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THE ALL ENGLAND LAW REPORTS 1999

European Cases

Editor-in-chief

CAROLINE VANDRIDGE-AMES LLM

Editor

CRAIG ROSE Barrister

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The reference 26 *Halsbury's Laws* (4th edn) para 577 refers to paragraph 577 on page 296 of volume 26 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (1996 reissue) para 9 refers to paragraph 9 on page 24 of the 1996 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 26 *Halsbury's Statutes* (4th edn) 734 refers to page 734 of volume 26 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (1997 reissue) 269 refers to page 269 of the 1997 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

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(formerly The English and Empire Digest)

The reference 37(2) *Digest* (Reissue) 424, 2594 refers to case number 2594 on page 424 of the reissue of green band volume 37(2) of *The Digest*.

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Halsbury's Statutory Instruments

The reference 17 *Halsbury's Statutory Instruments* 305 refers to page 305 of volume 17 of the grey volumes series of *Halsbury's Statutory Instruments*.

The reference 14 *Halsbury's Statutory Instruments* (1994 reissue) 201 refers to page 201 of the 1994 reissue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

Cases reported in European Cases volume

	Page		Page
Bagnasco v Banca Popolare di Novara soc coop ari (Joined cases C-215- 216/96) [ECJ]	678	Lloyd Schufabrik Meyer & Co KG v Klijens Handel BV (Case C-342/97) [ECJ]	587
Bayerische Motorenwerke AG (BMW) v Deenik (Case C-63/97) [ECJ].	235	Mecklenburg v Kreis Pinneburg—Der Landrat (Case C-321/96) [ECJ]	166
Calfa (Criminal proceedings against) (Case C-348/96) [ECJ]	850	Norbury Developments Ltd v Customs and Excise Comrs (Case C-136/97) [ECJ]	436
Card Protection Plan Ltd v Customs and Excise Comrs (Case C-349/96) [ECJ] ..	339	Note: Treaty citation [ECJ]	481
Chemische Afvalstoffen Dusseldorf BV v Minister van Volkshuisvesting,		Note: Treaty citation (No 2) [ECJ] ..	646
Ruimtelijke Ordening en Milieubeheer (Case C-203/96) [ECJ]	25	Pharmacia & Upjohn SA (formerly Upjohn SA) v Paranova A/S (Case C-379/97) [ECJ]	880
Connemara Machine Turf Co Ltd v Coillte Teoranta (Case C-306/97) [ECJ] ..	62	Practice note: notes for guidance of Counsel in written and oral proceedings before the Court of First Instance [CFI] ..	641
De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam (Case C-61/98) [ECJ]	803	Practice note: notes for guidance of Counsel in written and oral proceedings before the Court of Justice [ECJ]	545
Déménagements-Manutention Transport SA (DMT) (Proceedings relating to) (Case C-256/97) [ECJ]	601	Procter & Gamble Company (The) v Office for Harmonisation in the Internal Market (Case T-163/98) [CFI] ..	648
Egmont Film A/S v Laserdisken (Case C-61/97) [ECJ]	366	R v Secretary of State for Employment, ex p Seymour-Smith (Case C-167/97) [ECJ]	97
El-Yassini v Secretary of State for the Home Dept (Case C-416/96) [ECJ]	193	R v Secretary of State for Environment, ex p Standley (NFU intervening) (Case C-293/97) [ECJ]	41
Endemol Entertainment Holding BV v European Commission (Case T-221/95) [CFI]	385	Rijksdienst voor Pensioenen v Lustig (Case C-244/97) [ECJ]	75
European Commission v AssiDomän Kraft Products AB (Case C-310/97 P) [ECJ]	737	Romanelli (Criminal proceedings against) (Case C-366/97) [ECJ]	473
European Commission v Germany (Case C-191/95) [ECJ]	483	Roy Scot Leasing Ltd v Customs and Excise Comrs (Case C-305/97) [ECJ] ..	908
Europièces SA (in liq) v Sanders (Case C-399/96) [ECJ]	831	Sebago Inc v GB-Unico SA (Case C-173/98) [ECJ]	575
Gemeente Arnhem v BFI Holding BV (Case C-360/96) [ECJ]	709	Sirdar v Secretary of State for Defence (Case C-273/97) [ECJ]	928
Gencor Ltd v European Commission (Case T-102/96) [CFI]	289	Staatssecretaris van Financiën v Coffeeshop 'Siberie' vof (Case C-158/98) [ECJ]	560
General Motors Corp v Yplon SA (Case C-375/97) [ECJ]	865	Swaddling v Adjudication Office (Case C-90/97) [ECJ]	217
Gregg v Customs and Excise Comrs (Case C-216/97) [ECJ]	775	Tarantik v Directeur des Services Fiscaux de Seine-et-Marne (Case C-421/97) [ECJ]	523
Høj Pedersen v Kvickly Skive (Case C-66/96) [ECJ]	138	Travel-Vac SL v Antelm Sanchis (Case C-423/97) [ECJ]	656
Kuwait Petroleum (GB) Ltd v Customs and Excise Comrs (Case C-48/97) [ECJ]	450	UPS Europe SA v European Commission (Case T-127/98) [CFI]	794
Langnese-Iglo GmbH v European Commission (Case C-279/97 P) [ECJ]	616	Van Uden Maritime BV v Kommandit- gesellschaft in Firma Deco-Line (Case C- 39/95) [ECJ]	258
Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96) [ECJ]	1	Verein für Konsumenteninformationen v Österreichische Kreditversicherungs AG (Case C-364/96) [ECJ]	183

