'But some are more equal than others' — The Equal Treatment Directives and equalising the state pension age

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Abstract This paper outlines the developments in the application of EU legislative provisions to the adoption of a principle of equal treatment in UK state and non-state pensions. It identifies many of the principal judgments of the European Court of Justice (ECJ), the UK courts and the Social Security Commissioners that removed unequal treatment between men and women in pension provision. It also highlights changes to UK legislation to implement EU Directives and ECJ case law which should remove the majority of unequal treatment by 2020. In the light of the ECJ judgment in the case of *Preston*, the paper briefly outlines the current state of play as regards retrospective entitlement of part-time workers to join occupational pension schemes.

Keywords: *European Union; European Court of Justice; equal treatment; retirement pensions; Barber; Coloroll; Preston; part-time workers; pension age*

Introduction — But some are more equal than others

I don't suppose that the case of *Preston v Wolverhampton Health Authority*¹ will be remembered as long and as well as the impeachment of Warren Hastings or Dickens' famous *Jamdyce v Jamdyce*² for the length of time taken for it ultimately to be decided. That a case involving several thousand female part-time workers wishing retrospectively to join their pension scheme and who initially claimed equal treatment in 1994 should still be being judicially determined in 2004 seems remarkable.

To equalise the ages at which, and conditions under which, men and women became entitled to state and occupational pensions would at first sight seem a simple enough exercise. Nevertheless, to get from A to B would appear to have been by way of Z, Y and X and all the other letters of the alphabet.

Social Security ministers looked forward to equalising state pension age at 65. At a time when life expectancy was rapidly rising, to raise women's state pension age to that of men would have the effect of reducing the future growth

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of the pensions budget. It would, however, be politically unpopular. So when ultimately the decision was taken to equalise at 65, ministers could put off the evil day for 15 years — this meant that no woman aged 45 or over would be affected — and blame could be placed on the powers that be in Brussels.

The Equal Treatment Directives

The EEC Council of Ministers had adopted the Commission's proposals for directives to bring about equal treatment in state and supplementary pensions. Recognising that many member states still had different pension ages for men and women, the Commission's proposals had to include derogations in the Directives as regards pension age to ensure that member states would sign up to the Commission's proposal.

Article 4 of Directive 79/7/EEC, which required member states to bring in measures to abolish provisions contrary to equal treatment in relation to state social security benefits, stated:

'The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

- the scope of the schemes and the conditions of access thereto,
- the obligation to contribute and the calculation of contributions,
- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

This was subject to Article 7, however, which, though requiring member states periodically to examine matters excluded by the derogation to see whether the exclusions were still justified, provided:

'The Directive shall be without prejudice to the right of member states to exclude from its scope:

- (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;
- (b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;
- (c) the granting of old-age or invalidity benefit entitlements by virtue of derived entitlements of a wife;
- (d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife;
- (e) the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.'

These derogations allowed the UK the right, at least until it needed to examine the justification for them, to retain unequal provisions in national legislation. State pension age could continue to be 65 for men, but 60 for women. The provision of home responsibility protection to enable those out of the labour market while looking after children, mainly of advantage to women, could continue. Married women and widows could qualify for Category B state retirement pension on the basis of their husband's contribution record, when there was no equivalent opportunity for men to qualify for such a pension on their wife's contribution record. Husbands could receive an increase in their pension for a dependent wife in circumstances when wives would not receive a comparable increase for a dependent husband. Lastly, those married women and widows who retained the residual right to pay reduced rate

national insurance contributions, albeit at the cost of failure to qualify for a state retirement pension, could avoid being compelled to pay the contributions at the full rate.

By 1986 the 1979 Directive had been complemented by an analogous Directive on supplementary pensions. Article 5 of Directive 86/378/EEC provided:

‘Under the conditions laid down in the following provisions, the principle of equal treatment means that there shall be no discrimination whatsoever on basis of sex either directly, or indirectly, by reference in particular to marital or family status, especially as regards:

- the scope of the schemes and the conditions of access thereto;
- the obligation to contribute and the calculation of contributions;
- the calculation of benefits including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.’

