Neutral Citation Number: [2020] EWCA Civ 869

Case No: A3/2016/1518

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE WARREN
[2016] EWHC 377 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2020

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE FLOYD
and
LORD JUSTICE ARNOLD

- -

Between :

SAFEWAY LIMITED	**Appellant**
- and -	
(1) ANDREW NEWTON	
(2) SAFEWAY PENSION TRUSTEES LIMITED	**Respondents**

- -
- -

Sebastian Allen (instructed by **DWF Law LLP**) for the **Appellant**
Andrew Short QC and Michael Uberoi (instructed by **Burges Salmon LLP**) for the **First Respondent**
David E. Grant (instructed by **Eversheds Sutherland (International) LLP**) for the **Second Respondent**

Hearing date: July 2 2020

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Approved Judgment

Lord Justice Floyd:

1. This is a further stage in the appeal from the order of Warren J dated 29 February 2016 concerning the date on which the Normal Pension Ages ("NPAs") applicable under the occupational pension scheme for employees of the Safeway Group, the Safeway Pension Scheme ("the Scheme"), were equalised at 65 years old for both women and men (when previously it had been 60 for women and 65 for men). The issue raised in this stage is concerned with the effect of the coming into force of section 62 of the Pensions Act 1995 on 1 January 1996.

2. On 5 October 2017 this court (Lord Briggs of Westbourne JSC, and Longmore and Floyd LJJ) handed down a judgment dealing (at least to some extent) with two of the three outstanding issues in the appeal: [2017] EWCA Civ 1482, [2018] PLR 2 ("the first judgment"). It is intended that this judgment should be read in conjunction with the first judgment.

3. At the stage of the first judgment, the appellant, Safeway Limited, which is the principal employer under the Scheme, contended that the equalisation of NPAs had occurred on 1 December 1991, that being the date notified to Scheme members for that purpose by a written announcement, and the date by reference to which a subsequent formal amendment to the Scheme was effected by a deed ("the 1996 Deed") which was said to be effective retrospectively. The position of the first respondent, Mr Andrew Newton, who acted and continues to act in a representative capacity for those members of the Scheme with an interest in doing so, was that the judge had been correct to hold that NPA equalisation did not occur until 2 May 1996, the date of the formal amendment to the Scheme by deed. In the meantime, it followed that the NPA for both men and women had to be treated as 60 and not 65.

4. The first of the three issues was whether the power to amend the terms of the Scheme could be exercised by the principal employer, with the agreement of the Scheme Trustee, otherwise than by deed. Safeway contended that it could be so exercised and, in particular, that it could be exercised by means of a written announcement to members. This court concluded, in agreement with Warren J, that the power could only be exercised by deed, although the deed would have effect retrospectively to the date of the announcement.

5. The second issue was whether the power to effect amendments to the Scheme retrospectively for the purpose of equalisation of NPAs to the NPA of the previously disadvantaged class was prohibited by the directly applicable EU law principle of equal treatment then enshrined in Article 119 of the Treaty of Rome ("Article 119", now Article 157 of the Treaty on the Functioning of the European Union). Warren J held that Article 119 did have this prohibitory effect and, moreover, that this was, as a matter of EU law, *acte clair*. This court differed from the judge on the question of whether the prohibitory effect was *acte clair*, principally because the rights covered by the retrospective exercise of the power of amendment were defeasible rights. The court considered that it was necessary to refer a question to the CJEU in order to decide the appeal.

6. On 7 October 2019 the Grand Chamber of the CJEU handed down its judgment: Case C-171/18 *Safeway Limited v Andrew Newton and Safeway Pension Trustees Limited* [2020] 1 CMLR 1321 ("*Safeway CJEU*"). The CJEU held that, in the absence of

objective justification, a pension scheme was prohibited from adopting, in order to end discrimination resulting from the fixing of an NPA differentiated by gender, a measure which equalises, with retrospective effect, the NPA of members to that of the previously disadvantaged class for the period between the announcement of that measure and its adoption, even where such a measure is authorised under national law and under the Trust Deed. It is now common ground that the fact that the affected rights were defeasible is irrelevant to that question. Safeway no longer contends that the amendment to the Scheme validly equalised the NPAs to 65 from the date of the announcement in 1991.