Digest of cases reported in European Cases volume

ACCESS TO INFORMATION – Information relating to the environment – Whether including statement of views of countryside protection agency relating to road construction project

Mecklenburg v Kreis Pinneberg—Der Landrat (Case C-321/96) ECJ 166

COMMISSION – Decision – Partial annulment of decision relating to proceeding under Community competition provisions – Effect of annulment on persons to whom decision addressed but who did not bring actions for annulment

European Commission v AssiDomän Kraft Products AB
(Case C-310/97 P) ECJ 737

— Failure to act – Commission failing to reach definitive position on complaint under Community competition rules – Action for failure to act brought – Whether reasonable time having elapsed

UPS Europe SA v European Commission (Case T-127/98) CFI 794

— Principle of collegiality – Reasoned opinion – Decision to commence proceedings for failure by member state to fulfill obligations – Conditions for compliance with principle of collegiality

European Commission v Germany (Case C-191/95) ECJ 483

CONFLICT OF LAWS – Jurisdiction – Civil and commercial matters – Whether provisional measures jurisdiction could be invoked notwithstanding existence of arbitration agreement

Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line
(Case C-391/95) ECJ 258

CONSUMER PROTECTION – Contracts negotiated away from business premises – Time-share contract concluded on excursion to see property – Purchaser renouncing contract three days later – Which Community legislation applicable – Rights of renunciation

Travel-Vac SL v Antelm Sanchis (Case C-423/97) ECJ 656

— Package travel – Tour operator becoming insolvent – Hotelier forcing tour operator's clients to pay own accommodation before leaving – Tour operator's insurance company refusing to reimburse clients – Extent of protection afforded by Community law

Verein für Konsumenteninformationen v Österreichische
Kreditversicherungs AG (Case C-364/96) ECJ 183

COPYRIGHT – Rental and lending rights – Videodiscs – Whether copyright holder able to prohibit films being offered for rental in one member state if rental authorised in another member state

Egmont Film A/S v Laserdisken (Case C-61/97) ECJ 366

EMPLOYMENT – Transfer of undertaking – Whether Community rules protecting employees applicable where transferred undertaking in voluntary liquidation