Article 6 spelled out what that entailed. Issues such as entitlement to join the scheme, the compulsory or optional nature of membership, contribution rates and retirement ages were covered by the no discrimination rule. But, once again, there were derogations. Article 9 provided:

‘Member States may defer compulsory application of the principle of equal treatment with regard to:

- (a) the determination of pensionable age for the purposes of granting old age or retirement pensions, and the possible implications for other benefits:
 - either until the date on which such equality is achieved in statutory schemes;
 - or, at the latest, until such equality is required by a directive
- (b) survivors’ pensions until a directive requires the principle of equal treatment in statutory social security schemes in that regard;

- (c) the application of the first paragraph of Article 6(1)(i) [this related to worker and employer contributions] ‘to take account of different actuarial calculation factors, at the latest until the expiry of a thirteen-year period as from the notification of the Directive.’

This meant that, as long as the state did not equalise pension age for state retirement pension, occupational pension schemes could retain unequal pension ages. In practice, many schemes had rules that adopted the state scheme practice of a normal pension age of 65 for men and 60 for women.

That there were derogations permitting unequal pension ages, the extent of those derogations and whether any derogation was compatible with the Treaty of Rome were quickly under challenge. Although not directly concerned with pension age, the issue of retirement age was raised before the European Court of Justice (ECJ) in 1986 in the case of *Marshall v Southampton Health Authority*.³ Under the terms of employment in the National Health Service, Miss Marshall, as a woman, could be compulsorily retired at the women’s state pension age of 60, whereas, had she been a man, she would have been entitled to continue in employment until the men’s state pension age of 65. Although she had been permitted to work beyond age 60, she was compulsorily retired earlier than men’s pension age. Despite the claim by the UK government that different pension ages were permissible under the derogation, the ECJ ruled that pension age and retirement age were not the same and accordingly that to force Miss Marshall to retire when, had she been a man, she could have continued in employment, was incompatible with equal treatment requirements. That she would be entitled to a state pension

when a man would not, did not affect the requirements for an equal retirement age.

Testing the State Scheme Directive

The extent of the derogation was tested at about the same time in 1986. It was a condition for entitlement beyond state pension age to two non-contributory benefits, invalid care allowance (now carers' allowance) and non-contributory invalidity pension, that the claimant had been entitled to the benefit immediately before state pension age and there were restrictions on entitlement by married women. Thus women had to be entitled before 60, but men could acquire entitlement up to 65. This difference was justified by the government as being within the derogation in Article 7(a) of Directive 79/7/EEC on the ground that it was a consequence of different state pension ages. Married women were not entitled to invalid care allowance and for entitlement to non-contributory invalidity pension had to satisfy an additional condition of incapacity for normal household duties in addition to the condition of incapacity for work that men and single women needed to satisfy. The government's attempted justification was challenged and overturned by the ECJ.

In the case of *Drake v Chief Adjudication Officer*,⁴ the ECJ ruled that the provision of national legislation that prevented Mrs Drake, a married woman, who had given up work to care for her mother, from qualifying for invalid care allowance was incompatible with EC law. By the time that Mrs Drake's claim had been finally determined and allowed, UK national legislation had removed the offending discriminatory provision.

In the subsequent case of *Borrie Clarke*,⁵ the ECJ ruled that to impose on

married women the additional condition for entitlement to non-contributory invalidity benefit was also incompatible with the equal treatment requirements. The government reacted, not by abolishing the discriminatory provision, but by replacing the existing benefit by a new severe disablement allowance, for which the conditions were more stringent for men and women, married or single. They included, however, a transitional provision that allowed those who were entitled to non-contributory invalidity pension when it was replaced to be 'passported' to entitlement to the new benefit. If the objective was to continue to provide benefit at no extra cost — had the government simply abolished the normal household duties test, by far the greater number of those entitled would have been women — the government did not quite succeed. In a subsequent case, *Johnson v Chief Adjudication Officer*,⁶ Mrs Johnson claimed that, but for the discriminatory provision, she would have been entitled to non-contributory invalidity pension and so would have been 'passported' to the new severe disablement allowance without the need to qualify for the new more stringent conditions. The ECJ ruled that the effect of the transitional arrangements perpetuated the previous incompatible discriminatory provisions and that she would qualify for the new benefit on the same terms as a man. In a subsequent reference to the ECJ, however, the latter ruled that national restrictions on backdating entitlement were applicable to entitlement arising under EC law in the same way as they applied to provisions under UK law alone.