7. The third issue in the appeal concerned the effect of section 62 of the Pensions Act 1995 ("section 62"), which was intended to provide a domestic law framework for Article 119 in relation to pension rights, and which came into force on 1 January 1996. We held over decision on this issue until after the judgment on the reference to the CJEU. It is that issue which comes before us now.

8. To explain this third issue I need to explain the concept of "the *Barber* window", so named after the CJEU case, *Barber v Guardian Royal Exchange Assurance Group* (Case – C262/88) [1991] 1 QB 344. In the first judgment at 11 we said this:

> "On 19 May 1990 the European Court of Justice delivered judgment in *Barber v Guardian Royal Exchange Assurance Group* (Case – C262/88) [1991] 1 QB 344, holding that the direct effect of Article 119 made it unlawful discrimination within the community for pension schemes to provide for different NPAs for men and for women. But the Court of Justice held that (because of the absence of any sufficiently clear prior jurisprudence) the direct effect of Article 119 could not be relied upon to claim a pension entitlement by reason of that discrimination with effect prior to the publication of that decision on 17 May 1990. Subject to that restraint upon retroactivity, imposed in part because of concerns expressed by the United Kingdom as to the large financial consequences for pension schemes which commonly discriminated between men and women in that way, the Court held that it was for national courts to apply Article 119 so as to safeguard the equal treatment right in relation to pensions thereby conferred."

9. 17 May 1990 is thus the date from which the *Barber* principle applies throughout the EU and is generally referred to as the opening of the *Barber* window. Thereafter there is an obligation on employers, pension trustees and, if necessary, on the courts of member states, to give effect to that principle.

10. At [38] in the first judgment we explained what may happen thereafter with respect to future pensionable service:

> "… employers and pension trustees may take effective measures available to them under domestic law (including the terms and rules of the relevant Scheme) to implement Article 119 by levelling down, that is reducing the rights of the advantaged class to those of the disadvantaged class, with

> respect to future pensionable service (i.e. service undertaken after the taking of those effective measures). But in relation to the period from the opening of the *Barber* window until the taking of those effective measures (generally described as the closing of the *Barber* window) employers and trustees will be required to confer the same rights upon the disadvantaged class as those enjoyed by the advantaged class…"

11. As in the first judgment, I will use the term "levelling up" to mean improving the rights of the disadvantaged class to those of the advantaged class. In practice this means that to lower the pension age of men from 65 to 60 is levelling up. To raise the pension age of women from 60 to 65 is "levelling down".

12. Safeway contends that the coming into force of section 62 on 1 January 1996 closed the *Barber* window because it was an effective domestic law measure implementing Article 119 with respect to future pensionable service. This is because section 62 introduced into every UK occupational pension scheme an equal treatment rule conferring enforceable rights on members of such schemes to equalised levelled up benefits. Although in relation to the period before 1 January 1996 Article 119 precludes levelling down, from that date forward the level of members benefits is purely a matter of domestic law. As a matter of domestic law, so Safeway contends, the 1996 Deed was effective to level down the NPAs of men and women with effect from 1 December 1991. This domestic law effect of the 1996 Deed was nullified by Art 119 only insofar as it related to the period between 1 December 1991 and 31 December 1995. It remained effective to level down the NPAs with effect from 1 January 1996.

13. Mr Newton does not accept that the effect of section 62 was to close the *Barber* window. He contends that the CJEU's jurisprudence on what constitutes an effective measure to implement Article 119 requires that the measure be adopted by the pension scheme itself. He very fairly accepts, however, that if section 62 did close the window, the domestic law effect of the 1996 Deed was to level down the pension rights of both men and women to an NPA of 65.

14. On the appeal, Mr Sebastian Allen appeared for Safeway and Mr Andrew Short QC and Mr Michael Uberoi for Mr Newton. The second respondent ("the Trustee") was represented by Mr David E. Grant who supplied a helpful background skeleton argument, but took a neutral position on the outcome of the third issue.

Relevant EU legal principles

15. At the material times, the principle of equal pay was laid down in Article 119 in the following terms:

> "1. Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.
>
> 2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration,

> whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."

16. It follows that the primary responsibility is on member states for ensuring and subsequently maintaining the principle of equal treatment.