Europièces SA (in liq) v Sanders (Case C-399/96) ECJ 831

ENVIRONMENT – Waste – National restrictions on export of dangerous waste for recovery – Whether waste destined for recovery subject to principles of self-sufficiency and proximity – Whether export restriction illegal

Chemische Afvalstoffen Dusseldorp BV v Minister van
Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer
(Case C-203/96) ECJ 25

ENVIRONMENT AND CONSUMERS – Water – Nitrates – Scope of application of Community directive – Whether directive infringing principles of polluter pays, rectification of environmental damage at source and proportionality

R v Secretary of State for the Environment and anor, ex p Standley
and ors (Case C-293/97) ECJ 412

EQUALITY OF TREATMENT OF MEN AND WOMEN – Derogation from principle of equal treatment – Royal Marines requiring every marine to be capable of fighting in commando unit – Whether policy discriminating against women		
Sirdar v Secretary of State for Defence (Case C-273/97)	ECJ	928
— Equal pay – Limitation – Applicant's discrimination claim brought late because of employer's deceit – Whether application of limitation period in such circumstances compatible with Community law		
Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96)	ECJ	1
— Equal pay and working conditions – Dismissal – National legislation making right to bring unfair dismissal claim conditional on two years' continuous employment – Whether two-year threshold discriminatory – Whether compensation for unfair dismissal constituting 'pay'		
R v Secretary of State for Employment, ex p Seymour-Smith (Case C-167/97)	ECJ	97
— Equal pay and working conditions – Pregnancy – National rules – Incapacity for work caused by pregnancy-related illness outside maternity leave period – Absence from work due to pregnancy related inconveniences – Employer's right not to provide work for pregnant employee – Compatibility with Community law		
Høj Pedersen v Kvickly Skive (Case C-66/96)	ECJ	138
FREEDOM OF MOVEMENT – Goods – Exhaustion of trade mark – Whether trade mark exhaustion relating to similar or individually specified goods for which trade-mark proprietor's consent given		
Sebago Inc v GB-Unic SA (Case C-173/98)	ECJ	575
— Goods – Post clearance recovery of duties – Whether customs authorities who are aware of potential fraud in a transaction obliged to warn innocent participant in transaction		
De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam (Case C-61/98)	ECJ	803
— Services – Credit institutions – Defendants who were not a credit institution selling financial instruments which were repayable as a result of contractual provisions – Whether constituting 'repayable funds' for purposes of Community directive		
Criminal proceedings against Romanelli (Case C-366/97)	ECJ	473
— Workers – Greek legislation providing for automatic expulsion for life of non-nationals convicted of possession and use of prohibited drugs – Compatibility with Community law		
Criminal proceedings against Calfa (Case C-348/96)	ECJ	850
— Workers – Social security – Calculation of benefits where person concerned not simultaneously fulfilling conditions laid down by all the legislation under which periods of insurance or residence completed		
Rijksdienst voor Pensioenen v Lustig (Case C-244/97)	ECJ	75
— Workers – Social Security – English worker returning from France, declaring intention to remain in United Kingdom and claiming income support – National legislation making grant of income support conditional on claimant's residence for an appreciable period – Whether compatible with Community law		
Swaddling v Adjudication Officer (Case C-90/97)	ECJ	217
IMMIGRATION – Co-operation agreement with Morocco – Whether refusal to extend residence permit of lawfully employed Moroccan migrant worker constituting illegal discrimination with regard to working conditions		
El-Yassini v Secretary of State for the Home Dept (Case C-416/96)	ECJ	193
PUBLIC PROCUREMENT – Services – Municipal waste contracts awarded to company set up for that purpose and owned by public law entities without using public tender procedure – Whether Community rules on public procurement applicable		
Gemeente Arnhem v BFI Holding BV (Case C-360/96)	ECJ	709