The question of the acquisition of entitlement between 60 and 65 arose in the case of *Secretary of State for Social Security v. Thomas*.⁷ The government argued that the fact that women could

not obtain entitlement to non-contributory invalidity pension or severe disablement allowance between 60 and 65, when men could, was a consequence of different pension ages. The ECJ disagreed. Where benefits were non-contributory, they were not linked financially to the state pension scheme. The 'possible consequences for other benefits' were limited to the forms of discrimination existing under the other benefit schemes 'which are necessarily and objectively linked to the difference in retirement age'. In 1992, an attempt to force the government's hand and indirectly remove the unequal pension age, the Equal Opportunities Commission (EOC) took a case to the ECJ. Recognising that they would be unable successfully to challenge state pension age because of the derogation, the EOC challenged the maximum age for employees' liability for national insurance contributions and the actual calculation of the state retirement pension entitlement. The contribution liability ceased at state pension age (ie 60 for women, 65 for men). As contributions were not, in the EOC's view, 'other benefits', however, it argued that the derogation did not extend to national insurance contributions. Similarly, the calculation of entitlement took account of the years of the individual's working life. This ended at the end of the tax year before that in which the individual attained state pension age (ie 59 for women, 64 for men). If the EOC could convince the ECJ that neither of these issues came within the scope of the derogation and that they had to be equalised, it would be extremely difficult, albeit not impossible to continue to operate with different state pension ages.

In the event, in its decision in the case of *The Queen v Secretary of State for Social Security ex parte The Equal*

Opportunities Commission,⁸ the ECJ did not accept the EOC's argument. The Court considered that the termination of employees' contribution liability and the calculation of pension entitlement were so intimately and financially connected with the difference in state pension age that they came within the derogation. The EOC would have to wait another 28 years before the state pension age would finally be equalised.

Other individuals attempted to obtain the ECJ's approval where the EOC had failed. In *Secretary of State v Graham*,⁹ the question arose about entitlement to invalidity benefit for a woman aged between 60 and 65. At 60 her invalidity benefit reduced under UK legislation to her retirement pension rate. Had she been a man, the reduction would not have occurred at 60. She was also denied an invalidity allowance that was payable if invalidity arose more than five years before state pension age. In her case, it did not, but, had she been a man, it would have done. The ECJ, however, rejected her argument, holding once again that the detrimental effect on her invalidity benefit entitlement was a consequence of the difference in state pension age and so covered by the derogation.

In a subsequent case, the question arose whether a woman was entitled to pay contributions beyond age 60 to acquire entitlement to incapacity benefit, when a man would have been able to. In decision *R(IB)5/04* the Social Security Commissioner disallowed her claim to incapacity benefit when she ultimately failed to pursue the question whether she should be allowed to pay contributions.

In decision *R(P)1/95*, another Social Security Commissioner disallowed a woman's claim to be allowed to 'deretire' after age 65 to qualify for invalidity benefit. The law permitted men and women to 'deretire' in the five years after

state pension age. At 67 she was not permitted to do so, when a man was. This too was held to be consequential to different state pension ages.

In decision *R(U)3/92*, a male claimant over 60 objected to the statutory reduction in unemployment benefit to take account of his occupational pension. Had he been a woman, he claimed, he would not have been in receipt of unemployment benefit, but would have received a retirement pension, which would not have been reduced by his occupational pension. In his case the Commissioner found that there was no discrimination on grounds of sex, but because of other legislation in the contributory benefits system.

In *Bramhill v Chief Adjudication Officer*,¹⁰ the derogation in respect of an increase for a dependent spouse was challenged. Mrs Bramhill was entitled to a state retirement pension, but did not satisfy the conditions for entitlement to an increase of her pension for her husband, but, had she been a man, an increase would have been payable for a spouse. The ECJ held that the derogation applied and that the withholding of any increase for a husband was not incompatible with European law.

By the time that the government had started to consider what to do about state pension age, the position had been complicated by a series of decisions in the supplementary (ie occupational) pensions field.