17. As explained in the first judgment at [39] the origins of the approach taken by the CJEU in *Barber* and the cases which followed it can be found in a number of earlier decisions of the Court. Those cases concerned situations where the law of a member state was non-compliant with principles of equal treatment, and in which it was necessary to consider the direct effect of EU law pending the bringing of the law of that member state into line. It was in these cases that the Court introduced the concept of levelling up in that interim period, the rationale being that, until the domestic law was changed, there was no other frame of reference to adopt.

18. Thus in Case C-71/85 *State of the Netherlands v Federatie Nederlandse Vakbeweging* [1987] 3 CMLR 767 the issue was the conformity of a provision of Netherlands law on unemployment benefit under which married women who were not the head of the household were excluded. The relevant provisions of the directive ensuring equal treatment (Council Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security) was held to be directly applicable during the period of non-conformity of Netherlands Law. The Court said at [22]:

> "It follows that until such time as the national government adopts the necessary implementing measures, women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation since, where the directive has not been implemented, those rules remain the only valid point of reference."

19. This is a recurring theme in the cases. If domestic law is not compliant with the principle of equal treatment, then EU law imposes a transitional regime in which levelling up takes place. That is not because the equal treatment principle always requires levelling up: it requires equality of treatment only. In the transitional period, however, before implementation into national law, the regime imposed is a levelling up of the rights of the disadvantaged class because the rights of the advantaged class are "the only valid point of reference".

20. In Case C-33/89 *Kowalska v Freie und Hansestadt Hamburg* [1992] ICR 29 the plaintiff, a civil servant, complained of indirect discrimination in contravention of Article 119 because, under the terms of a collective agreement, as a part-time rather than full-time employee, she did not receive a severance grant on her retirement. The indirect discrimination arose because the proportion of part-time workers who were women was significantly higher than the proportion of women who were full-time workers. The court held that, in principle, such an agreement contravened Article 119. In reply to the question whether, in such circumstances, the part-time employee was nevertheless entitled to be treated on an equal footing the court said at [20]:

> "... where there is indirect discrimination in a clause in a collective wage agreement, the class of persons placed at a

> disadvantage by reason of that discrimination must be treated in the same way and made subject to the same scheme, proportionately to the number of hours worked, as other workers, such scheme remaining, for want of correct transportation of article 119 of the EEC Treaty into national law, the only valid point of reference."

21. The same principle was applied by the Court in another collective agreement case, Case C-184/89 *Helga Nimz v Frie und Hansestadt Hamburg* [1992] 3 CMLR 699; [1991] ECR I-297 at [18]-[20]. It was applied again in the NPA equalisation cases to which we referred in the first judgment. Thus, in Case C-200/91 *Coloroll Pension Trustees Ltd v Russell and others* [1995] ICR 179, at [30] to [31], the Court said:

> "31 Moreover, in paragraphs 18 to 20 of its judgment of 7 February 1991 in Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297 the Court held that the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by collective bargaining or by any other constitutional procedure, and to apply to members of the disadvantaged group the same arrangements as those enjoyed by the other employees, arrangements which, failing correct implementation of Article 119 in national law, remain the only valid point of reference.
>
> 32 It follows that, once the Court has found that discrimination in relation to pay exists and so long as measures for bringing about equal treatment have not been adopted by the scheme, the only proper way of complying with Article 119 is to grant to the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class."

22. Passages to similar effect are to be found in Case C-28/93 *Van den Akker v Shell* [1994] ECR I-4527 at [16] and in Case C-408/92 *Smith v Avdel Systems Ltd* [1995] ICR 596 at [16].

23. In *Safeway CJEU* the Court explained, at [16] to [18], the three periods of service which needed to be considered in this case, and which I will refer to (as the parties did) as Periods 1, 2 and 3:

    i) Period 1 encompassed periods of service before the opening of the *Barber* window on 17 May 1990. In this period pension schemes were not obliged to apply a uniform NPA because of the limitation on the temporal effects of the judgment in *Barber,* excluding the application of Article 119 to pension benefits in respect of this periods.

    ii) Period 2 encompassed periods of service between 17 May 1990 and the adoption by the Scheme of measures reinstating equal treatment. In this period levelling up applies.

    iii) Period 3 encompasses periods of service after the adoption by the Scheme of measures reinstating equal treatment. In this period Article 119 does not

preclude levelling down, because Article 119 only requires "that men and women should receive the same pay for the same work without imposing any specific level of pay".

