Case No: A2/2014/1195 & 1061

Neutral Citation Number: [2015] EWCA Civ 1000

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Sir David Keene
UKEAT 0466/13/LA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 October 2015

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LORD JUSTICE UNDERHILL

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Between :

DERMOD O'BRIEN	**Appellant**
- and -	
MINISTRY OF JUSTICE	**Respondent**
AND BETWEEN	
MR JOHN P D WALKER	**Appellant**
- and -	
INNOSPEC & ORS	**Respondents**
SECRETARY OF STATE FOR WORK AND PENSIONS	**Interested Party**

- -

MR ROBIN ALLEN QC & MS RACHEL CRASNOW QC (instructed by **Browne Jacobson LLP**) for the **1st Appeal Appellant**
MR JOHN CAVANAGH QC, MR CHARLES BOURNE QC & MS RACHEL KAMM (instructed by **the Government Legal Department**) for the **1st Appeal Respondent**
MR MARTIN CHAMBERLAIN QC & MR MAX SCHAEFER (instructed by Liberty) for the **2nd Appeal Appellant**

MR NICHOLAS RANDALL QC & MS CLAIRE DARWIN (instructed by Eversheds LLP) for the **2nd Appeal Respondent**
MR JASON COPPEL QC & MS HOLLY STOUT (instructed by the Government Legal Department) for the **Interested Party in 2nd Appeal**

Hearing dates : 29, 30 June and 1 July 2015

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Judgment

Lord Justice Lewison:

The two appeals

1. Mr O'Brien QC was appointed as a Recorder sitting part-time on the Western Circuit on 1 March 1978. He held that office until 31 March 2005. He is entitled to a pension by virtue of the Part Time Workers Directive (97/81/EC) ("the PTWD"), which the United Kingdom was required to transpose into domestic law by 7 April 2000. The question on this appeal is whether, in calculating the amount of the pension that he is entitled to receive, the calculation should bring into account Mr O'Brien's sitting days since the beginning of his appointment, or only those that took place after 7 April 2000. The Employment Tribunal (EJ Macmillan) held that the calculation should take into account all Mr O'Brien's sitting days; but the Employment Appeal Tribunal (Sir David Keene) held the contrary. Sir David's decision is at UKEAT/466/13, [2014] ICR 773.

2. Mr Walker worked for Innospec Ltd from January 1980 until his retirement on 31 March 2003. He was a member of Innospec's pension scheme. Rule 8.1 of the scheme provided:

> "If a Member dies on or after 1 December 1999 leaving a surviving spouse that spouse will receive a pension for life."

3. At the date of his retirement Mr Walker had been living with his male partner since September 1993. The Framework Directive (2000/78/EC) established a general framework for combating discrimination on a number of grounds, including sexual orientation. The United Kingdom was required to transpose that directive into domestic law by 2 December 2003. The Civil Partnership Act 2004 came into force on 5 December 2005; and Mr Walker and his partner registered a civil partnership on 23 January 2006. They have since married. The question on this appeal is whether Mr Walker is entitled to require the pension fund to pay a surviving spouse's pension to his husband in the event that his husband outlives him. The Employment Tribunal (EJ Russell, Ms CS Jammeh and Mr CS Williams) held in his favour but the Employment Appeal Tribunal (Langstaff P, Mr A Harris and Mrs MV McArthur) reversed that decision. Their decision is at UKEAT/232/13, [2014] ICR 645.

4. In both cases the outcome of the appeal turns on principles of EU law and, in Mr Walker's case, on a provision of domestic legislation.

The relevant principles of EU law

5. The first two relevant principles of EU law are the "no retroactivity" principle and the "future effects" principle. The first of these principles is that EU legislation does not have retroactive effect unless, exceptionally, it is clear from its terms or general scheme that the legislator intended such an effect, that the purpose to be achieved so requires and that the legitimate expectations of those concerned are duly respected: (Case C-162/00) *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer* [2002] 2 CMLR 1 at [49]. It is common ground that the PTWD is not retroactive in this sense. The second of these principles is that amending legislation applies, unless otherwise

specifically provided, immediately to the future effects of a situation which arose under the law as it stood before amendment: (Case 68/69) *Bundesknappschaft v Brock* [1970] ECR 171 at [7]; (Case 270/84) *Licata v Economic and Social Committee* [1986] ECR 2305 at [31]; *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer* at [50]; (Joined Cases C-395/08 and C-396/08) *INPS v Bruno* [2010] 3 CMLR 45 at [53] ("*Bruno and Pettini*"). This principle applies only to EU legislation and rules. It does not apply to judge-made law, although there are different techniques by which the Court of Justice is able to avoid practical retroactivity.

6. The formulation of the future effects principle is to some extent a loose one. Much depends on what is meant by "a situation which arose" under the old law or rule. Fortunately the jurisprudence of the Court of Justice gives answers to that question. The critical point is whether the legal effects of the situation in question have been exhausted before the change in the law. If they have then the situation is described as being "permanently fixed". A rule that applies to a situation that is permanently fixed before the introduction of the new rule would have retroactive effect, whereas the immediate application of the new rule to ongoing situations which were created but not permanently fixed before the change in the rules would not have retroactive effect but is simply an application of the "future effects" principle: (Case C-321/97) *Andersson v Svenska Staten* [2000] 3 CMLR 191 at [57] (Cosmas A-G). Another way of expressing the distinction is to contrast (i) definitively established situations on the one hand, and (ii) on-going cases in which legal situations have not yet arisen and become definitive on the other: (Case C-596/13 P) *European Commission v Moravia Gas Storage* at [30] (Kokott A-G); (Case C-60/98) *Butterfly Music Crl v CEMED* at [25] and footnote 15 (Cosmas A-G).

