of Article 119 can be relied on in order retroactively to claim equal treatment in relation to the right to join an occupational pension scheme and this may be done as from 8th April 1976"

He submits that, following SIMMENTHAL I must disapply sec 2(5) to eliminate the conflict. I do not agree. The passage which he has quoted is taken entirely out of context. It appears in the judgement in relation to the question of whether a temporal limitation of the BARBER type should be imposed. The Court having decided that it should not, the passage does no more than restate the law after DEFRENNE. The Court ruled, in its answer to the fifth question in FISSCHER, that the right to rely upon Article 119 is subject to national time limits. That is a restatement of the REWE principle which also refers to procedural rules and the passage cited to me must be read as being subject to it.

61. He next submits that as a matter of construction section 2(5) does not bite. He submits that the section only applies in respect of claims for arrears of remuneration or damages, neither of which are apt to describe the applicants claims. As a secondary limb of that submission he submits that at the very least the subsection is ambiguous and therefore falls to be interpreted to accord with Community law rights following the principle established by MARLEASING S.A -v- La COMERCIAL INTERNACIONAL de ALIMENT ACION S.A. [1990] ECR 1-4135. I respectfully regard that submission as misconceived. It ignores the modifying provisions of Reg 12 of the 1976 Regulations which render the subsection entirely apt and unambiguous.

62. His third submission requires more careful analysis. He submits that the two year limitation conflicts \\ith the obligation, enunciated in MARSHALL (No.2), to provide an adequate remedy for discrimination and is an a priori limitation on the amount of compensation of the kind held unlawful in MARSHALL. He submits that the social security cases relied upon by the respondents to support the limitation, STEENHORST -NEERINGS -v- BESTUUR van de BEDRIJFSVERENIGING voor DETAILHANDEL [1994] IRLR 244 ECJ and JOHNSON -v- CHIEF ADJUDICATION OFFICER [1994] ICR 375 ECJ are not in point as their principles are confined to matters of social security and, moreover, are based on policy considerations which have no application here. His alternative contention that if.' STEENHORST-NEERINGS and JOHNSON apply, they can be distinguished because of the practical impossibility of bringing these proceedings within any such limitation, must fail for the reasons I have already given.

63. In their written outline reply which Mr Goudie developed in his closing submissions, Counsel for the applicants submit vigorously that the suggestion that paragraph 27 of the judgement of FISSCHER is taken out of context is a fallacy. In support they drew my attention to the facts of Mrs Fisscher's claim. Although, for the reasons given above, I am satisfied that paragraph 27 has been taken out of context in an attempt to give it a meaning it was never intended to have, the facts of FISSCHER and the conclusions that I am invited to draw from them warrant some consideration.

64. Mrs Fisscher was employed by Voorhuis from 1st January 1978 to l0th April 1992. There was a pension scheme from which, prior to 1st January 1991, she was excluded because she was a married woman. On that date, the rules then being changed, she was admitted to the scheme and was granted "back service" for a period of three years. The pension scheme was statutory origin and membership was compulsory. On 16th July 1992 she commenced proceedings claiming that the old rules under which she was excluded were contrary to Article 119 of the Treaty. Relying on DEFRENNE she claimed that she had acquired pension rights from the date upon which she had entered the service of Voorhuis. Mr Goudie submits that paragraph 27 of the judgement has to be read in the light of the three year limit on retroactivity imposed by the pension scheme (which was a respondent before the Dutch court) and, consequently has the effect of outlawing it.

65. With respect to Mr Goudie, not only do I not find that argument persuasive, a closer examination of the point suggests that it strongly supports the respondents contentions, although I do not recollect them praying it in aid. The Dutch court referred 6 questions to the European Court. The second question asked whether the temporal limitation in BARBER applied to the right to join an occupational pension scheme. The question was of practical importance as if answered in the affirmative, Mrs Fisscher's right to membership of the scheme could only have been backdated to the 17th May 1990 rather than 1st January 1988.. The fifth question asked, somewhat enigmatically:

> "(5) is it relevant that the plaintiff did not act earlier to enforce the right which she now claims to have?"

I see nothing in either the opinion of the Advocate General or the judgement of the Court which makes any connection between the three year retroactivity limitation and the second question on the application of BARBER. In my judgement the two issues are unconnected and Mr Goudie's submission is therefore based on a false premise.

66. There is however, a clear connection with the fifth question. At paragraph 31 of his opinion (ICR 656 F-G and 657 D-E and G-H) the Advocate General said:

> "31. The point of the fifth question ... is not entirely clear '" it may have two meanings. First of all, the question may relate to the applicability of the *limitation periods* laid down in domestic law in relation to individuals who seek to assert rights deriving from Article 119 of the Treaty against their employer and/or the occupational pension scheme to which the employer is affiliated. Like the Commission, I take the view that EMMOTT, relied on here by Mrs Fisscher is not a relevant precedent in the present proceedings " (emphasis in the original)

Pausing there, the Advocate General for reasons which closely parallel those which I have given in paragraphs 37 to 40 supra, expressed the view that EMMOTT was not appropriate to 'horizontal' situations, such as where claims are brought in reliance upon the Treaty.