24. The transition between Period 2 and Period 3 was well explained by Advocate General Van Gerven in his joint opinion in *Avdel* and *Van den Akker* (see [1995] ICR at pages 612-614):

> "9. … In my joint opinion of 28 April 1993 in *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers -en Schoonmaakbedrijf* (Case C-109/91) and other cases [1995] I.C.R. 74, 128-129, point 60, taking the court's case law as my basis, I drew a distinction between pension benefits according to whether they were based on discrimination occurring in the past (after the judgment in *Barber v. Guardian Royal Exchange Assurance Group* (Case C-262/88) [1990] I.C.R. 616) or they were related to service performed after the introduction of new rules adapted to the principle of equal treatment as a result of that judgment. That distinction must also be maintained in the present cases.
>
> 10. As regards benefits based on periods of service completed *in the past* to which discriminatory rules applied, it is necessary, pending rules to abolish such discrimination, to increase the level of benefits of the disadvantaged sex so as to bring it up to that of the advantaged sex. In cases involving sex discrimination the court has consistently held that the more favourable rules must be applied to the less favoured sex, those rules forming "the only valid frame of reference" for immediate implementation of the principle of equal treatment. …
>
> 11. The situation is fundamentally different so far as concerns benefits based on new rules adapted to the principle of equal treatment and relating to future periods of service, that is to say periods completed after the entry into force of the rules. I share the view taken by Avdel Systems Ltd., the United Kingdom, the German Government and the Commission that Community law does not preclude a lowering of such benefits so long as those benefits are set at a level which is the same for both men and women. Any different conclusion would amount to undesirable Community interference in a policy area which at present is the province of the member states, which, as the court has consistently ruled, "enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation:" *Hofmann v. Barmer Ersatzkasse* (Case 184/83) [1985] I.C.R. 731, 765, para. 27; *Commission of the European Communities v. Kingdom of Belgium* (Case C-229/89) [1991] E.C.R. 1-2205, 2229, para. 22, and *Molenbroek v. Bestuur van de Sociale Verzekeringsbank* (Case C-226/91) [1992] E.C.R. 1-5943, 5969, para. 15. See also *De Weerd* [1994] E.C.R. 1-571, 598,

> para. 28, where the court ruled, with regard to Directive (79/7/E.E.C), that that Directive:
>
> > "leaves intact . . . the powers reserved by articles 117 and 118 of the Treaty to the member states to define their social policy within the framework of close co-operation organised by the Commission, and consequently the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented."
>
> In my view, the same applies to article 119 of the E.E.C. Treaty."

25. The critical question for the purposes of this appeal is how one determines when Period 2 ends so that Period 3 may begin: i.e. the date on which the *Barber* window closes and domestic law can apply. Advocate General Tanchev expressed the view at [33] of his Opinion in *Safeway CJEU* that the date on which the *Barber* window closed is:

> "the date that measures which are fully legally enforceable are taken to equalise the NPA of men and women. Such measures are to be embedded in a legal regime that complies with Article 47 of the Charter of Fundamental Rights of the European Union and Article 19(1) TEU."

26. The way in which the Court approached this issue is to be found at [24] to [26] of the judgment:

> "24 Having regard to the direct effect of art.119 of the EC Treaty, the application of that provision by employers, once discrimination has been found to exist, must be immediate and full, and therefore measures taken with a view to reinstating equal treatment cannot, as a rule, be made subject to conditions which maintain discrimination, even on a transitional basis (see, to that effect, *Avdel Systems* [1995] 3 C.M.L.R. 543 at [25] and [26]).
>
> 25 Furthermore, the principle of legal certainty must also be observed. That latter principle, which must be observed all the more strictly in the case of rules liable to entail financial consequences, requires that the rights conferred on individuals by EU law must be implemented in a way which is sufficiently precise, clear and foreseeable to enable the persons concerned to know precisely their rights and their obligations, to take steps accordingly and to rely on those rights, if necessary, before the national courts. The introduction of a mere practice, which has no binding legal effects with regard to the persons concerned, does not meet these requirements (see, to that effect, *Aventis Pasteur SA v OB* (C-358/08) EU:C:2009:744; [2010] 2 C.M.L.R. 16 at [47], and *Euro Park Service v Ministre des Finances et des Comptes publics* (C-14/16) EU:C:2017:177;

> [2017] 3 C.M.L.R. 17 at [36]–[38], [40] and [42] and the case law cited).
>
> 26 Thus, in order to be capable of being regarded as reinstating the equal treatment required by art.119 of the EC Treaty, the measures adopted with a view to ending discrimination contrary to that provision must satisfy the requirements set out at [24] and [25] above."