7. The question then becomes: when does the situation become permanently fixed or definitively established? In *Andersson v Svenska Staten* Cosmas A-G gave some helpful examples:

    i) A claim by employees for compensation because their former employer had ceased to pay them on becoming insolvent, was held to have been a situation that became permanently fixed on the declaration of insolvency and the termination of the employment.

    ii) A claim for compensation arising out of a traffic accident was held to have been a situation that became permanently fixed at the date of the accident.

8. On the other hand:

    i) A new rule affected ongoing legal proceedings, even though they had been begun before the change in the rule.

    ii) A change in the law affects the continuing future performance of an ongoing contract of employment (*Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer*); or the continued enjoyment of election to a representative position (*Licata v Economic and Social Committee*).

    iii) Where exploitation of a musical work had begun at a time when the work was not protected by copyright, a new law that revived copyright precluded further exploitation of the work (*Butterfly Music Crl v CEMED*).

9. I agree with Mr Cavanagh QC that these two principles are not in conflict, but are complementary. Which of them applies depends on deciding whether a situation has become permanently fixed (or definitively established) before the entry into force of a new law.

10. I mentioned a technique which the Court of Justice uses to avoid practical retroactivity. That is to rule that a judgment of the court may only be relied on in the future. It is a technique only used in rare cases, where the court takes the view that its ruling has upset a widely held view of what the law was; and the practical consequences of retroactivity would be prejudicial. The court used this technique in (Case C-262/88) *Barber v Guardian Royal Exchange Assurance Group* [1991] 1 QB 344. That case established for the first time that pension benefits payable under a non-contributory "contracted-out" scheme fell within article 119 of the EEC treaty relating to equal pay. The real question was not whether in principle pension benefits fell within the concept of "pay": that had already been decided by the court. The Court of Justice has consistently ruled that contractual pension benefits "constitute consideration received by the worker from the employer in respect of his employment": (Case C-170/84) *Bilka-Kaufhaus v Weber von Harz* [1987] ICR 110 at [22]. The question was whether the fact that the scheme was a substitute for statutory entitlement to social security benefits took it outside the scope of article 119. The court decided that it did not, because the scheme in question, although "contracted-out," was itself the product of an agreement between employer and employee. However, the court concluded that because of derogations about pensionable age contained in a number of Directives member states and the parties were reasonably entitled to consider that that was not the law; and therefore limited the scope of its judgment. As the court put it at [44]:

> "… overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called into question where that might upset retroactively the financial balance of many contracted-out pension schemes."

11. The concept underpinning this limitation on the effect of the judgment is, in my judgment, the same concept that distinguishes between situations that are permanently fixed or established and those that are not. Thus in *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer* (which was all about the application of the "future effects" principle) the court held at [52] that:

> "The conclusion of a fixed-term contract of employment does not exhaust its legal effects on the date of its signature, but, on the contrary, continues regularly to produce its effects throughout the duration of the contract."

12. The similarity of language with the principle expressed in *Barber* is striking. The reason that the court in *Barber* did not apply the "no retroactivity" and "future effects" principles directly was that they only apply to legislative changes. But the policy is exactly the same. Accordingly, I do not accept the argument that the subsequent working out of what the court meant in paragraph [44] of *Barber* is some island of EU jurisprudence. The juridical nature of entitlement to pension was comprehensively considered by van Gerven A-G in (Case C-109/91) *Ten Oever v*

Stichting Bedrijfspensioenfonds Voor Het Glazenwassers-en Schoonmaakbedrijf [1995] ICR 74 ("*Ten Oever*"). In fact he considered and gave his opinion to the court in a number of cases before the court, including (Case C-200/91) *Coloroll Pension Trustees Ltd v Russell* ("*Coloroll*").

13. The Advocate-General began his analysis by pointing out at [17] that an employee accrues pension entitlements on the basis of his periods of service with the employer concerned. He continued by reasoning that the accruing nature of occupational pension schemes leads to a distinction between the coming into being of pension rights, namely as a result of the accrual of the pension on the basis of completed periods of service, and those rights becoming exercisable, namely when the pension falls to be paid for the first time. In other words what the employee acquires at the time of his service is a vested right to a future payment. He continued at [18] by saying that it was the service itself that gave rise to the employee's pension rights. He then came to the critical point: when were the legal effects of the situation exhausted? I must quote his answer at [19]:

> "I also consider the distinction between the accrual of the pension, or the coming into being of pension rights, and the pension's falling to be paid for the first time, or the pension rights' becoming exercisable, to be important for a proper understanding of what the court means in *Barber*, para. 44, where it holds that "legal situations which have exhausted all their effects in the past" may not be called in question. To give that passage a literal reading, as do certain parties in the *Coloroll* case, namely, James Russell, Gerald Parker and Robert Sharp, is quite wrong. *On a literal reading, it may indeed be asserted that the effects of an occupational pension are only fully exhausted once the pension has been paid in full to the retired employee*. Such a reading would mean that the temporal limitation of the judgment decided on by the court would have almost no significance and that the useful effect of the limitation imposed by the court would largely vanish. …
>
> Here again, the distinction between the accrual and the falling due of the pension helps to clarify matters. Since it is the service itself and, in some cases, the relevant contributions which give rise to the rights and obligations of the employee and the employer and/or of the trustees of the pension scheme, it may reasonably be assumed that in using the expression "legal situations which have exhausted all their effects in the past" the court had in view situations in which the right to a pension had already been acquired by virtue of periods of service prior to the judgment in *Barber* [1990] ICR 616 . *The coming into being of a pension right on the basis of a period of service in the past leads indeed to a legal situation whose effects are exhausted in the sense that the worker has definitively acquired the pension right relating to that period of service*. " (Emphasis added)