> "Such situations are governed only by the 'classic' conditions laid down by the Court in relation to national procedural rules in the absence of Community rules, those

> conditions being that the national rules must not be less favourable for actions based on Community law than those relating to similar domestic actions and they must not make the exercise of rights conferred by Community law practically impossible"

and

> "The second way in which the (Dutch court's) fifth question could be understood is that it seeks to ascertain whether having regard to the date on which Mrs Fisscher commenced her action (16th July 1992) when she had been in Voorhuis's service since 1st January 1978, she must be regarded as having 'forfeited' her rights. If that is what the (Dutch court) is asking, the Court should, in my view, refer it back to it's own national law: in some member states forfeiture of rights ("rechtsverwerking") is a doctrine which has been developed in relation to actions in private law and administrative law and on which Community law, subject to the observance of the conditions mentioned above, has no impact."

and at page 658 C-D he advised the Court that the fifth question should be answered:

> "Community law does not affect the application of national rules on limitation periods or rules on the forfeiture of rights ('rechtsverwerking') in proceedings between individuals, provided that those rules are not less favourable for actions based on Community law than those relating to similar actions and do not make the exercise of rights conferred by Community law practically impossible."

67. In its judgement the Court held (page 669 G - 670 C)

> "38. By the fifth question the national court asks in substance whether the national rules relating to time limits for bringing actions under national law may be relied on as against workers who assert their right to join an occupational pension scheme."

The Court then reiterated the REWE principle...

> "40. The answer to the fifth question must therefore be that the national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are no less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by . Community law impossible in practice."

68. Whilst there is nothing in the report of the proceedings to suggest that any such rule other than the three year retroactivity provision was before the Court, the Courts ruling ref~rs specifically to time limits and does not mention the question ofrechstverwerking. Had it done so it would have been determinative of the point against the applicants. On the other hand, as the Court does not deal specifically with the matter at all, particularly it does not comment adversely on rechstverwerking when it manifestly had the opportunity to do so, it is of powerfully persuasive authority.

69. In my judgement, the retroactive limitation in section 2(5) as modified- is qualitatively different from the a priori limitation condemned in MARSHALL (No.2). The limitation there was a ceiling on the financial compensation which could be awarded for an act of sex discrimination, irrespective of the loss suffered. In the case of section 2(5), provided that the first day on which the equality clause is said to have been breached falls within the two year period, full and complete recovery of the loss is permitted, irrespective of its size. In that case, as in the case where the first day of loss falls outside the two year period, compensation for a breach of the equality clause can be awarded for an indefinite future period without restriction as to the amount. I do not accept Mr Goudie's submission that here is no difference in principle between those propositions and the self evident proposition that in some circumstance even the a priori limitation on compensation for sex discrimination afforded full and complete recovery, that is in every case where circumstances combined to restrict the actual loss to below the ceiling. Section 2(5) is merely an incentive to an applicant to act timeously.

70. For that reason I accept Mr Elias's submission that the subsection is merely part of the limitation and other procedural rules which attach to claims brought under the Equal Pay Act which. as with other more familiar aspects of time limits. are designed to ensure legal certainty. (Of course if that view is correct then the Court in FISSCHER ~ expressly approving the principle ofrechtsverwerking subject to the application of the REWE test) Without it the absurd situation could arise of a 16 year old girl suffering inequality of pay for the first four years of her employment, bringing a claim 45 years later upon her retirement at 65 when all those in management at the time are either long since retired or dead.

71. The two year retroactivity limitation applies equally to claims based exclusively on domestic law and my observations on the applicants claims that section 2(4) made it impossible (etc.) in practice to enforce their European law rights applies with equal force to section 2(5). It therefor passes the REWE test. That disposes of the point and it is not necessary for me to consider either STEENHORST -NEERINGS or JOHNSON as,

putting it at its lowest, they support rather than undermine the view that the section 2(5) limitation is pennissible under European law.

K The Practical Consequences of Section 2(5)