Testing the supplementary scheme equal treatment rules

The occupational social security schemes Directive 86/378/EEC had permitted a derogation as regards equal state pension ages as long as state pension age had not been equalised. Accordingly many pension schemes retained separate pension ages, with the intention of

equalising only when the state decided to do so. This was considered appropriate as, first, it was not known at what age the state would equalise. It could be either 60 or 65 or some date in between. Secondly, because of the intimate connection between state pension age and the age at which guaranteed minimum pensions (GMPs) and pensions derived from protected rights under contracted-out pension schemes and the calculation of GMPs, it would be difficult to disentangle or uncouple the two issues.

These assumptions were overturned by the ECJ's decision in the case of *Barber v Guardian Royal Exchange*.¹¹ Mr Barber had been made redundant. The terms of the redundancy included a provision that those within five years of the pension scheme's normal pension age (57 for women, 62 for men) would receive an immediate pension; others would receive a redundancy payment and have their pension preserved for payment from the pension age. Mr Barber was 52. He was within five years of women's normal pension age, but not of his own. The company argued that the difference was covered by the derogation; Mr Barber argued that it was contrary to Article 119 (now 141) of the Treaty of Rome. As the scheme was contracted-out, at least part of it was in substitution for a state benefit covered by the 79/7 Directive derogation.

Article 119 required member states to ensure the principle of equal pay for male and female workers. 'Pay' in this context included not only the worker's salary or wage, but also 'any other consideration in cash or kind, which the worker receives directly or indirectly, in respect of his employment'. Mr Barber argued that there could be no derogation from Article 119 and that the pension age derogation in the Directive was incompatible with the Treaty.

Earlier ECJ judgments had touched on pensions. As far back as 1976 in *Defrenne v Sabena* (*Defrenne No. 3*),¹² the ECJ had ruled that Ms Defrenne, a member of the Sabena cabin staff should have the same conditions as male cabin staff, including the right to join the pension scheme. In *Worringham and Humphreys v Lloyds Bank*,¹³ the ECJ had ruled that the bank should pay the same contributions to its pension scheme for female workers as for male. It was not permissible to require women to wait for a period before being eligible to join the pension scheme and then to have membership backdated, if men could join immediately. In *Bilka-Kaufhaus v. Weber von Hartz*,¹⁴ the ECJ had ruled that women employees should have the same pension rights as men, but in that case the company itself, not a pension scheme, would make the payments.

The ECJ ruled in Mr Barber's favour. A pension paid out of a contracted-out pension scheme fell within the scope of Article 119 and Article 119 could be relied on before national courts. The Directive 86/378 derogation was indeed incompatible with the Treaty. Mr Barber was entitled to the immediate pension that he would have received, if he had been a woman.

The ECJ recognised, however, that member states, and employers within them, had assumed that the derogation was valid and could be relied on. Hence, to avoid considerable confusion and uncertainty, the Court ruled that the direct effect might not be relied on from any date before their judgment given on 17th May, 1990, unless a person had initiated proceedings or raised a claim before that date.

Lest at any time anyone should challenge the restriction to that date, the Dutch government proposed to the Inter-governmental Conference considering the Maastricht Treaty a

Protocol to that Treaty restricting the application of Article 119 as regards benefits under occupational pension schemes to periods on or after the 17th May, 1990. The protocol was attached to the Treaty and is now part of European law.

The UK government quickly inserted into legislation currently before Parliament a provision enabling pensions derived from protected rights to be paid at any time between 60 and 65. Without it, the previous legislation requiring those pensions to be paid at, but not before, state pension age would have resulted in any contracted-out money purchase scheme being either unable to satisfy the conditions for contracting-out or being in breach of European law. The position for GMPs was left for future consideration. Pensions from schemes liable for GMPs were not restricted to payment no earlier than state pension age.

The issue of equalising GMPs has never been fully resolved. Even when state pension age for state benefits is being equalised, state pension age for GMP purposes remains 60 for women and 65 for men and the calculation of GMP entitlement remains unequal. When, however, the Pensions Ombudsman decided to clarify the issue, ruling that GMPs had to be equalised, his determination was overturned by the High Court in *Marsh Mercer Pension Scheme v Pensions Ombudsman*,¹⁵ on the ground that the Ombudsman's decision was *ultra vires*.