14. It is, to my mind, clear from this passage that pension rights attributable to a particular period of service are acquired definitively during that period of service; and that the legal situation created by that period of service is definitively fixed on expiry of that period of service. Moreover the Advocate-General stated clearly at [26] that this principle did not depend on what kind of pension scheme was under consideration. In all its essentials the court in *Ten Oever* accepted the Advocate-General's analysis. Thus at [17] it said of pension benefits that:

> "…it is a characteristic of that form of pay that there is a time-lag between the accrual of entitlement to the pension, which occurs gradually throughout the employee's working life, and its actual payment, which is deferred until a particular age."

15. Plainly, therefore, the court was holding that there is a gradual accrual of vested rights. *Ten Oever* was followed in *Coloroll* at [46]. This analysis has been consistently applied by the Court of Justice: (Case C-57/93) *Vroege v NCIV Instituut voor Volkshuisvesting BV* [1995] ICR 635 at [16].

16. Not only does this analysis apply to pension benefits payable to a retired employee: it also applies to a survivor's pension as the court in *Ten Oever* held at [13]:

> "Entitlement to such a benefit is a consideration deriving from the survivor's spouse's membership of the scheme, the pension being vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and being paid to him or her by reason of the spouse's employment."

17. The consequence of this analysis impacts on the date by reference to which any alleged contravention of EU law must be considered. As Van Gerven A-G put it in *Ten Oever* at [20]:

> "Legal certainty means in this connection that the extent of those rights falls to be determined on the basis of the Community rule which applied at *the time of the period of service* on the basis of which those rights were acquired, that is to say article 119 as it was interpreted before *Barber*." (Emphasis added)

18. In *Ten Oever* the court agreed with the Advocate-General at [19]:

> "Given the reasons explained in *Barber* … for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed *only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990*, the date of the judgment in *Barber*, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law." (Emphasis added)

19. In my judgment the same principle applies to a case where the law is changed not by a judgment, but by a change in legislation. This is no more than an application of the complementary "no retroactivity" and "future effects" principles.

20. There is another distinction that EU law draws in the field of pensions. That is the distinction between access to a pension scheme and calculations of benefit payable under a scheme. The Court of Justice had held in (Case 170/84) *Bilka-Kaufhaus v Weber von Harz* [1987] ICR 110 that the right to belong to a contractual pension scheme was part of "pay" for the purposes of article 119, and that a scheme that excluded part time workers might amount to sex discrimination. Claims of sex discrimination in pay had been directly actionable in EU law ever since the decision of the court in (Case 43/74) *Defrenne v Sabena* [1976] ICR 547. Judgment in that case was given on 8 April 1976 and, as in *Barber*, the court limited the effect of its judgment to claims made after the date of the judgment. Accordingly, for the purposes of claims relating to access to pension schemes where sex discrimination was alleged, the relevant change in the law was 8 April 1976. In (Case C-246/96) *Magorrian v Eastern Health and Social Service Board* [1998] ICR 979 two part-time mental health workers complained that they had been denied access to a more favourable pension arrangement applicable to full-time mental health officers; and that the denial amounted to indirect sex discrimination. The court held that the right to the more favourable pension arrangements was indissolubly linked to the right to join the scheme; and consequently the relevant date from which the claim ran was 8 April 1976: see [32] and [35]. The distinction between a question relating to admission to a pension scheme and a question relating to calculation of benefits was made clearly by Cosmas A-G at [38]:

> "I now come to an examination of the question whether the present dispute concerns admission to a pension scheme, in which case … the temporal limitation imposed by the court in *Barber* and adopted in Protocol No. 2 does not apply or, conversely, whether it concerns the calculation of benefits granted under such a scheme, in which case the temporal limitation does apply."

21. *Bruno and Pettini* concerned pension arrangements for part-time workers employed by Alitalia as cabin crew. Some workers worked for limited hours in every week ("horizontal part-time workers") and others worked full-time hours, but not every week ("vertical part-time workers"). The relevant pension arrangements provided that only weeks in which a salary was paid counted as contributory periods for pension purposes. The vertical part-time workers alleged that the difference in the pension arrangements was incompatible with the PTWD. The reference was bedevilled by the fact that the precise basis on which entitlement to pension was calculated was not stated in the national court's reference; and even after questioning of counsel by Sharpston A-G it was not entirely clear: see [49], [56], [63] and [90]. The problem, as she understood it, was not related to the way in which the pension was actually calculated, because the number of hours worked was taken into account for both kinds of part-time workers in the same way: see [91]. She also pointed out that it was not clear whether any of the claimants had actually retired. The problem was that in order to become entitled to a pension at all, a worker had to have 1,820 qualifying weeks. For horizontal part-time workers who worked limited hours every week, each week

counted. But for vertical part-time workers who worked full-time hours, but only for some weeks, the weeks in which they did not work did not count at all. Thus in the example that the Advocate-General considered a horizontal part-time worker would have to work for 35 years to gain any pension, whereas a vertical part-time worker would have to work for 70 years. One argument that arose was whether periods worked before the coming into force of the PTWD should be taken into account in calculating the number of qualifying weeks. The Advocate-General's answer to that question was that:

> "[The PTWD] governs the calculation of qualifying weeks for access to the pension at issue in the main proceedings, to the extent that none of the claimants had retired definitively before the entry into force of the [PTWD]."