72. It is common ground that on the 1st April 1991 all employees in the Health sector became eligible to join the pension scheme irrespective of the number of hours worked. In the case of Midland Bank, the only respondent in the private non-contributory sector, the hours qualification was removed with effect from September 1992. I do not know whether the same is true of the other clearing banks and other employers in the banking and finance industry. In the electricity supply sector, the qualifying hours threshold was removed from the Electricity Supply Pension scheme as long ago as 1st April 1988. None of the test cases nor, I believe any of the remaining 40,000 or so applications, were started until some weeks and possibly months after 28th September 1994. As I understand it, it is conceded on behalf of the applicants that a claim cannot lie in respect of periods of service after the abolition of such a threshold during which an employee remained outside the pension scheme unless that was due to something which itself amounted to sex discrimination or was causally connected to past sex discrimination. That being so, although it is not open to me to rule that the applicants in such cases are not eligible to bring these proceedings and dismiss them.' pursuant to Rule 6 of the 1993 Regulations, plainly to continue with them would be frivolous and probably vexatious as the Tribunal could make no declaration pursuant to Reg 12 of the 1976 Regulations. The appropriate course of action is therefore to give notice that I intend strike cases to out all from those sectors where the qualifying threshold was removed more than 2 years before proceedings were commenced unless in an case cause to the contrary is shown within 7 days, that period being suspended, in respect of the test cases, until the completion of any appeals from this judgement. In respect of the other cases in those sectors the time will run from the date upon which letters are sent to individual applicants which will not begin until the appeal process is complete.

73. So far as the employees in the local government sector are concerned, the hours qualification was abolished on 17th August 1993 but with the opportunity for employees to back date their membership to 1st January 1993. Any claim in the local government sector commenced after 31st December 1994 will therefore suffer the same fate. However, it seems that many Originating Applications were registered on or about the 24th December 1994. Those claims, although restricted to one week of membership of the scheme must be allowed to proceed.

L Periods of Claim Prior to 13 May 1986 (date of judgement in BILKA-KAUFHAUS)

74. For the sake of completeness I should add that I am satisfied that no special significance attaches to this date as no temporal limitation of the DEFRENNE or BARBER kind was incorporated into the BILKA judgement. However the point is dealt with by my findings with regard to sec 2(5) which has the effect of preventing a claim being made in respect of service before that date.

M Breaks in Service

75. Mr Goudie submits that the concept of continuity of employment has no place in the Equal Pay Act. I agree, and the respondents do not submit otherwise. The effect of a break in service is still of importance however, in the context of whether time begins to run for the purposes of sec 2(4) from the end of each period of service or whether there is some mechanism, either within the Act itself or by the application of FORD -v- WARWICKSHIRE COUNTY COUNCIL [1983] ICR 273 HL and FLACK -v- KODAK LTD [1986] ICR 775 CA to bridge one or more gaps and thus postpone the moment from when time starts to run. If so, the question arises whether any such mechanism has universal application and therefore may be dealt with as a preliminary point or whether, the mechanism being established in law, its application falls for consideration at the Common Points or even the individual case stage.

76. The starting point must be the words of the Act itself. Section 2(4) provides;

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

Mr Goudie submits that the respondents are in error in arguing that the italicised words equate with "contract of employment". If Parliament had intended to apply the time limit in such a way that a claim could be made only in relation to the last contract of employment, it could have said so. The respondents argument, if successful would require such people as teachers on term or academic year contracts to submit an IT I from in respect of each separate contract and supply teachers employed by the day, in respect of each separate day (subject .to a point about umbrella contracts to which I will turn in a moment). This would greatly undermine the efficacy of the Act and would he submits, without explanation, render section 2(5) otiose for many people.

77. In the main skeleton argument Counsel for the applicants submit that "it is clear" from sections 1(6) and 1(8) that employment is not limited to employment under the same contract of employment although it means employment under .a contract of employment. I was also invited to consider references to "in the same employment" in sections 1 (2)(a)(b) and (c). I regret that I find it far from clear. Section 1(8) is simply not in point as it merely extends the application of section 1 to Crown employment. Nor are the three paragraphs of

subsection (2) which are designed to ensure that comparison is made only between a man and woman in the same employment. Subsection (6) provides:

> "Subject to the following subsections, for 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 constructed accordingly*

78. The expression " in the employment" in section 2(4) is clearly related to the defined word 'employed'. Therefore, contrary to Mr Goudie's submission, the plain words of the Act compel me to accept the submissions of Mr Elias and Miss Caws. The words can only mean the employment under the contract of service etc. about which complaint is made. That is consistent with the scheme of the Act which operates by the insertion of an equality clause into the contract. Therefore once that contract ends and with it the equality clause, time begins to run. The impossibility of the applicants contentions in practice is demonstrated not by a reduction ad absurdiam but by one of the four different types of break in service which they identify from the test cases, all four of which, they submit, are governed by their general submission. Mrs Culley was employed part time by Midland Bank until June 1982 when she left. She returned to their employment part time 5 years later in June 1987. Although acknowledging that the position is less clear in such cases nonetheless Mr Goudie submits that irrespective of the length of the break - and presumably of the reason for it - if she returned to the same type of employment all her service should count.

79. That cannot be right. Not only is it totally inimical to the principles of legal certainty, it offends against common sense. It must be presumed, because I would have been told if the contrary were the case, that until she applied for re-employment in June 1987 Midland Bank cannot have known that she would return to their employment. They would rightly have assumed that she had waived any claims that she might have had in respect of that earlier period. If she had commenced proceedings in May 1987 in respect of her exclusion from the pension scheme which had ended in June 1982, she would inevitably have failed. Why should she be in a better position over 7 years later? The answer can only be that she isn't.