27. To summarise, to be sufficient to close the *Barber* window, the measures must be immediate, full, unconditional and legally certain (in the sense they must be sufficiently precise, clear and foreseeable to enable the persons concerned to know their rights and obligations, and to rely on those rights before national courts).

28. Two further passages in the Court's judgment shed some light on the foregoing. At [37] the Court said:

> "Furthermore and above all, it must be pointed out that any measure seeking to eliminate discrimination contrary to EU law constitutes an implementation of EU law, which must observe its requirements. In particular, neither national law nor the provisions of the Trust Deed governing the pension scheme concerned can be relied upon in order to circumvent those requirements."

29. Finally at [41] the Court said:

> "It would be contrary to that objective, to the principle of legal certainty and to the requirements set out at [17], [24] and [34] above to allow the authorities with responsibility for the pension scheme concerned to eliminate discrimination contrary to art.119 of the EC Treaty by adopting a measure equalising, with retroactive effect, the NPA of the members of that scheme to the NPA of the persons within the previously disadvantaged category. To accept such an approach would relieve those authorities of the obligation, after the finding of discrimination, to eliminate it immediately and in full. Moreover, it would fail to comply with the obligation to grant the persons within the previously disadvantaged category enjoyment of the NPA of the persons within the previously favoured category so far as concerns the pension rights relating to the periods of service between the date of delivery of *Barber* [1990] 2 C.M.L.R. 513 and the date of the adoption of the measures achieving equal treatment, and with the prohibition on removing, with retroactive effect, the advantages of the latter persons. Lastly it would, until the adoption of such measures, create doubts, contrary to the principle of legal certainty, as regards the scope of the rights of the members."

The Pensions Act 1995

30. Section 62 provides, so far as material:

> "(1) An occupational pension scheme which does not contain an equal treatment rule shall be treated as including one.
>
> (2) An equal treatment rule is a rule which relates to the terms on which—
>
> (a) … and
>
> (b) members of the scheme are treated.
>
> (3) Subject to subsection (6), an equal treatment rule has the effect that where—
>
> (a) a woman is employed on like work with a man in the same employment,
>
> (b) a woman is employed on work rated as equivalent with that of a man in the same employment, or
>
> (c) a woman is employed on work which, not being work in relation to which paragraph (a) or (b) applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision) of equal value to that of a man in the same employment,
>
> but (apart from the rule) any of the terms referred to in subsection (2) is or becomes less favourable to the woman than it is to the man, the term shall be treated as so modified as not to be less favourable.
>
> (4) An equal treatment rule does not operate in relation to any difference as between a woman and a man in the operation of any of the terms referred to in subsection (2) if the trustees or managers of the scheme prove that the difference is genuinely due to a material factor which—
>
> (a) is not the difference of sex, but
>
> (b) is a material difference between the woman's case and the man's case.
>
> (5) References in subsection (4) and sections 63 to 65 to the terms referred to in subsection (2), or the effect of any of those terms, include—
>
> (a) a term which confers on the trustees or managers of an occupational pension scheme, or any other person, a discretion which, in a case within any of paragraphs (a) to (c) of subsection (3)—

> (i) may be exercised so as to affect the way in which persons become members of the scheme, or members of the scheme are treated, and
>
> (ii) may (apart from the equal treatment rule) be so exercised in a way less favourable to the woman than to the man, and
>
> (b) the effect of any exercise of such a discretion;
>
> and references to the terms on which members of the scheme are treated are to be read accordingly.
>
> (6) In the case of a term within subsection (5)(a) the effect of an equal treatment rule is that the term shall be treated as so modified as not to permit the discretion to be exercised in a way less favourable to the woman than to the man."

31. Section 63(4) states that section 62 is "to be construed as one with the Equal Pay Act 1970". Under section 1(13) of the Equal Pay Act 1970 provisions in that section and sections 2 and 2A framed with reference to women and their treatment relative to men are to be read as applying equally in a converse case to men and their treatment relative to women. It was common ground that this applied equally to section 62.