22. This seems to me to be an orthodox application of the "future effects" principle to an ongoing legal relationship, namely the continuing relationship of employer/employee. Nowhere, however, did the Advocate-General deal with (let alone cast any doubt on) the analysis of the nature of an accruing pension right as explained in *Ten Oever* and the other cases to which I have referred.

23. At [55] the court held, applying the future effects principle to what was (or what was assumed to be) an ongoing employment relationship, that the calculation of the period of service required to qualify for a retirement pension was governed by the PTWD, "including periods of employment before the directive entered into force." The distinction between access to a pension scheme and calculation of benefits under it was explained by the court at [65] and [66]:

> "65 Accordingly, the calculation of the amount of the pension is directly dependent on the amount of time worked by the employee and the corresponding amount of contributions, in accordance with the principle of *pro rata temporis*. It must be borne in mind, in that regard, that the Court has already held that EU law does not preclude a retirement pension being calculated *pro rata temporis* in the case of part-time employment. Taking into account the amount of time actually worked by a part-time worker during his career, as compared with the amount of time actually worked by a person who has worked on a full-time basis throughout his career, is an objective criterion, allowing his pension entitlement to be reduced proportionately (see, to that effect, *Schönheit* [2006] 1 CMLR 51 at [90] and [91], and *Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS)* [2009] 3 CMLR 41 at [59]).
>
> 66 On the other hand, the principle of *pro rata temporis* is not applicable for the purpose of determining the date required to acquire pensions rights, since that depends solely on the worker's length of service. The length of service is, in fact, the actual duration of the employment relationship and not the amount of time worked during that period. In accordance with the principle of non-discrimination as between full-time and

> part-time workers, therefore, the length of the period of service taken into account for the purpose of determining the date on which a worker becomes entitled to a pension should be calculated for a part-time worker as if he had held a full-time post, periods not worked being taken into account in their entirety."

24. What, therefore, was in issue in *Bruno and Pettini* was the length of service required under a continuing employment relationship in order to qualify for any pension at all.

Mr O'Brien's appeal

25. The first point that I need to deal with is Mr Allen QC's argument that the nature of the domestic judicial pension scheme is such that a judge's final pension cannot be known until he (or she) actually retires. That is because it is a final salary scheme and a judge's final salary cannot be known until retirement. I do not consider that this is a valid point. The scheme under consideration in *Coloroll* was a final salary scheme; and the Judge Rapporteur pointed out that the pension to which a member would be entitled on retirement could not be known in advance (see [1995] ICR 182 G-H). This did not affect the court's ruling that the critical period was the period of service. Moreover, Van Gerven A-G had made it clear in *Ten Oever* that the analysis applied to all contractual pension schemes whatever their nature.

26. Second, Mr Allen submits that the question before us has been answered in Mr O'Brien's favour by the Court of Justice's rejection of a submission made by the Latvian government when Mr O'Brien's case was before the Court of Justice: Case C-393/10 *O'Brien v Ministry of Justice* [2012] ICR 955. I reject that argument. The point that the Latvian government argued was that since Mr O'Brien had been appointed as a Recorder before the date for transposition of the PTWD, and the last extension of his appointment also preceded that date, he was not entitled to any pension at all. The basis for the submission was that "it would not be acceptable for legal rules adopted subsequently to be applicable to *legal relationships* which commenced before the adoption of the rules." That was, with respect, a hopeless argument. It had been conclusively answered by *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer*. It does not advance Mr O'Brien's appeal.

27. The third and main point was that the issue had been resolved in Mr O'Brien's favour by *Bruno and Pettini*. This argument was accepted by EJ Macmillan in the Employment Tribunal but rejected by Sir David Keene in the Employment Appeal Tribunal. I agree entirely with the way in which Sir David dealt with this argument. There is no point in my rehearsing the reasons in my own words when I cannot improve on his:

> "It is clear that, in taking into account periods of service before the Directive entered into force, the court was only dealing with the issue of qualifying service, not with the level of pension to which the claimants were entitled. One can appreciate that it may seem strange to take into account such periods of employment for one purpose and not to do so for another. Yet the court was not seeking to deal with the issue of the level of benefits, and if it had been addressing that issue, it would have

> had to deal with the long-established law on the topic of occupational pensions and how far past service could be reflected in the amount payable. It would have had to deal, as would the Advocate General, with *Ten Oever*, *Barber*, *Coloroll*, *Magorrian*, *Brouwer* and other previous decisions of the court, and to explain why the fundamental principle of legal certainty did not operate in this instance. It would have had to consider the effect on any decision as to the level of benefits of the "deferred pay" nature of those benefits. It did none of those things. It observed that "pay" covered pensions (para 41), but it did so only in order to judge whether pensions were covered by the phrase "employment conditions" in clause 4(1) of the framework agreement: see para 42 of the judgment."

28. Mr Allen argued that this was a faulty appreciation of the facts in *Bruno and Pettini*; and that the court was considering the question of how the pensions should be calculated. I do not consider that to be correct. It seems to me to be clear that the only relevant question with which the court was concerned was when the workers became entitled to access to the scheme. Once they had accessed it, there was no problem in calculating the amount of the pension due. Nor do I consider that much reliance can be placed on the form of the questions posed by the national court in view of the criticisms of the quality of the reference made by the Advocate-General.