The *Barber* judgment immediately raised a large number of issues, which took a succession of cases to resolve. In *ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers*,¹⁶ the ECJ quickly ruled that the *Barber* judgment applied to survivors, as well as old-age pensions. In *Neath v Hugh Steeper Ltd*,¹⁷ the ECJ ruled that Article 119 did not apply to

sex-based actuarial factors. Mr Neath's transfer payment did not have to be calculated on female actuarial factors even though they would have given him a higher transfer payment. In *Birds Eye Walls v Roberts*,¹⁸ the Court ruled that, where there was an integrated scheme with a bridging pension, which meant that women's pensions from the scheme reduced at 60 and men's at 65 to take account of state pension entitlement, the reduction in women's pension between 60 and 65 was compatible with Article 119. This applied even in the case of Mrs Roberts who herself was not entitled to a state retirement pension, as she had opted not to pay the full rate national insurance contributions that would have given her title.

In 1994 the ECJ gave its judgments on a number of equal treatment cases intended to clarify *Barber*.¹¹ Many of the issues arose in *Coloroll Pension Trustees v Russell*.¹⁹ This concerned a series of pensions schemes sponsored by the Coloroll company that had gone into liquidation. The court ruled:

- The direct effect of Article 119 could be relied upon against pension scheme trustees, as well as against the employer. The trustees themselves are bound to observe the principle of equal treatment.
- Employers and trustees are bound to use all means available under national legislation to eliminate all discrimination in matters of pay, including pensions. Where national law prohibits them from acting beyond their powers or in disregard of the trust deed, they have recourse to the courts.
- There is no EC requirement for equal treatment before 17th May, 1990, nor can retroactive reduction of the more favoured treatment be justified. However, from 17th May, 1990 the

more favourable treatment must be applied to both sexes until measures have been introduced to bring about equality, but such measures may reduce the more advantaged treatment.

- If trustees have insufficient assets to meet liabilities following equalisation, they must resolve the problem under national legislation regarding priority.
- If benefits are not linked to service, the *Barber*¹¹ judgment applies only to events occurring after 17th May, 1990.
- The *Barber*¹¹ judgment, not surprisingly, applies to contracted-in as well as contracted-out schemes.
- Because the judgment does not apply to sex-based actuarial factors, inequalities in lump sum benefits following commutation are not prohibited.
- It does not matter that some of the contributions to meet the cost of the benefits were paid by the members. The resulting benefits are still treated as 'pay' for the purposes of Article 119.
- If rights are transferred from one scheme to another, the receiving scheme must make good any detriment caused by unequal provisions in the transferring scheme.
- Article 119 does not apply where a scheme had only members of one sex, even if, had there been members of both sexes, there would have been unequal treatment.

At the same time as the *Coloroll*¹⁹ decision, the ECJ ruled in *van der Akker v Stichting Shell Pensioenfondsen*²⁰ and *Smith v Avdel Systems*²¹ that a scheme may not transitionally retain a lower pension age for women than for men for post-*Barber*¹¹ judgment periods, or otherwise give transitional advantages, even if a decision regarding pension age was made before the *Barber*¹¹ judgment.

If *Coloroll*¹⁹ and *van der Akker*²⁰ and

some other simultaneous judgments clarified most of the outstanding *Barber*¹¹ issues, two other judgments issued at the same time raised a whole new raft of issues.

Fisscher v Voorhuis Hengelo BV,²² and *Vroege v NCIV Instituut*,²³ were concerned, not with entitlement to benefits, but access to the pension scheme. Mrs Fisscher and Mrs Vroege had been precluded from joining their employer's pension schemes while employed part-time. This they considered indirectly discriminatory as the majority of part-timers were women. The Court ruled that neither the temporal restriction in *Barber*,¹¹ nor the Maastricht Protocol applied to access to pension schemes. There could be no confusion in this aspect, as the derogation under Directive 86/378 did not apply to access to a scheme. Thus, entitlement to join a scheme went back either to the start of employment or to the *Defrenne No. 3*¹² judgment on 8th April, 1976. The right to retrospective membership did not preclude the member from having to pay member contributions for that past period, however. In addition, national rules for bringing actions applied to such cases, provided that they applied no less favourably to the exercise of EU rights as to rights under national legislation.