80. If that basic proposition is right in the case of Mrs Culley, it must be right in all cases, that Act imposing an absolute time limit not susceptible to elasticity in individual cases such as when it is just and equitable to extend it or when it was not reasonably practicable to commence proceedings within what is a not ungenerous time limit in the context of employment law. And why, one asks rhetorically, is it more difficult for the teacher on a terms contract to start proceedings at the end of the term than for the employee who has served for some years before leaving to commence proceedings. Both will suffer the same anxieties about being able to return to the place of employment if they issue an IT 1 and it is no answer to say that the teacher is naturally looking to return to the same college to continue her career while an employee in another class of employment has a wider scope. The Act, and the principle of legal certainty, do not permit the making of special rules for special cases.

81. I am therefore satisfied that time begins to run against an employee at the end of each contract of employment no matter how short the gap between it and the next one with the same employer (subject of course to questions of mala fides on the part of the employer). I am also satisfied that, apart from one exception which will fall to be considered at the Common points stage, the point is of universal application which I can deal with now. In their written reply, Counsel for the applicants identified four separate classes of breaks of employment. I have already dealt with the Mrs Culley class. The others they classify as: regular employment with regular breaks in the contract of employment (e.g. teachers with termly or academic year contracts): irregular employment in the same capacity where there is an "umbrella" contract (e.g. supply teachers): and irregular employment in the same capacity where there is no "umbrella" contract. It is only in those cases of irregular employment where there exists a document which can reasonably be called an umbrella contract that I feel unable to say that this matter can be dealt with as a preliminary point. During the hearing I have been shown two 'contracts' answering this generic description. They are sufficiently different in terms for me not to be able to rule out the possibility that some local education authorities (and possibly other respondents) employ people on contracts of employment which only require work to be performed on an occasional and indeterminate basis as the need arises, payment being made only in respect of days actually worked, but which nonetheless provide a continuing contractual relationship such as to prevent time running under section 2(4).

N The Overarching Nature of some Pension Schemes

82. In some sectors, notably education, a move from one employer to another does not entail (or would not if the employee was a member of the scheme) a break in pensionable service as their is only one scheme for that industry. For the avoidance of doubt, I am satisfied that the interpretation which I have given to section 2(4) applies equally in these cases, even if employment with employer A ends on day one and begins with employer B on day two. Any argument that that places part time employees at a disadvantage when compared with full time colleagues is met, in my judgement, by my reasoning on the main point; there was

nothing to stop the part time employee issuing an IT1 in respect of the employment with employer A at any time during the 6 months beginning with day one.

O Claims by Men

83. For the applicants Mr Goudie submits that as VROEGE and FISSCHER establish that women part-timers have always had the right to join a pension scheme it must follow that male part-timers have always had the same right, any other result necessarily being discriminatory against them on the grounds of sex. Miss Caws submits that a part time male employee will only be able to bring a claim where either part-time female employees are admitted to the scheme but males continue to be excluded or denial of access to a particular scheme adversely affects a considerably greater proportion of men than women. She further submits that a purely parasistic claim does not arise under domestic law until a part-time woman is admitted to the scheme. For the Secretaries of State Mr Paines submits that it is misconceived to say that a man can run a piggy-back or parasitic argument. His cause of action arises only when a part time woman is admitted to the scheme and it only gives rise to a claim for the future, never in respect of the past. He submits that it is artificial to say that a man automatically has a claim when a woman is ordered by a tribunal to be given access to the scheme for a period of two years preceding the date of presentation of her claim. That creates the anomoly of a mans claim being dependent on how timeously his female comparator has brought her claim. The argument is artificial because the reason for his exclusion from the scheme prior to the tribunals order was not discrimination on the grounds of his sex.

84. It is necessary to consider the matter from first principles. The exclusion of part-time women employees is indirectly discriminatory because the condition or requirement of working full time hours to attain membership of a pension scheme is one with which a considerably smaller proportion of women than men can comply. It must follow therefore, that it is not indirectly discriminatory against male part-timers. As yet they therefore have no cause of action. Once a female part-timer is admitted to a scheme however, the exclusion of a male part-timer immediately becomes directly discriminatory and a cause of action arises (subject of course to any possible arguments on objective justification although it is difficult to conceive of circumstances which would apply only to some as opposed to all members of a part-time work force). In my judgement such discrimination remains until the mans rights are made co-extensive with the rights of his chosen comparator. I therefore reject Mr Paines submission. Even if the man is admitted to the scheme on the same day as his comparator he has suffered inequality of pay in respect of the period during which the womans admission to the scheme is backdated. There is nothing in the Act to prevent a woman complaining of breach of an equality clause in respect of a pay rise given to herself and a comparator but which is backdated only for her comparator.