29. In my judgment the principle of legal certainty, which is a fundamental principle of EU law, requires that, in the words of Van Gerven A-G in *Ten Oever*:

> "…the extent of [pension] rights falls to be determined on the basis of the Community rule which applied at the time of the period of service on the basis of which those rights were acquired."

30. At the time of Mr O'Brien's service before 7 April 2000 as a part-time worker he acquired no pension rights, and cannot do so retroactively.

31. Accordingly I agree with the EAT that Mr O'Brien's appeal fails.

Mr Walker's appeal

32. Mr Walker retired before the Framework Directive came into force. He faces an obstacle to his claim under domestic law. Schedule 9 paragraph 18 of the Equality Act 2010 in its current form provides:

> "(1) A person does not contravene this Part of this Act, so far as relating to sexual orientation, by doing anything which prevents or restricts a person who is not within sub-paragraph (1A) from having access to a benefit, facility or service—
>
> (a) the right to which accrued before 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force), or

(b) which is payable in respect of periods of service before that date.

(1A) A person is within this sub-paragraph if the person is—

(a) a man who is married to a woman, or

(b) a woman who is married to a man, or

(c) married to a person of the same sex in a relevant gender change case."

33. Mr Walker is not within paragraph (1A), and consequently it is not unlawful to restrict his access to a benefit (such as a surviving spouse's pension) which is payable in respect of service before 2 December 2005. Since Mr Walker's entitlement to any pension benefit at all depends on his service, and since the entirety of his service was completed before 2 December 2005, the obvious reading of paragraph 18 is that his claim must fail.

34. Mr Chamberlain QC argues in the following steps:

i) The act of discrimination on which Mr Walker relies is the refusal of the Innospec pension trustees to confirm that his civil partner (and now his husband) would be entitled to a survivor's pension. That is an act that took place after the Framework Directive came into force; and consequently the future effects principle applies.

ii) In any event the Court of Justice has decided in (Case 267/06) *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] All ER (EC) 977 and in (Case C-147/08) *Römer v Freie und Hansestadt Hamburg* [2013] CMLR 11 that a claim such as Mr Walker's is permitted by the Framework Directive even though his period of service ended before it came into force.

iii) The prohibition on discrimination on the ground of sexual orientation is a fundamental principle of EU law. Accordingly, paragraph 18 must either be read in such a way as to make it compatible with the Framework Directive or, if that is not possible, it must be disapplied.

35. So far as the first step is concerned the question, in my judgment, is: what is the extent of Mr Walker's entitlement? It does not seem to me that the pension trustees can be required to confer on Mr Walker a benefit to which he is not entitled. Mr Walker's entitlement to benefit was part of his pay that was earned incrementally during his period of service. At the time when he earned that entitlement the discriminatory treatment of which he complains was lawful. I agree with Mr Coppel QC on behalf of the Secretary of State that the principle of "no retroactivity" means that conduct which was lawful when it occurred cannot retroactively become unlawful. Nor does the "future effects" principle avail Mr Walker because his entitlement to pension was definitively established (or permanently fixed) as he earned it; and *a fortiori* cannot have been enlarged following his definitive retirement. This is entirely consistent with the analysis of the nature of pension rights adopted in *Ten Oever*, which also applies to a survivor's pension as demonstrated by *Coloroll*.

The same considerations of legal certainty that informed the decision in *Ten Oever* are equally applicable here. Mr Walker's entitlement must be judged by reference to the EU law in force at the time of his service. I do not therefore accept the first step in Mr Chamberlain's argument.

36. I turn to the second step. In *Maruko* Mr Maruko had entered into a life partnership with a designer of theatrical costumes who had been a member of an insurance scheme administered by a public body called the VddB. The latter had paid contributions into the scheme from 1959 until his death in 2005. The rules of the scheme provided for the spouse of an insured man to receive a widow's pension on his death and for the spouse of an insured woman to receive a widower's pension on her death. Mr Maruko applied for a widower's pension which was refused. The national court referred five questions to the Court of Justice. The court regarded questions 1, 2 and 4 as giving rise to the question whether a survivor's benefit paid under an occupational pension scheme fell within the scope of the Framework Directive: *Maruko* [34]. It answered those questions in the affirmative. The third question was whether the Framework Directive precluded provisions which gave a surviving life partner a smaller survivor's pension than a surviving spouse. The court reasoned that from the introduction of life partnerships in 2001 the member state had gradually assimilated life partnerships and marriages. In particular in 2004 national legislation had made it clear that as regards state pensions a life partnership was to be treated as equivalent to marriage: *Maruko* [68]. The court held that if life partnership was comparable to marriage then the Framework Directive did preclude discrimination between the two statuses. In this country there was no equivalent status until the introduction of civil partnerships on 5 December 2005. The final question was whether, in the event that the court were to rule that the Framework Directive precluded legislation such as that at issue in the main proceedings, entitlement to the survivor's benefit at issue in the main proceedings must be restricted in time and in particular to periods subsequent to 17 May 1990 on the basis of the case law in *Barber's* case.