In the light of the *Barber*¹¹ and *Coloroll*¹⁹ and associated ECJ judgments, the EU Commission proposed and the Council adopted Directive 96/97/EC, which amended Directive 86/378 by removing those features that were incompatible with what had now become Article 141 (previously Article 119) of the Treaty of Rome.

Resolving *Preston*

The *Fisscher*²² and *Vroege*²³ judgments led to the deluge of claims from part-time

workers in the UK, encouraged by their trade unions to seek retrospective membership of their employer's pension scheme. A number of test cases were identified and were lumped together as *Preston v Wolverhampton Health Authority*.¹ They were heard before the Employment Tribunal, the Employment Appeal Tribunal, the Court of Appeal and the House of Lords, who referred questions to the ECJ. In the light of the ECJ's judgment, the House of Lords overturned certain of the issues decided in lower jurisdictions. This meant, however, that a number of new questions arose. Yet again the Employment Tribunal considered a raft of issues. Some of their decisions were appealed to the Employment Appeal Tribunal and again to the Court of Appeal. Ten years after the initial claims, the majority are likely now at long last to have been decided.

The ECJ was asked in *Preston*¹ to decide some procedural questions, but on these would rest whether the part-timers concerned would be entitled retrospectively to join their employer's scheme. An earlier case from Northern Ireland, *Magorrian v Eastern Health & Social Services Board*,²⁴ concerned the effect on pension entitlement of rather idiosyncratic contractual arrangements for Northern Irish part-time and full-time mental nurses. In that case the ECJ ruled that a provision under national legislation restricting retrospection to two years before the commencement of proceedings was incompatible with European law. The *Preston*¹ judgment confirmed that European law precluded a two-year limit on retrospection. The ECJ held, however, that national procedural rules that required an application for occupational pension scheme membership to be made during, or within six months after ceasing, employment were not contrary to

European law. An exception was made where the individual had a succession of fixed-term contracts that constituted stable employment.

Although the ECJ judgment on *Preston*¹ made clear that those claiming more than six months after the termination of their employment were excluded, the issue of retrospection left a similar number of unanswered questions as had the *Barber*¹¹ judgment. These have gradually been resolved by the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal. One case, *Allonby v Accrington and Rossendale College*,²⁵ had itself to be referred to the ECJ, which held a woman whose contract of employment with an undertaking had not been renewed and who was immediately made available to her previous employer through an agency to provide the same services was not entitled to rely, as regards the agency, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed directly by the woman's previous employer. As a consolation prize the ECJ ruled that Mrs Allonby, though self-employed, should be able to participate in the teacher's pension scheme.

The decisions interpreting the *Preston*¹ judgment are outlined in Table 1.

The government legislates

What changes did the government make to UK legislation to comply with the equal treatment provisions? Sections 62–66 of the Pensions Act 1995 implemented the equal treatment requirements as regards occupational pension schemes. These provisions were supplemented by the Occupational Pension Schemes (Equal Treatment Regulations 1995 (SI 1995/3183)). These

specified the exceptions to the requirement for equal treatment as a result of ECJ's judgments, eg in the *Birds Eye Walls*¹⁸ case or because there were issues that had never been brought before the ECJ. These exceptions included:

- Bridging pensions where a man's pension from the scheme is higher than a woman's between 60 and 65, provided that the difference does not exceed the current rate of state retirement pension.
- An adjustment to take account of different indexation of the state second pension.
- Lump sums following commutation.
- The pension payable after such commutation.
- Money purchase benefits.
- The treatment of transfer credits or equivalent following a transfer from another occupational or personal pension scheme.
- Calculation of transfer payments.
- Pensions payable following early or postponed retirement.
- Allocation of a pension for provision for a dependant.
- Pensions derived from additional voluntary contributions.