85. But this creates major procedural problems. Until female part-timers are admitted to schemes, their male counterparts are suffering no discrimination or inequality of pay. It is therefore at least arguable that any proceedings commenced by a man prior to that event are premature, and therefore doomed to fail and should be dismissed. However, it is not unlikely in those cases where employers intend to argue objective justification on grounds other than sex for excluding part-time workers, that (assuming such arguments fail) the first orders requiring a womans admission to the scheme will not be made until 1997. By that. time she may well be entitled to a total of more than four years back membership; the two years preceding the commencement of proceedings (section 2(5)) and the two years between- that date and the date of the order. If a male colleague was unable to commence proceedings until that moment, by virtue of the section 2(5) limitation he could never achieve equality;
Moreover, there are bound to be at least some male part-time employees who will retire or leave their present employment for other reasons during this time. Any who leave more than six months before the admission of female former colleagues to the scheme have no right to bring a claim at all because of section 2(4). I am assuming - and for the reasons I have given for excluding the Sex Discrimination Act from consideration in these proceedings, I think that I must be right to do so - that the male part timer in both situations is precluded from bringing his claim under that Act with its potentially more flexible time limits and no limit on retroactivity. Moreover, as the Equal Pay Act provides a perfected cause of action for directly discriminatory exclusion from pension schemes (indeed since 31st May 1995 it does so in respect if indirectly discriminatory exclusion) they would appear to have no possible recourse to Article 119 and to the argument that the inter-reaction of sections 2(4) and (5) and the effect of the tribunals orders in respect of female colleagues has had the effect of making it impossible in practice to exercise their European law rights, although I concede that that is not acte claire and may be a point for future consideration by the European Court.

86. The question of entitlement to bring proceedings falls for consideration under Rule 6 of the 1993 Regulations"

> "(1) A tribunal may at any time before the hearing of an originating application, on the application of a party or of its' own motion, hear and determine any issue relating to the entitlement of any party to bring or contest the proceedings to which the originating application applies."

At first site it is perhaps surprising that the Rule does not stipulate that a claim shall be dismissed where lack of entitlement to bring it is found. In the absence of such a stipulation I must look elsewhere in the Rules of Procedure to determine my powers in that respect. Rule 13(2) provides:

"A tribunal may-

> (d)subject to paragraph (3), at any stage of the proceedings, order to be struck out or amended any originating application on the grounds that it is scandalous, frivolous or vexatious."

I have no doubt that in normal circumstances a Chairman *would* order to be struck out under this Rule any originating application that he had held an applicant was not entitled to bring.

87. Despite what may seem the logical inevitability of the argument that at the moment, male applicants have suffered no inequality in relation to pay and therefore all claims must be premature, I feel unable to say, for the purposes of Rule 6 that they are not entitled to bring. them, in the special circumstances of these cases. In any event, the use of the word "may" in Rule 13(2) makes the ultimate decision to strike out a matter for the exercise of my discretion. Against the injustices to male part-timers which I have described if I were to strike out these claims now, the injustices suffered by employers are slight. They are not being deprived of their right to raise the arguments which I have set out about the entitlement of males to bring claims at this moment. Those arguments can be raised again at. the appropriate time which is likely to be at the third and final stage of these cases when individual claims are considered. The only injustice the respondents are likely to suffer therefor if I exercise my discretion in favour of not striking out at this stage is the small additional costs of fighting that matter on another day. In my judgement in the light of those competing injustices it would be perverse of me to do other than exercise it in favour of not striking out claims by male applicants at this preliminary stage. All such claims are however to remain stayed until such time as a female part-timer is admitted to their employee pension scheme with membership back dated beyond the date when membership of the scheme ceased to require a minimum number of hours service. The fact that proceedings are stayed should not inhibit any party from attempting to settle.

88. As a final point under this section, I should add that I see difficulties in the second limb of Miss Caws' submission - denial of access affecting a considerably greater proportion of men than women - particularly where the proportion of men full timers in the scheme is considerably greater than the number of women.

P The Secretary of State for the Environment

89. I trust Mr Paines and Mr Hill will forgive me if I do not deal in detail with their submission on whether the Secretary of State for the Environment is a correct respondent to these proceedings. I propose to take a pragmatic rather than a legalistic view of the matter. Without purporting to deal with the question of whether ultimately the tribunal has jurisdiction to make declarations or Orders binding upon the Secretary of State given the nature of his role vis a vis the local government pension schemes, as the maker of the rules governing those schemes. though not their administrator or trustee, he is plainly a proper party to these proceedings if only because the processes of negotiation and settlement which are likely to be embarked upon at some stage would be hampered by his absence. Moreover, the tribunal which in due course will be called upon to determine the Common Points of the local government scheme will find his submissions of invaluable assistance.