37. It must be said that this was a very puzzling question. The restriction in *Barber* was a restriction on the effect of the judgment of the court; not a decision about the temporal reach of a change in legislation. It was a technique to avoid a decision on the effect of article 119 (which had been directly enforceable since 1976) from having general retroactive effect. It is impossible to see how that question could have been relevant to the other questions that the national court referred to the Court of Justice. Moreover both the Advocate-General and the Commission invited the court not to answer it. However the court did give an answer. Before I come to it I must set out the submission made by the VddB on which Mr Chamberlain relies heavily:

> "The VddB considers that the case which led to the judgment in *Barber's* case differs, on its facts and in law, from the case in the main proceedings and that [the Framework Directive] cannot be given retroactive effect by means of a decision that the directive applied at a date prior to the date of expiry of the period allowed to member states for its transposition."

38. The Commission, having submitted that no answer to the question was needed, also said that since life partnerships had only been introduced in 2001 and equal treatment

of life partners and spouses only dated from 2005 the financial consequences were unlikely to be severe.

39. In answering the question the court referred at [77] to the circumstances in which the court was able to limit the effects of its judgment; and said that there was no evidence that the balance of the scheme was likely to be retroactively disturbed if "the effects of this judgment are not restricted in time." Thus it concluded at [79]:

> "It follows from the foregoing that the answer to the fifth question must be that there is no need to restrict the effects of this judgment in time."

40. Both the question and the answer are plainly directed to the effect of the judgment and not to the effect of the coming into force of the Framework Directive itself. In short the court gave an unnecessary answer to the wrong question. It was neither asked nor answered the question that arises on this appeal. I cannot see that it supports Mr Walker's appeal.

41. In *Römer* Mr Römer was employed by the Hamburg City Council and was a member of their pension scheme. He worked for the Council between 1950 and 1990 when he became unfit for work. He had lived with a man since 1969 and they entered into a life partnership in October 2001. Under the terms of the scheme he was entitled to a pension. In calculating the pension there was to be a deduction representing tax in the application of the tax code to a married pensioner. The deduction was lower in the case of a married person than a non-married person. Mr Römer applied for the lower deduction to be applied to him with effect from 1 November 2001. The Council said that he was not entitled to the deduction because he was not married. The national court referred six questions to the Court of Justice. Question 4 asked whether the differentiation in entitlement between a life partner and a married pensioner infringed article 141 EC or a general principle of EU law. Question 5 asked whether, if that were the case, Mr Römer was entitled to be treated as a married person even before the deadline for transposition of the Framework Directive. Question 6 was:

> "If Question 5 is answered in the affirmative:
>
> Is that subject to the qualification—in accordance with the grounds of the Court's judgment in Case C-262/88 *Barber* — that in the calculation of pension entitlement the principle of equal treatment is to be applied only in respect of that proportion of pension entitlement earned by the pensioner for the period from 17 May 1990?"

42. Jääskinen A-G reviewed the development of EU law in relation to discrimination on the ground of sexual orientation and concluded at [147] that the right to equal treatment on the ground of sexual orientation had become a general principle of EU law by the time that Mr Römer registered his life partnership in October 2001. Accordingly, he proposed that the court should answer question 5 by holding that it was for the national court to ensure the full effect of the general principle of non-discrimination on the basis of sexual orientation by disapplying any provision of national law, even from a date before the period for transposing the Framework Directive expired. The court did not follow that advice. At [57] it held:

> "In that regard, it should be observed, first of all, that, if there were discrimination within the meaning of [the Framework Directive], the applicant in the main proceedings would not be entitled under that directive, before the expiry of the period allowed to Member States to transpose it, to the same rights as married pensioners in respect of the supplementary pension at issue in the main proceedings."

43. Continuing on that theme the court held that entitlement to equal treatment on the ground of sexual orientation did not become part of EU law until the expiry of the time limit for transposing the Directive. Thus it concluded at [64]:

> "… the answer to Question 5 is that, should [the national provision] constitute discrimination within the meaning of art.2 of [the Framework Directive], the right to equal treatment could be claimed by an individual such as the applicant in the main proceedings at the earliest after the expiry of the period for transposing the Directive, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with EU law by the national legislature."

44. That answer to question 5 was plainly a negative answer: the entitlement did not apply before the deadline for transposing the Directive. Thus question 6, which was conditional on an affirmative answer to question 5 did not arise. Nevertheless the court answered it. Once again the question was asked and answered by reference to *Barber* and the judge-made limitation on the effect of the court's judgment. The court's answer was:

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

45. Mr Chamberlain fastens on the court's statement that *Barber* has no bearing "notwithstanding the fact that the contributions underpinning the entitlement had been paid before the date of that judgment". From this he argues that the court must have held that the whole of Mr Römer's past contribution period should be taken into account in calculating his pension benefit. He submits that this, at any rate, is how the Advocate-General understood the question at [154]:

> "By its sixth question, the national court asks whether, if the Court should hold that Directive 2000/78, art.141 EC or any general principle of Union law precludes legislation such as

> that that at issue in the main proceedings, the entitlement to a pension in the same amount as that paid to married pensioners must be limited in time, and particularly whether it must be considered that, in the calculation of pensions, the principle of equal treatment is to be applied only in respect of the pension entitlement earned by the pensioner by virtue of contribution periods after 17 May 1990, in accordance with the judgment in *Barber* … pronounced on that date."