PUBLIC PROCUREMENT – Supply contracts – National forestry board set up as private company but subject to some state control – Whether constituting a ‘contracting authority’ for purposes of Community public procurement rules		
Connemara Machine Turf Ltd v Coillte Teoranta (Case C-306/97)	ECJ	62
REFERENCE FOR A PRELIMINARY RULING – Admissibility – Court or tribunal – Whether immigration adjudicator constituting a ‘court or tribunal’ under art 177		
El-Yassini v Secretary of State for the Home Dept (Case C-416/96)	ECJ	193
RULES ON COMPETITION – Abuse of dominant position – Domestic undertaking designated as sole end-processor for incineration of dangerous waste in Netherlands – Whether exclusive right justifiable under Community competition rules as ‘service of general economic interest’		
Chemische Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Case C-203/96)	ECJ	25
— Concerted practices – Standard bank conditions prescribing terms and conditions of current account credit facilities offered by banks belonging to banking association – Whether affecting competition between member states		
Bagnasco v Banca Popolare di Novara soc coop arl (Joined cases C-215–216/96)	ECJ	678
— Exclusive purchasing obligations – Commission decision finding supply agreements containing exclusive purchasing obligations incompatible with Community law and prohibiting future conclusion of such agreements – Court of First Instance annulling provision on future agreements but otherwise upholding decision – Appeal and cross appeal		
Langnese-Iglo GmbH v European Commission (Case C-279/95 P)	ECJ	616
— Mergers – Concentrations having no Community dimension – Scope of Commission’s power of investigation – Rights of defence – Access to file – Procedural requirements		
Endemol Entertainment Holdings BV v European Commission (Case T-221/95)	CFI	385
— Mergers – European Commission declaring merger of South African and English undertakings incompatible with common market – Territorial scope of Community merger regulation – Whether regulation applying to collective dominant positions – Whether behavioural commitments offered by parties to concentration sufficient		
Genco Ltd v European Commission (Case T-102/96)	CFI	289
STATE AIDS – Private undertaking granted exceptionally long grace period for payment of employees’ social security contributions – Whether constituting illegal state aid		
Proceedings relating to Déménagements-Manutention Transport SA (DMT) (Case C-256/97)	ECJ	601
TAXATION – Discrimination – French car tax system such that only imported cars falling under higher tax bands – Rate of increase of tax between higher tax bands greater than between lower ones – Whether tax system discriminating against imported vehicles		
Tarantik v Directeur des Services Fiscaux de Seine-et-Marne (Case C-421/97)	ECJ	523
TRADE MARKS – Community trade mark – Appeal – Examiner refusing to register ‘Baby-Dry’ as Community trade mark – Whether term purely descriptive – Whether Appeal Board obliged to consider all grounds of appeal		
The Procter & Gamble Company v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (Case T-163/98)	CFI	648
— Exhaustion – Parallel imports – Parallel importer replacing trade mark used in exporting member state with mark used in importing state – Whether parallel importer entitled to do so		
Pharmacia & Upjohn SA (formerly Upjohn SA) v Paranova A/S (Case C-379/97)	ECJ	880

TRADE MARKS – 'Likelihood of confusion' – Aural similarity – Criteria to be applied in assessing likelihood of confusion

Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV
(Case C-342/97) ECJ 587

— Non-similar products or services – Criteria for establishing whether trade mark having a reputation

General Motors Corp v Yplon SA (Case C-375/97) ECJ 865

— Unauthorised use – Garage business specialising in working on and selling certain cars – Garage using car trade mark in advertising its services – Whether trade mark proprietor entitled to prevent such use

Bayerische Motorenwerke AG (BMW) v Deenik (Case C-63/97) ECJ 235

TREATY CITATION – New treaty numbers – Amsterdam Treaty – Method of citation

Press release No 74/98 ECJ 481

— New treaty numbers – Amsterdam Treaty – Method of citation

Press release No 57/99 ECJ 646

VALUE ADDED TAX – Exemptions – Building land – Whether member state's entitlement to maintain exemption conditional on maintenance of conditions existing at time of adoption of Community VAT directive