Q Summary

90. summary therefore, my conclusions on the preliminary points are as follows:

> 1 (a) and (b) claims are only in time if commenced within six months of the end of the contract of employment containing the equality clause allegedly breached
> 1 (c) periods of employment covered by previous contracts of employment do not give rise to a cause of action unless proceedings have been commenced in respect of them within six months of their termination. This applies to all such contracts including term and academic year contracts
> 2(a) claims do not lie in respect of periods of employment prior to 8th April 1976
> (b) the date 13th May 1986 has no special significance beyond the consequences of my holding on point 2(c)
> (c) a declaration cannot be made requiring an employer to admit an employee to a pension scheme with effect from a date prior to the date two years before proceedings were commenced
> 3 Part time male employees are eligible to bring claims, subject to the right of employers to re-argue the point in individual cases at a subsequent stage,
> 4 and 5 The fact that admission to a scheme was possible at a date earlier than that on which an applicant actually joined has no additional consequences to those arising. as a result of the application of the answers to points 1 and 2(c). no cause of action. arising in respect of the period after membership became possible unless the applicants continuing exclusion was as a result of further sex discrimination by the employer or was causally linked with the earlier discrimination
> 6 The Secretary of State is a proper Respondent to these proceedings although the . question whether orders or declarations can be made against him will fall to be decided at the time they are made against other respondents.

7 The overarching nature of the education (and possibly other) pension schemes does not affect the answer given to point l(c)

R The Test Cases

91. For the avoidance of doubt I should make it clear that I have heard no evidence on any of the cases and the facts on which I rely are drawn largely from the skeleton arguments or Counsel for the applicants. I have used only such facts as are necessary to-dispose of the cases at this stage.

92. The Health Sector

Preston -v- Wolverhampton Health Care Trust and Secretary of State for Health Mrs Preston was employed continuously by the National Health Service from 5th June 1978 until her transfer to the first respondents in 1994 under the provisions of The National Health Service and Community Care Act 1990. She became eligible to join the scheme on 1st April 1991 and did so in September 1991. She remains in the employment of the first respondent. Although her claim is in time, proceedings having been commenced on 19th December 1994, she has been a member of the scheme throughout the two year period preceding the commencement of proceedings. No declaration can therefore be made within the time limited by section 2(5) of the Equal Pay Act as modified. She is accordingly required to show cause within 7 days of the ending of the appeal process for the test cases, why her claim 1 should not be struck out under Rule 13(2)(d) of the 1993 Rules of Procedure Regulations.

93. The Education Sector

Brack -v- Manchester City Council and the Secretary of State for Education and Employment Mrs Brack is a retired teacher already in receipt of a pension. She has done supply teaching for the first respondents since April 1994 under what is arguably an umbrella contract. That teaching is not pensionable. Her entitlement to bring these proceedings arise by virtue of the fact that had she returned to full time teaching, it would have ranked as further pensionable service. Her claim was presented on or about 21st December 1994. Because the arrangement which she enjoys with the first respondents is arguably that of an umbrella contract, her claim appears to be in time and must proceed to the next stages. The question of whether it is or is not an umbrella contract and the consequences flowing from the determination of that issue fall to be decided at the third stage, provided that her claim survives the Common Points stage in the Education Sector.

Light -v- Birmingham City Council and the Secretary of State

Mrs Light was employed by the first respondents from September 1975 (or perhaps 1976) to July 1987 and from September 1991 to the present. Her originating application was presented in December 1994. No claim lies in respect of the first period of employment. The claim in respect of the second period is in time but is limited to a declaration covering the period between the date two years prior to the date of presentation of her claim and the date upon which she became eligible to join the scheme (which I understand to be in issue for the time being) subject to any breaks in service.

Maltby -v- Binningham City Council, Sutton College and the Secretary of State

Mrs Maltby was employed by the first respondent from 5th November 1979 until September 85 as an hourly paid lecturer at Sutton College. She did not meet the qualifying conditions for the scheme. From September 1985 she has been a part-time lecturer at the College and her employment has been pensionable. By virtue of the Further and Higher Education Act her employment transferred to the second respondents with effect from the 1st April 1993 and is continuous to the present time. Her originating application was presented in December 1994 and is therefore in time. However, as the whole of the period to which the complaint relates lies outside the two-year period preceding its presentation no declaration can be made under section 2(5) as modified. She is accordingly required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out.

Jones -v- Stockport Metropolitan Borough Council and the Secretary of state

Mrs Jones has been employed by the first respondents from April 1977 to the present time. Throughout that time she has been employed as a home tutor which was not pensionable until August 1993. Since August 1989 she has also worked as a part time teacher at the Pendlebury Centre and this employment has been pensionable from its inception. Her claim which was presented on 6th December 1994 is therefore in time. However a declaration can only be made in respect of the period between the date two years prior to the commencement of proceedings and the date in August 1993 when she joined the scheme. Moreover there are formidable problems with regard to continuity because of the peculiar nature of the work of a home tutor. These can only be resolved at the third stage.