46. Once again it is very difficult to understand the relevance of this question. The date of the *Barber* judgment appears to have no relevance to either the facts of the case or the law that the court was called upon to consider. Moreover the case concerned a deduction from the ongoing pension by reference to Mr Römer's tax status, to which his past contributions appear to me to have been irrelevant. In addition, as I have said, on the basis of the court's answer to question 5, the question did not arise at all; and the Advocate-General's paraphrase of it ignored the conditionality of the question. Finally I cannot accept that without any discussion at all the court intended to sweep aside the well-established principles of EU law applicable to the accrual of pension entitlement, particularly since it had ruled clearly in answer to question 5 that Mr Römer was not entitled to complain about unequal treatment before December 2003. In short I agree with the EAT at [23] that:

> "The court [in *Römer*]was recognising that the enforcement of equal treatment of the claimant, so far as payment of his pension was concerned, was not to run from the date of his contracting a registered partnership, but from the date that the law recognised that the relevant discrimination was unlawful. In short, legislating that such treatment was unlawful did not have the retrospective effect of rendering unlawful payments which would not have been recognised as such at the time that they were made."

47. Paragraph 18 of Schedule 9 to the Equality Act 2010 tracks precisely the court's analysis in *Ten Oever* at [19] and the Advocate-General's at [20]. In my judgment, in agreement with the EAT, paragraph 18 of Schedule 9 is not incompatible with the Framework Directive; and neither *Maruko* nor *Römer* compels the contrary conclusion.

48. Since I have concluded that paragraph 18 is not incompatible with the Framework Directive, questions of "*Marleasing*" interpretation (Case C-106/89 *Marleasing SA v la Comercial Internacional de Alimentacion SA* [1992] 1 CMLR 1113) and disapplication do not, strictly, arise. I can therefore deal with them shortly. It is true that the national court must, if it can, interpret a national law so as to conform with a European Directive. But that power and duty does not enable a national court to trespass into the field of lawmaking which is the task of Parliament and not the courts: *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, [2006] STC 1252 at [82]. Although the court may be robust in applying this interpretative technique, the interpretation must go with the grain of the legislation under consideration. I agree with Mr Randall QC, on behalf of Innospec, that paragraph 18 was expressly designed to preclude a claim such as Mr Walker's from being made. It can have no other purpose than to prevent claims for discrimination on the ground of sexual orientation

being made in relation to pension entitlement earned during periods of service that pre-dated 5 December 2005. To interpret paragraph 18 so as to allow the claim to be made would be to make new law which Parliament has plainly rejected. It is, in my judgment, clearly a question of policy whether survivor's pensions should be extended to same-sex couples, whether in civil partnerships or marriages. That very question was raised in connection with the Marriage (Same Sex Couples) Act 2013, section 16 of which required the government to review the differences in survivor benefits in occupational pension schemes; and, in the light of the review, to consider whether changes in the law were needed. That, to my mind, is a clear indication that we are in the realms of policy rather than interpretation. For the same reasons, the argument that paragraph 18 should be interpreted compatibly with the European Conventionon Human Rights and Fundamental Freedoms must also fail. The legislation is clear and cannot be interpreted in such a way as to enable Mr Walker to succeed.

49. In support of the argument that paragraph 18 should be disapplied Mr Chamberlain relies on Case 555/07 *Kücükdeveci v Swedex GmbH* [2011] 2 CMLR 27. That was a case in which national legislation permitted an employer to give shorter notice terminating employment in the case of a younger worker. Although Ms Kücükdeveci's employment had begun in 1978, it continued after the Framework Directive came into force. She was given notice on 19 December 2006 to take effect on 31 January 2007. The notice was given after the latest date for the transposition into national law of the Framework Directive. The court held that age discrimination had been brought within the fundamental principles of EU law with effect from the expiry of the time limit for transposing the Framework Directive: *Kücükdeveci* [25]. Once that period had expired the national court was obliged to disapply national legislation which contravened that principle: *Kücükdeveci* [50]. *Kücükdeveci* was considered in *Römer* when the court was answering question 5. It will be recalled that the answer to question 5 was that the right to equal treatment on the ground of sexual orientation did not become part of EU law until 2003. Since Mr Walker retired before that date whatever entitlement to pension he had was definitively established before that date. It follows in my judgment that there is no need to disapply paragraph 18; and even if it were to be disapplied it could not retrospectively enlarge Mr Walker's pension benefits.

50. Accordingly I agree with the EAT that Mr Walker's appeal fails.

Reference to the Court of Justice

51. Before coming to a conclusion that both appeals should be dismissed, there is one further point to consider. That is whether to make a reference to the Court of Justice.

52. In (Joined Cases C-72/14 and C-197/14) *X v van Dijk* Wahl A-G said of the doctrine of *acte clair* at [69] that it all boiled down to the question that if a national court is sure enough of its own interpretation to take the responsibility (and possibly the blame) for resolving a point of law without the assistance of the Court of Justice, it ought to be legally entitled to do so.

53. In these appeals I have in both cases agreed with the closely reasoned decisions of the EAT. I am sure enough of the answer to take the responsibility of deciding these appeals without the assistance of the Court of Justice.

Result

54. I would therefore decline to make a reference and dismiss both appeals.

Lord Justice Underhill:

55. I agree that we should not make a reference to the CJEU and that both appeals should be dismissed. My reasons are essentially the same as those of Lewison LJ, but because of the importance of the issues raised I will state them in my own words.