Norbury Developments Ltd v Customs and Excise Comrs
(Case C-136/97) ECJ 436

— Exemptions – Insurance transactions – Credit card protection plan – Whether bundle of related services comprising insurance element entitled to benefit from insurance exemption

Card Protection Plan Ltd v Customs and Excise Comrs (Case C-349/96) ECJ 339

— Exemptions – Whether health and welfare exemptions limited to 'legal persons' only

Gregg v Customs and Excise Comrs (Case C-216/97) ECJ 775

— Supply of services – Defendant renting table out for sale of narcotic drugs – Whether table rent subject to VAT

Staatssecretaris van Financiën v Coffeeshop 'Siberie' vof
(Case C-158/98) ECJ 560

— Taxable amount – Supply of goods and services – Consideration – Vouchers issued to purchasers of fuel redeemable for goods listed in catalogue – Whether goods supplied in exchange for vouchers taxable

Kuwait Petroleum (GB) Ltd v Customs and Excise Comrs (Case C-48/97) ECJ 450

— United Kingdom rules providing tax not deductible on motor cars – Whether member states authorised to exclude deduction where cars essential tools in business of taxable person or not could not be used for private purposes by taxable person

Royscot Leasing Ltd v Customs and Excise Comrs (Case C-305/97) ECJ 908

WRITTEN AND ORAL PROCEEDINGS – Guidance for Counsel – Court of First Instance

Practice note: notes for guidance of Counsel in written and oral proceedings before the Court of First Instance CFI 641

— Guidance for Counsel – Court of Justice

Practice note: Notes for Guidance of Counsel in written and oral proceedings before the Court of Justice ECJ 545

Levez v T H Jennings (Harlow Pools) Ltd

(Case C-326/96)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES RODRÍGUEZ IGLESIAS (PRESIDENT), PUISOCHET, HIRSCH AND JANN (PRESIDENTS OF CHAMBERS), MANCINI (RAPPORTEUR), MOITINHO DE ALMEIDA, MURRAY, EDWARD, RAGNEMALM, SCHINTGEN AND IOANNOU
ADVOCATE GENERAL LÉGER

12 MAY, 3 MARCH, 1 DECEMBER 1998

European Community – Equal pay – Limitation – Remedies for discrimination – Applicant's claim for equal pay brought late because of employer's deceit – Whether application of limitation period in such circumstances compatible with Community law – Equal Pay Act 1970 – Council Directive (EEC) 75/117, arts 2, 6.

The female applicant became manager of a betting shop owned by J Ltd on a starting salary of £10,000. In February 1991 she was appointed manager of another shop owned by J Ltd, replacing a man who had received an annual salary of £11,400 throughout his employment there. The applicant's pay was raised to £10,800, which J Ltd declared was the salary paid to her male predecessor, and did not reach £11,400 until April 1992. On leaving her job in March 1993, the applicant discovered that she had been paid less than her male predecessor and brought an action in September 1993 before the industrial tribunal under the Equal Pay Act 1970. It was common ground that the work which the applicant and her predecessor had been employed to perform was the same and the tribunal found that she had been entitled to the same salary as her male predecessor since February 1991 and ordered J Ltd to pay the corresponding salary arrears. J Ltd challenged that decision, contending that s 2(5)¹ of the 1970 Act precluded the award of any such arrears in respect of a time earlier than two years before the date on which the proceedings were instituted and that the tribunal was therefore not entitled to award arrears to the applicant for any period prior to September 1991. The tribunal agreed and informed the applicant of its decision. The applicant appealed to the Employment Appeal Tribunal, contending that the tribunal's decision was contrary to Community law. That tribunal stayed the proceedings and referred to the Court of Justice of the European Communities for a preliminary ruling the questions whether Community law precluded the application of such a limitation period (i) where the delay in bringing a claim was attributable to the employer's deliberate misrepresentation and (ii) even when another remedy was available but, as compared with other similar domestic actions, was likely to entail procedural rules or other conditions which were less favourable.