32. Section 65 provides trustees and mangers with a power of amendment to secure conformity with an equal treatment rule:

> "(1) The trustees or managers of an occupational pension scheme may, if—
>
> (a) they do not (apart from this section) have power to make such alterations to the scheme as may be required to secure conformity with an equal treatment rule, or
>
> (b) they have such power but the procedure for doing so—
>
> (i) is liable to be unduly complex or protracted, or
>
> (ii) involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty,
>
> by resolution make such alterations to the scheme.
>
> (2) The alterations may have effect in relation to a period before the alterations are made."

The judgment of Warren J

33. The judge considered the effect of section 62 at paragraphs 147 to 158 of his judgment. It appears that the main focus of the argument before him was that one could not seek to achieve in two stages that which you could not achieve in one. It

appears to have been contended that the introduction of section 62 could have the effect of rendering the 1996 deed valid in respect of the past, i.e. from 1 December 1991 to 31 December 1995. In light of *Safeway CJEU*, Safeway no longer contends that section 62 has any effect so far as this past period is concerned. We were not, therefore, addressed in any detail on the judge's reasoning. It was not suggested that the way in which Safeway now put their case was not open to them in this court[1].

The arguments on the appeal

34. Mr Allen submitted, first, that section 62 gave domestic law effect to legally enforceable equalised benefits for men and women members of occupational pension schemes, including the Scheme, thereby implementing and bringing domestic law into compliance with Article 119. He submitted, secondly, that this implementation of Article 119 satisfied "the litmus test" for such measures in terms of its legal enforceability and certainty as explained by the Advocate General and the Court in *Safeway CJEU*. Thirdly, he submitted that this test is obviously correct, as it defines the transition from Period 2, where Article 119 is required to supply the remedies because of non-compliance, into Period 3 where domestic law takes over, and the remedies are supplied by domestic law.

35. Mr Short submitted that the jurisprudence of the CJEU was clear in requiring the non-compliance to be remedied by a measure taken by the Scheme itself. The only measure taken by the Scheme itself was the 1996 Deed. Legislation which seeks to implement Article 119 is insufficient. That was clear from the fact that legislation outlawing discrimination had been in place from 1 December 1991 (the date of the announcement) to 1 May 1996. Prior to 1 May 1996 discriminatory provisions were overridden by Article 119, and after that date by section 62. Yet Article 119 cannot have been a relevant measure (otherwise the *Barber* window would have closed as soon as it opened). It followed that section 62 was not a relevant measure closing the *Barber* window either.

36. Mr Short submitted further that, as section 62 was introduced to give effect to Article 119, it could improve the rights afforded by Article 119 but not reduce them. He submitted that to accept Safeway's argument concerning section 62 would be to allow national law to circumvent the provisions of Article 119, something which the CJEU had ruled out at [37] of its judgement in *Safeway (CJEU)* (quoted in paragraph [28] above).

37. Mr Short also placed reliance on section 65(3) of the Pensions Act 1995. The existence of this statutory power of amendment of trust deeds was a recognition of the fact that further action by the Scheme itself was required to implement equality in full.

38. Finally Mr Short submitted that to allow benefits earned after section 62 came into force to be reduced retrospectively would be contrary to the policy of EU law for the reasons explained by the court at [41] of its judgment (see paragraph [29] above). It

[1] Safeway said in their skeleton argument (paragraph 7 FN 14) without contradiction from the first respondent, that their narrower formulation of the point was advanced orally before this court in 2017 alongside the wider formulation.

would relieve the authorities with responsibility for the pension scheme of the obligation to eliminate discrimination immediately and in full, and it would create doubts, contrary to the principle of legal certainty, as regards the scope of the rights of the members.

Discussion

39. I take first the submission that it is only measures adopted by the Scheme itself which can close the *Barber* window. There is certainly some literal support for that in the trilogy of equalisation cases: *Coloroll, Avdel* and *Van den Akker*. I have set out paragraph 32 of *Coloroll* at [21] above, and it is clear that, in that case, it was contemplated that steps would be "adopted by the scheme". I cannot, however, extract from that or the corresponding passages in the other cases a general principle that nothing apart from textual amendment of the scheme is sufficient to close the *Barber* window. Mr Short was constrained to accept in argument that a domestic enactment which expressly imposed a mandatory NPA of 60 on all members of occupational pension schemes would be an effective measure to close the *Barber* window. I think he was right to do so, but that concession cannot sit with the general principle for which he contended.