Cockrill -v- Wolverhampton MBC and the Secretary of State Mrs Cockrill was employed by the first respondent as a supply teacher between February
1985 and 18th July 1988 with breaks in service. On the latter date she joined the permanent staff of a school and her employment became pensionable for the first time. As her claim was presented on 21st December 1994 and her employment with the first respondent continues, it is in time. However, as no declaration can be made under section 2(5) to cover the period of time about which complaint is made which ended in July 1988, she is required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out under Rule 13(2)(d)

Fox -v- Humberside County Council, Grimsby College, Hull College, the Secretary of State
Mrs Fox's claim is factually complex. She has been employed by the first respondents at Grimsby College as a part time lecturer under a series of contracts since September 1980. On 1st April 1993 her employment transferred to the second respondents where she remains in employment in non-pensionable part time work the subject of sessional contracts. The same applies mutatis mutandis to her work for the first respondents at Hull College which began in October 1992. Her originating application was issued on a date in December 1994 which is not clear from the face of the document. The claims in respect of these two employments are in time but are restricted to the period of two years which precedes the date of commencement subject to questions of breaks of service. It is possible that those breaks in service will mean that the claim against the respondent Council will fail. The third element of her claim is against the respondent Council alone and relates to a period of service between 1987 and 1989 at Grimsby Adult and Basic Education Unit. This claim is out of time and is dismissed.

Ham -v- Birmingham City Council and the Secretary of State
Mrs Ham retired in April 1984 from full time teaching and is in receipt of a pension. She has worked as a part time teacher at various schools under sessional contracts since 1986. Her hours became full time between 1st January 1993 and 18th April 1993 but she elected to opt out of the pension scheme for that period. She remains in the first respondents employment and her claim which was presented on or about 22nd December 1994 is therefore in time. However it is limited to the period since the date two years prior to the date of claim and is subject to questions of continuity. Presumably the period when she was eligible for but opted out of the scheme in 1993 does not give rise to a cause of action in any event.

94. The Local Government Sector
Mannion and Kynaston -v- Stockport MBC and the Secretary of State for the Environment Mr Mannion retired on 11th May 1994 more than six months before the presentation of his originating application on the 27th December 1994. His claim is therefore out of time and is dismissed. Moreover, the claim related exclusively to a period of about one year which ended on 1st April 1990 when he was admitted to the pension scheme. No declaration could therefore have been made in respect of it

Mrs Kynastons claim is also out of time, having been commenced on or about 21st December 1994, more than six months after her employment with the first respondents ended on 20th May 1994. Because of the amendments to the Local Government Superanuation Scheme which came into effect in August 1993 and which allowed employees to back date their membership to the 1st January 1993, a declaration could have been made only in respect of the period between 21st and 31st December 1992

95. The Banking Sector
Nuttall, Fletcher, Barron, Foster, Gilbert, Harrison, Walker, Wainsborough and Culley -v- Midland Bank Plc
Mrs Nunals employment has been continuos since July 1983. However she has been a member of one of the respondents schemes since 1st January 1989. No declaration can be made in respect of her service prior to that date. She is accordingly required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out.

Mrs Fletchers employment ended on 30th June 1991 more than six months prior to the presentation of her claim on 13th December 1994. Her claim is accordingly dismissed.

Mrs Barron has been a member of the respondents pension scheme since 11th July 1988 when she started to work full time having worked part time since July 1984. The period of claim is therefore outside the two year period for which a declaration could be made. She is accordingly required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out.

Mr Foster was granted access to the respondent's pension scheme on 1st September 1992 having worked part time for them Since May 1979. She left their employment In May 1994 and did not commence proceedings until 23rd December 1994 more than six months later. Her claim is therefore out of time and is dismissed

Mrs Gilbert has been continuously employed by the respondents since May 1975. However, since 31st March 1985 she has been employed full time and has been a member of the pension scheme. Her complaint was made to the tribunal on 22nd December 1994. None of the period of claim falls within the two years preceding the commencement of proceedings and she is accordingly required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out.

Mrs Harrison ended her employment with the respondents on 30th November 1993, more than six months before she commenced these proceedings on 8th December 1994. Her claim is therefore out of time and is dismissed

Mrs Walker has been continuously employed by the respondents since May 1970, working part time until March 1993. She was admitted to the pension scheme on 1st January 1989. These proceedings were commenced on 12th December 1994 so any declaration which could be made cannot cover the period of claim. She is accordingly required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out.

Mrs Wainsborough has worked part time for the respondents since May 1973 and was granted access to the pension scheme on 1st September 1992. However, as she did not commence these proceedings until 8th December 1994, none of the period of claim falls within the preceding two years. She is accordingly required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out

Mrs Culley resumed part time working for the respondents on 18th June 1987 after a gap of five years. She was admitted to the pension scheme on 1st January 1989 but did not commence these proceedings until 14th December 1994. No declaration can therefor be made to cover the period of claim and she is accordingly required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out.