¹ Section 2(5), so far as material, is set out at p 5 e, post

Held – (1) A national rule under which entitlement to arrears of remuneration was restricted to the two years preceding the date on which proceedings were instituted was not, in itself, open to criticism. However, where the applicant was late in bringing a claim because of inaccurate and misleading information provided by her employer, such a rule manifestly precluded the possibility of either full compensation or an effective remedy in cases of failure to comply with the principle of equal pay contrary to arts 2 and 6² of Council Directive (EEC) 75/117 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women. It followed that the application of a limitation period in such circumstances was manifestly incompatible with the exercise of rights conferred under Community law and therefore precluded by Community law (see p 20 c to f, p 21 f to h j to p 22 a and p 24 g, post); *Handels- og Kontorfunktionærernes Forbund i Danmark v Danfoss* Case 109/88 [1989] ECR 3199 applied. a
b
c

(2) The principle of equivalence required that a rule such as that at issue be applied without distinction, whether the infringement alleged was of Community or national law, where the purpose and cause of action were similar. Community law therefore precluded the application of a national rule which limited an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to two years prior to the date on which proceedings were commenced, even when another remedy was available, if it was likely to entail procedural rules or other conditions which were less favourable than those applicable to similar domestic actions. It was for the national court to determine whether that was the case, taking into consideration both the purpose and the essential characteristics of allegedly similar domestic actions, the role played by the national provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts (see p 22 h to p 23 c and p 24 d j, post); *Edilizia Industriale Siderurgica Srl (Edis) v Minister delle Finanze* Case C-231/96 (1998) ECJ Transcript, 15 September, *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* Joined cases C-430–431/93 [1996] All ER (EC) 259 and *Palmisani v Istituto Nazionale della Previdenza Sociale (INPS)* Case C-261/95 [1997] ECR I-4025 applied. d
e
f

Notes

For Community provisions on equal pay, see 52 *Halsbury's Laws* (4th edn) para 21-12. g

For the Equal Pay Act 1970, s 2(5), see 16 *Halsbury's Statutes* (4th edn) (1997 reissue) 41.

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- Handels- og Kontorfunktionærernes Forbund i Danmark v Danfoss* Case 109/88 [1989] ECR 3199.
- d* *Hans Just I/S v Danish Ministry for Fiscal Affairs* Case 68/79 [1980] ECR 501.
- Johnson v Chief Adjudication Officer (No 2)* Case C-410/92 [1995] All ER (EC) 258, [1994] ECR I-5483, ECJ.
- Magorrian v Eastern Health and Social Security Services Board* Case C-246/96 [1998] All ER (EC) 61, [1997] ECR I-7153, ECJ.
- Pabst & Richarz KG v Hauptzollamt Oldenburg* Case 17/81 [1982] ECR 1331.
- e* *Palmisani v Istituto Nazionale della Previdenza Sociale (INPS)* Case C-261/95 [1997] ECR I-4025.
- Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989.
- Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* Case C-338/91 [1993] ECR I-5475.
- f* *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* Joined cases C-430-431/93 [1996] All ER (EC) 259, [1995] ECR I-4705, ECJ.