The Pensions Act 1995 also took measures to equalise the state pension age, but by doing so gradually between 2010 and 2020. Under the equalisation provisions, a woman born before 6th April, 1950 still attains state pension age when she reaches age 60. However, a woman born on any day in the period 6th April, 1950 to 5th May, 1950 attains state pension age on 6th May, 2010 and for a woman born in every succeeding month she attains state pension age on the sixth of the month two months later (eg if born 6th May, 1950 to 5th June, 1950, her state pension age is 6th July

Table 1: Decisions interpreting the *Preston* judgment

Issue	Decision
A claim by a part-time worker for retrospective access to a scheme is made either during the employment relationship or within six months of its termination.	It may be backdated to the later of the start of the employment relationship or 8th April, 1976, but, if the scheme is contributory, the applicant must pay the contributions that would have been paid if they had been a member throughout.
A claim is made where the employment relationship has been broken or by its nature is intermittent.	The six-month time limit runs from the end of each period of employment, unless a stable employment relationship subsists bridging the periods when no work is done. In such cases the six-month limit runs from the end of that relationship.
Can the six-month time limit be extended in specific circumstances?	No.
What is the position if there has been a change of employer under a TUPE transfer and the unequal treatment occurred during employment by the transferring employer?	The six-month time limit applies from the end of employment by the transferring employer, not from the end of employment by the receiving employer.
What is the position if there is a change of employer because of statutory reorganisation of further education or the health service?	A claim against the first employer may be brought up to six months from leaving the second employer under the statutory reorganisation provisions, unless the employee voluntarily transferred from one employer to another.
What is the position if the same multi-employer scheme applies to both the first and the second employer, other than on a TUPE transfer?	The six-month time limit applies in respect of the employment with the first employer. That it is the same scheme is irrelevant.
If members are required to opt in to join a scheme, must a claim fail because the part-timer did not join the scheme as soon as qualified to do so? Can an applicant succeed in respect of a time before becoming eligible to join, if, when she did become eligible, she did not join?	A claim will not automatically fail in respect of a period when part-timers were excluded just because they did not join as soon as they became eligible. The equality requirement is breached if membership for full-timers was compulsory, but part-timers were excluded, even if a part-timer did not join on becoming eligible, but is not breached if membership for full-timers was not compulsory and a part-timer failed to join on first becoming eligible or shortly afterwards. Part-timers, who can demonstrate that they would have joined during the exclusion period, but, due to changed circumstances did not join on becoming eligible, may establish a breach. Where there is a breach, there is <i>prima facie</i> a right to retrospective membership. There is no breach where membership for full-timers was compulsory, but membership for part-timers was voluntary.
If an applicant, who was always eligible to join, failed to do so, or did not join on first becoming eligible, can she succeed?	There is no claim beyond the date of eligibility to join, but if the employer fails to inform employees of rights following change of statutory position and for that reason the individual did not join, there is no breach of the equality clause, but there may be a separate breach
If an applicant establishes a breach of the equality requirement, is she entitled as of right to a declaration of access?	Entitlement to a declaration of access is only at the tribunal's discretion. It may insert dates in the declaration different from those claimed or those covered by the breach.
When does a succession of fixed contracts form a stable employment relationship?	A stable relationship arises only when an employee is employed by the same employer on a succession of contracts (punctuated by intervals without a contract) on the same or broadly similar terms to perform essentially the same work under the same pension scheme. It exists provided that the sequence of contracts and pattern of intervals is dictated by the nature of the work, or the employer's requirement for employees to perform it,