96. Electricity Supply Sector.
Guerin and Lee -v- Southern Electricity Plc
Mrs Guerin has been employed by the respondents and its public utility predecessor from August 1973. She became eligible to join the pension scheme with effect from the 1st April 1988 but did not in fact join until she started to work full time from April 1990. She presented her claim on 22nd December 1994 and so no declaration can be made in respect of the period of claim. She is accordingly required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out.

Mrs Lee retired from the respondents employment on 12th August 1992 but did not commence these proceedings until some time in mid-December 1994. The claim is therefore out of time and is dismissed.

CHAIRMAN
RESERVED

DECISION ENTERED IN REGISTER
AND COPIES SENT TO PARTIES ON
4/12/95
P.A.S.

SCHEDULE OF DECISIONS

Health Sector

507497/95 Preston -v- Wolverhampton Healthcare NHS Trust (1)
Secretary of State for Health (2)

The applicant is required to show cause within 7 days of the ending of the appeal process why her claim should not be struck out under Rule 13(2)(d)

Education Sector

500393/95 Brack -v- Manchester City Council (1)
Secretary of State for Education and Employment (2)

Claim in time and all within the two years preceding the date of claim - subject to questions of continuity
504275/95 Light -v- Birmingham City Council (1) Secretary of State (2)
Claim in time, limited to the period between the date two years prior to the date of presentation of the claim and the date she became eligible to join the scheme - subject to questions of continuity

504442/95 Maltby -v- Birmingham City Council (1) Sutton-College (2)
Secretary of State (3)

The applicant is required to show cause within 7 days of the ending of the appeal process why the claim should not be struck out under Rule 13(2)(d)

507029/95 Hams -v- Lancashire County Council (1) Preston College (2)
Secretary of State (3)

Claim in time, limited to the period between the date two years prior to the date of presentation of the claim and the date she joined the scheme - subject to questions of continuity

507817/95 Jones -v- Stockport Metropolitan Borough Council (1)
Secretary of State (2)

Claim in time, limited to the period between the date two years prior to the presentation of the claim and the date when her work as a home tutor became pensionable - subject to questions of continuity

509968/95 Cockrill-v- Wolverhampton Metropolitan Borough Council (1)
Secretary of State (2)

The applicant is required to show cause within 7 days of the ending of the appeal process why the claim should not be struck out under Rule 13(2)(d)

513866/95 Fox -v- Humberside County Council (1) Grimsby College (2) Hull College (3)
Secretary of State (4)

The claim in respect of the period of service between 1987 and 1989 with the first respondents at Grimsby Adult and Basic Education unit is out of time and is dismissed. The remaining claims are in time, limited to the period of two years preceding the presentation of the claim - subject to questions of continuity
525455/95 Ham -v- Birmingham City Council (1) Secretary of State (2)
Claim in time, limited to the period of two years preceding the presentation of the claim- subject to questions of continuity

Local Government Sector

514614/95 Mannion -v- Stockport Metropolitan Borough Council (1)
Secretary of State for the Environment (2)

Proceedings commenced more than six months after employment ended; claim dismissed

514631/95 Kynaston -v- Stockport Metropolitan Borough Council (1)
Secretary of State

Proceedings commenced more than six months after employment ended; claim dismissed

Private Sector Non-Contributory (Banking)
529030/95 Nuttall -v- Midland Bank Plc
The applicant is required to show cause within 7 days of the ending of the appeal process why the claim

should not be struck out under Rule 13 (2)(d)
525353/95 Fletcher -v- Midland Bank Plc
Proceedings commenced more than six months after employment ended; claim dismissed 525356/95 Barron -v- Midland Bank Plc
The applicant is required to show cause within 7 days of the ending of the appeal process why the claim should not be struck out under Rule 13 (2)(d)
525368/95 Foster -v- Midland Bank Plc
Proceedings commenced more than six months after employment ended; claim dismissed 525369/95 Gilbert -v- Midland Bank Plc
The applicant is required to show cause within 7 days of the ending of the appeal process why the claim should not be struck out under Rule 13 (2)(d)
525372/95 Harrison -v- Midland Bank Plc
Proceedings commenced more than six months after employment ended; claim dismissed 525374/95 Walker -v- Midland Bank Plc
The applicant is required to show cause within 7 days of the ending of the appeal process why the claim should not be struck out under Rule 13 (2)(d)
525378/95 Wins borough -v- Midland Bank Plc
The applicant is required to show cause within 7 days of the ending of the appeal process why the claim should not be struck out under Rule 13(2)(d)
525447/95 Culley -v- Midland Bank Plc
The applicant is required to show cause within 7 days of the ending of the appeal process why the claim should not be struck out under Rule 13(2)(d)

Private Sector Contributory (Electricity Supply)
517955/95 Guerin -v- Southern Electric Plc
The applicant is required to show cause within 7 days of the ending of the appeal process why the claim should not be struck out under Rule 13 (2)(d)
526316/95 Lee -v- Southern Electric Plc
Proceedings commenced more than six months after employment ended; claim dismissed