56. Mr O'Brien's appeal is the more straightforward. It is quite clear from the lucid and explicit analysis by A-G van Gerven in *Ten Oever* that under EU law the right to a pension payment is regarded as accruing at the time of the service to which it is referable, notwithstanding that no payment will fall to be made until retirement, and that that constitutes a "legal situation which has exhausted its effect": see paras. 18 and 19 of his opinion. It follows that the future effects principle does not apply in the way for which Mr Allen contends. On the contrary, to treat Mr O'Brien's entitlement to a pension calculated by reference to service prior to the coming into effect of the Part Time Workers Directive would be to give the Directive retroactive effect. The issue in *Bruno and Pettini* was different: it was concerned with the qualifying period for entitlement to pension and not with the periods of service by reference to which the quantum of pension should be calculated. That is the central issue in the appeal. I agree that the other two points made by Mr Allen are ill-founded for the reasons given by Lewison LJ at paras. 25 and 26 of his judgment.

57. Mr Walker's appeal appears more complicated, but that is only because of the difficulty in understanding aspects of the reasoning in the *Maruko* and *Römer* decisions. It is convenient first to consider the position without reference to those decisions.

58. The starting-point is that the terms of paragraph 18 (1) and (1A) of the 2010 Act are perfectly clear and evince an intention to preclude claims of the kind brought by Mr Walker. I do not believe that it is possible to avoid their effect by reference to the *Marleasing* principle: to do so would be directly contrary to the express legislative intention.

59. That means that Mr Walker can only succeed by showing that the denial of a pension to his husband, if he survives him, would involve a breach of a fundamental principle of EU law such that the provision fell to be disapplied in accordance with the approach in *Kücükdeveci*. But, as Lewison LJ points out, the CJEU held in *Römer* – in one of the parts of its decision that is perfectly clear – that the right to equal treatment on the ground of sexual orientation did not become a fundamental principle of EU law until the expiry of the implementation period for the Framework Directive on 3 December 2003. The question therefore is whether the establishment of that fundamental right as at that date gave Mr Walker a right to the payment of a pension to his husband, if he survived him, based entirely on his service at an earlier period.

60. In my view the principles to be applied in *O'Brien* must apply equally in this situation, even though the subject-matter is not the quantum of the payment but the class of the persons entitled to benefit. The right to pension arises, and becomes

fixed, during the currency of the service to which it is referable. That right was, when it became so fixed, a right for a pension to be paid to the employee and to a surviving spouse of the opposite sex. Mr Walker retired, on 31 March 2003, and ceased to accrue pension rights, before the change in the law effected by the Directive came into effect, and to change the character of those rights so that they included a right to have a payment made to a same-sex spouse would be to give that change retroactive effect. I should in any event add that I do not believe that the failure to accord employees such rights would involve a breach of the equal treatment principle at any time up to the introduction of civil partnerships in December 2005. As Lewison LJ says at para. 36 above, the (potential) breach of that principle found by the CJEU in *Maruko* depended on national law recognising a "registered partnership" between homosexuals as giving rise to a situation comparable to (heterosexual) marriage: see in particular para. 73 in the judgment of the Court. In the absence of a "comparable situation" of that kind there can be no discrimination.

61. That is why it makes no difference that, as Mr Chamberlain was at pains to emphasise to us, there is no evidence that the extension of the class of beneficiaries to include same-sex surviving spouses would seriously unsettle the financial basis of the Innospec scheme or of pension schemes generally. The difficulty is not of that pragmatic kind. It stems from the basic principle that the law cannot be changed retrospectively.

62. I return to *Maruko* and *Römer*. The Court's answers to question (5) in the former and question (6) in the latter are indeed problematic, for the reasons demonstrated by Lewison LJ, which I need not attempt to recapitulate. But they can only assist Mr Walker if they show that the CJEU has – or in any event may have – departed in this context from the *Ten Oever* analysis which I would otherwise hold to be applicable as explained at para. 60 above. I do not believe that they do. Both answers were to questions raising "the *Barber* issue" – that is, whether there should be a temporal limitation on the effect of the Court's judgment. That is not at all the same question as whether the respective claimants were entitled to payment benefits referable to a period before EU law recognised the right to equal treatment on the ground of sexual orientation. Mr Chamberlain submits that that is nevertheless how the Court must have understood the question, and/or that it must have appreciated that the claim was empty if there was no such entitlement. That is a very unsafe way to argue. The Court rightly focuses on the questions which it is asked, and it is certainly not clear to me that in the circumstances of the particular disputes the issue with which we are concerned in these appeals even arose. I appreciate that the Court did, in answering question (6) in *Römer*, say that the decision in *Barber* could not prevent the claimant claiming in respect of deductions from 2001 "notwithstanding the fact that the contributions underpinning the entitlement had been paid before the date of that judgment"; but, whatever its precise thinking was (which is frankly opaque), that phrase cannot possibly be read as an abandonment of the well-established *Ten Oever* analysis, which had not even been referred to, let alone discussed. Mr Chamberlain's submissions were essentially based not on anything that the Court actually said in either case but on the supposed implications of things not said.

63. The arguments ranged a good deal more widely, and we were referred to a considerable number of other authorities; but those arguments and authorities were of marginal, if any, relevance and I see no value in addressing them.

64. The only question which has given me real pause in deciding this appeal is whether, clear though I may think the answer is, I can be confident, particularly having regard to the difficulties caused by *Maruko* and *Römer*, that the Supreme Court would see it the same way if there is an appeal, since if the issue is not *acte clair* it will be bound to make a reference and the only effect of our declining to do so would be to increase the inevitable delay, and in a case where the passing years have a particular significance to the Appellants. But in the end I have concluded that the applicable principles are indeed sufficiently clear.

65. I can understand that Mr Walker and his husband will find this conclusion hard to accept. But changes in social attitudes, and the legislation which embodies those changes, cannot fully undo the effects of the past.

The Master of the Rolls:

66. I agree with both judgments.