40. I would reject the argument for a further reason. The effect of section 62 is to deem the Scheme to be amended by the inclusion of an equal treatment rule. As Patten J (as he was then) explained in *Foster Wheeler Ltd v Hanley and others* [2009] PLR 39 at [17]:

> "It is clear that under section 62 the rules of the scheme are to be read as modified so as to conform with Article 119…"

41. I cannot see any purpose in a rule which requires the Scheme to be modified by incorporating textual amendments, when those modifications are required by statute to be read into the Scheme in any event. Thus even if EU law requires the Scheme itself to be modified, section 62 has this effect. It cannot make a difference that the modifications are initiated by Parliament rather than the administrators of the Scheme.

42. Mr Short sought to obtain some support from the absence of references to domestic equality legislation in either the two German collective agreement cases (*Kowalska* and *Nimz*) or in the English cases, *Coloroll* (a reference from the High Court) and *Avdel* (a reference from the industrial tribunal at Bedford). As regards the former, we do not know whether there was any applicable German equal pay legislation to which reference could have been made. As regards the latter, we know that occupational pension schemes were expressly excluded from the operation of the Equal Pay Act 1970, a situation which was not rectified until the Pensions Act 1995. Both English cases related to periods before the Pensions Act 1995 came into force. It follows that there is no support for Mr Short's argument in the failure of these cases to mention equality legislation.

43. Next, I take the argument that section 62 is merely Article 119 in domestic law clothing, and does no more to close the *Barber* window than did Article 119 itself. I do not accept the premise of this argument. First, as the Court said in *Safeway (CJEU)* at [18], Article 119 only provides that men and women receive the same pay for the same work without imposing any specific level of pay. Section 62 goes further

and says that discriminatory terms are to be modified so that terms which treat one gender less favourably are modified so that they do not treat that gender less favourably. In other words, it requires levelling up. That is to do more than Article 119. Secondly, the closure of the *Barber* window is defined by the point at which domestic law provides legally enforceable and certain rights for members to enforce. Section 62 provides such rights, which may be enforced by recourse to the domestic courts.

44. It is true that, in one respect, section 62 does not provide the precise equivalent of an amendment of the Scheme to equalise the NPAs of men and women at 60. That is because section 62(3)(a) requires the woman (or man) to show that that they are employed on like work with a man (or woman) in the same employment. The CJEU jurisprudence requires the implementation of Article 119 to be full, immediate and unconditional. In my judgment, however, section 62 does give a full, immediate and unconditional right to enforce the terms of the equal treatment rule, which is a full implementation of the Article 119 right. The requirement to establish employment on like work in the same employment is not a relevant "condition" on the implementation of Article 119, because it is no more than Article 119 itself requires. To treat this as an inadequate implementation of Article 119 would be to require domestic law to enhance the Article 119 right, not to implement it.

45. Mr Short is obviously right that section 62 cannot be allowed to circumvent the principles of EU law which are designed to protect the rights of members during the *Barber* window. In my judgment, however, it does not do so. The effect of section 62 was to level up the rights of men to those of women in accordance with Article 119. That does not involve any undermining of Article 119 rights. Once that has happened, one moves into Period 3, when it is permitted to reduce the level of benefits by levelling down. That does not undermine Article 119 either, because the level of benefits is not controlled by Article 119 in Period 3, as the Court has made clear.

46. I do not think that the amendment power contained in section 65(3) of the Pensions Act 1995 assists the first respondent. The purpose of that provision is to allow the Scheme to be amended easily so as to bring its paperwork into conformity with equal treatment. It is not an indication that the members have no sufficiently enforceable rights before those amendments take place. Likewise, I am not persuaded by Mr Short's policy point. If the Scheme has effectively been modified by statutory intervention, no purpose is served by incentivising textual modification as well.

Conclusion

47. The criterion for whether a measure is sufficient to close the *Barber* window is to be gleaned from the judgment of the CJEU in *Safeway CJEU* and is as I have summarised at [27] above. Section 62 meets that criterion. I would therefore allow the appeal and hold that the *Barber* window was closed with effect from 1 January 1996.

Lord Justice Arnold:

48. I agree.

Lord Justice McCombe:

49. I also agree.