Reference

- g* By order of 14 August 1996, the Employment Appeal Tribunal, London, referred ([1998] IRLR 499) to the Court of Justice of the European Communities for a preliminary ruling under art 177 of the EC Treaty two questions (set out at p 19 *b* to *f*, post) on the interpretation of art 119 of that Treaty, and arts 2 and 6 of Council Directive (EEC) 75/117 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women (OJ 1975 L45 p 19). Those questions were raised in proceedings between Mrs Levez and T H Jennings (Harlow Pools) Ltd, her former employer, concerning arrears of remuneration not paid by reason of discrimination on grounds of sex. Written observations were submitted on behalf of: Mrs Levez, by D Pannick QC and D Rose, Barrister, instructed by P Matthews, Solicitor; the UK government, by L Nicoll, of the Treasury Solicitor's Department, acting as agent, with N Paines, Barrister; the French government, by C de Salins, Head of Sub-directorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A de Bourgoing, chargé de mission with the same directorate, acting as agents; and the European Commission, by C Docksey and M Wolfcarius, of its Legal Service, acting as agents. Oral observations were made by: Mrs Levez, represented by D Pannick and D Rose, instructed by P Matthews; T H Jennings (Harlow Pools) Ltd,
- h*
- j*

represented by J Coppel, Barrister; the UK government, represented by N Paines; the French government, represented by A de Bourgoing; the Irish government, represented by M Finlay SC and E Barrington, Barrister; and the Commission, represented by C Docksey. The language of the case was English. The facts are set out in the opinion of the Advocate General.

12 May 1998. **The Advocate General (P Léger)** delivered the following opinion (translated from the French).

1. By the questions referred to the Court of Justice of the European Communities, the Employment Appeal Tribunal ([1998] IRLR 499) essentially asks whether the principle of equal pay for men and women, laid down in art 119 of the EC Treaty and Council Directive (EEC) 75/117 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women (OJ 1975 L45 p 19), precludes application of a national rule of procedure which limits entitlement to arrears of remuneration, in the case of a woman in respect of whom that principle has been contravened, to a period of two years prior to the date on which she brings her claim.

RELEVANT COMMUNITY LEGISLATION

2. The first paragraph of art 119 of the Treaty requires member states to insure and subsequently maintain 'the application of the principle that men and women should receive equal pay for equal work'.

3. That article lays down a principle which 'forms part of the foundations of the Community'; it 'is directly applicable and may thus give rise to individual rights which the courts must protect' (see *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, [1976] ECR 455 (paras 12, 24)).

4. The material scope of art 119 is defined by Directive 75/117 which contains, in particular, various provisions designed to improve the protection available through the courts to employees who may be adversely affected by failure to apply the principle of equal pay.

5. To that end, art 2 of Directive 75/117 provides that member states are to—

'introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities.'

6. Article 6 of the directive provides:

'Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to insure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed.'

FACTS AND PROCEDURE

7. Mrs Levez, the appellant in the main proceedings, started work with T H Jennings (Harlow Pools) Ltd (Jennings) in February 1991 as manager of a betting shop in Chelmsford, for which she received an annual salary of £10,000.

8. In December 1991 Mrs Levez replaced a man whose job as manager of the Billericay branch had been vacant since October 1991. In giving Mrs Levez a salary of £10,800 as from that date, her employer maintained that she was being paid the

a same salary as her predecessor, who had in fact been paid £11,400. Mrs Levez's salary was not raised to that level until April 1992.

9. When, on leaving her job in March 1993, Mrs Levez discovered that—contrary to her employer's statements—she had until April 1992 been paid less than her male predecessor for doing the same job, she applied to the Industrial Tribunal on 17 September 1993 for the equal pay principle to be enforced in her case.

b 10. At the level of national law, that principle is protected by the Equal Pay Act 1970, which creates a statutory right for employees to terms of employment (including terms of remuneration) which are as favourable as those enjoyed by an employee of the opposite sex engaged in like work, work expressly rated as equivalent, or work of equal value. Under s 1(1) of the 1970 Act, the terms of any contract under which a woman is employed at an establishment in Great Britain are deemed to include an 'equality' clause³.

c 11. Given the fact that Mrs Levez's job was exactly the same as that of her predecessor, the tribunal upheld her claim and declared that she was entitled to a salary of £11,400 with effect from February 1991, the date on which she had taken up her duties as manager.

d 12. That award was 'adjusted', however, after Jennings drew attention to the limitation period laid down in s 2(5) of the 1970 Act, which provides:

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

f 13. On the basis of that provision, the tribunal reduced the award of salary arrears to cover no more than two years prior to the date on which Mrs Levez brought her claim. In the end, she was granted salary arrears only with effect from 17 September 1991, not from February 1991.

g 14. Mrs Levez thereupon applied to the Employment Appeal Tribunal, claiming that, in two respects, s 2(5) of the 1970 Act infringed art 119 of the EC Treaty, read in conjunction with arts 2 and 6 of Directive 75/117.

h 15. She claims, first, that in denying the courts any discretion to extend the limitation period—either in the interests of fairness because of the particular circumstances of the case or in view of the employer's deceitful conduct—s 2(5) of the 1970 Act fails to insure full and effective protection for individuals seeking to rely on the principle of equal pay.

j 16. Secondly, the two-year limitation is less favourable than the rules of procedure governing similar domestic actions. For example, ordinary actions for breach of contract can lead to an award of salary arrears in respect of a period of up to six years before initiation of proceedings. In actions of that kind, the courts enjoy a measure of discretion enabling them to take into account, where appropriate, deceit on the part of an employer. Similarly, more favourable procedural requirements apply to actions for pay arrears by reason of discrimination on grounds of race, which may be brought under the Race Relations Act 1976: no limit is placed on the period in respect of which

3 The appellant in the main proceedings emphasises in her written observations that all provisions in the 1970 Act referring to women apply equally to men.

compensation may be sought, provided that the action is brought within three months of termination of the contract of employment. a

17. The *amicus curiae* appointed during the proceedings before the national court maintained, on the contrary, that the provision at issue—which applies in the absence of Community rules governing the matter—complies with the requirement that actions relying on Community law must not be subject to rules of procedure which are less favourable than those governing similar domestic actions. Section 2(5) of the 1970 Act is a general rule which applies to all actions relying on the principle of equal pay for men and women, whether brought exclusively under the Act or under art 119 of the Treaty. b

18. While recognising that ‘The dispute is about a relatively small amount of money claimed by Mrs Levez for the period from 18th February 1991 to 17th September 1991’, the Employment Appeal Tribunal took the view that ‘The point of principle is, however, an important one. A decision in favour of Mrs Levez could have far reaching implications for many other cases’. It therefore referred the following questions to the Court of Justice: c

‘(1) Is it compatible with Community law to apply, to a claim for equal pay for equal work without discrimination on grounds of sex, a rule of national law which limits a claimant’s entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted, in circumstances where: d

(a) that rule of national law applies to all claims for equal pay without sex discrimination, but to no other claims; (b) rules which are in this respect more favourable to claimants are applied to other claims in the field of employment law, including claims in respect of breach of the contract of employment, racial discrimination in pay, unlawful deductions from wages, and sex discrimination in matters other than pay; (c) the national court has no discretion to extend the two-year period in any circumstance, even where a claimant was delayed in bringing her claim because her employer deliberately misrepresented to her the level of remuneration received by men performing like work to her own? e

(2) In particular, having regard to the consistent case-law of the Court that rights conferred by the direct effect of Community law are to be exercised under the conditions determined by national law, provided *inter alia* that those conditions are no less favourable than those relating to similar domestic actions, how is the expression “similar domestic actions” to be interpreted in the case of a claim for equal pay in circumstances where the conditions laid down by national legislation implementing the principle of equal pay differ from those laid down by other national legislation in the field of employment law, including legislation relating to breach of the contract of employment, racial discrimination, unlawful deductions from wages, and sex discrimination in matters other than pay? f

THE REPLIES TO THE QUESTIONS g

Introduction h

19. As the Employment Appeal Tribunal mentions in its second question, the Court of Justice has consistently held that in the absence of Community rules of harmonisation it is for the domestic legal system of each member state to determine the procedural conditions governing actions at law intended to insure i