Table 1: Continued

Issue	Decision
	<p>and the contracts and intervals are sufficiently regular for it to be apparent without benefit of hindsight when the sequence is broken. The time limit runs from that point.</p> <p>If the sequence is intermittent and irregular, both parties' intention regarding the start and end of the relationship outweighs strict regularity and the relationship continues until both parties intend otherwise.</p> <p>A stable relationship ceases and the time limit starts to run when one party indicates that no further contract will be offered or accepted, or acts inconsistently with continuation of the relationship, a further contract is not offered when the cycle would require it, a party no longer intends it to be stable, or the terms of the contract or work radically alter.</p> <p>It is for the applicant to prove the existence of a stable employment</p>
What is the position where a part-timer leaves the employment, but returns after more than six months?	The claim is to be rejected for the period of employment before the non-employment.
What is the position where an applicant has failed to name a comparator and the respondent maintains that there is no identifiable comparator.	A directly employed employee cannot be compared with an employee provided under a contract for services through an agency.
How should contributions to be paid by employees be calculated?	This is for agreement between the parties. Public sector employers reached an agreement with the unions on this issue. Scheme trustees must notify part-timers of the contributions they must pay to accrue benefits under the scheme in respect of part-time employment. As regards the private sector, the electricity industry reached an agreement with Unison.
Atypical workers (casuals, temps, zero-hours contract and on-call workers) can succeed only if scheme rules have a disproportionately adverse effect on women. Is it for the applicant to establish that they do, or the respondent that they don't? If it is for the applicant to do so, what requirement is there on the respondent to produce documents or answer questions about gender profile, etc?	The applicant must establish disproportionate impact to demonstrate whether there is a breach of the equality requirement. If the applicant alleges that the material factor stated by the respondent has disproportionate effect and supports the allegation with particulars to show that it is not vexatious or mischievous, it is for the respondent to disprove it. The employer can be required to disclose relevant statistics or documents that already exist in paper or electronic form and to provide written answers to questions, subject to the overriding objective and considerations of relevance and proportionality
What is the position where the employer claims objective justification, claims that the exclusion from the scheme is unconnected with hours worked or disputes the employee's work record?	Each case must be determined individually by a tribunal.

2010). This increase continues until women's state pension age reaches 65. Thus, a woman born after 5th April, 1955 attains state pension age when she attains the age of 65.

At the same time as the Pensions Act 1995 starts in April 2010 to equalise state

pension age, it repeals other discriminatory features. Thus men will become entitled to qualify for a 'Category B' state retirement pension on the basis of their wife's contribution record and wives will be able to obtain an increase in their retirement pension

for their husbands in the same circumstances as husbands can for their wives.

The differences in treatment for survivors under state pensions legislation was removed by the Welfare Reform and Pensions Act 1999 with effect from 9th April, 2001. Instead of widow's benefits, bereavement benefits were introduced which were payable to widowers on the same terms as to widows. To avoid the extra cost, however, the circumstances in which bereavement benefits were payable were more stringent than the previous widow's benefits, with a considerable narrowing of entitlement for survivors without dependent children.

References

- 1 (Case C-78/98) [2000] ICR 961 ECJ (plus subsequent determinations on the Employment Tribunals and Employment Appeal Tribunal websites).
- 2 Dickens, C. (1998) 'Bleak House' (Tambling, J. ed.), Macmillan, Basingstoke.
- 3 (Case 152/84) [1986] ECR 723.
- 4 (Case 150/85) [1986] 3 CMLR 43.
- 5 (Case 384/85) [1987] ECR 2865.
- 6 (Case C-410/92) [1994] ECR I-5483.
- 7 (Case C-328/91) [1991] 2 QB 164.
- 8 [1992] 3 All ER 577.
- 9 (Case C-92/94) see Appendix to Commissioner's decision *R(S)2/95*.
- 10 (Case 420/92) — see Appendix to Commissioner's decision *R(P)2/96*.
- 11 (Case C-262/88) [1990] ECR I-1889.
- 12 (Case 149/77) [1978] ECR 1365.
- 13 (Case 69/80) [1981] ECR 767.
- 14 (Case 170/84) [1986] ECR 1607.
- 15 [2001] 16 PBLR.
- 16 (Case C-109/91) [1993] I-4879.
- 17 (Case C-152/91) [1993] ECR I-6935.
- 18 (Case C-132/92) [1993] PLR 281.
- 19 (Case C-200/91) [1993] ECR I-5579.
- 20 (Case C-28/93 [1994] PLR 211.
- 21 (Case C-408/92) [1994] PLR 211.
- 22 (Case C-128/93) [1994] ECR I-4583.
- 23 (Case C-57/93) [1994] ECR I-4541.
- 24 (Case C-246/96) [1997] ECR I-7153.
- 25 (Case C-256/01) [2004] 15PBLR.

Further Reading

Decisions of the Social Security Commission may be found on their website at <http://www.dwp.gov.uk/advisers/docs/commdecs/index.asp>.