



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

7 October 2019*

(Reference for a preliminary ruling — Social policy — Article 119 of the EC Treaty (now, after amendment, Article 141 EC) — Male and female workers — Equal pay — Private occupational retirement pension scheme — Normal pension age differentiated by gender — Date of adoption of measures reinstating equal treatment — Retroactive equalisation of that age to the normal pension age of the persons previously disadvantaged)

In Case C-171/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 16 February 2018, received at the Court on 5 March 2018, in the proceedings

Safeway Ltd

v

Andrew Richard Newton,

Safeway Pension Trustees Ltd,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, A. Rosas, E. Juhász, M. Ilešič, J. Malenovský, T. von Danwitz (Rapporteur) and N. Piçarra, Judges,

Advocate General: E. Tanchev,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2019,

after considering the observations submitted on behalf of:

- Safeway Ltd, by B. Green, S. Allen, D. Pannick QC, R. Mehta, Barrister, and T. Green and J. Heap, Solicitors,
- Mr Newton, by A. Short QC, C. Bell and M. Uberoi, Barristers, and C. Rowland-Frank and J.H.C. Briggs, Solicitors,
- Safeway Pension Trustees Ltd, by D. Murphy and E. King, Solicitors, and by D. Grant, Barrister,

* Language of the case: English.

– the European Commission, by A. Szmytkowska and L. Flynn, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 28 March 2019,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 119 of the EC Treaty (now, after amendment, Article 141 EC).
- 2 The request has been made in proceedings between Safeway Ltd, on one hand, and Andrew Richard Newton and Safeway Pension Trustees Ltd, on the other hand, concerning the equalisation of retirement pension benefits for the male and female members of the pension scheme managed by Safeway Pension Trustees.

Legal context

- 3 The principle of equal pay between male and female workers, enshrined today in Article 157 TFEU, was, at the material time, laid down in Article 119 of the EC Treaty.
- 4 Under that latter provision:

‘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.

For the purposes 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.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.’

The dispute in the main proceedings and the question referred for a preliminary ruling

- 5 The pension scheme at issue in the main proceedings was created in the form of a trust by Safeway in 1978. Clause 19 of the Trust Deed governing that pension scheme (‘the amendment clause’) essentially allows that pension scheme, including the value of its benefits, to be amended retroactively, as of the date of a written announcement to the members, by means of a trust deed. That clause is drafted as follows:

‘The Principal Company may at any time and from time to time with the consent of the Trustees by Supplemental Deed executed by the Principal Company and the Trustees alter or add to any of the trusts powers and provisions of the Scheme including this Trust Deed and the Rules and all Deeds and other instruments in writing supplemental to this Trust Deed and the Deeds specified in the Second Schedule hereto and may exercise such powers so as to take effect from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written

announcement to Members of the alteration or addition or a date occurring at any reasonable time previous or subsequent to the date of such Deed so as to give the amendment or addition retrospective or future effects as the case may be.’

- 6 Whereas the pension scheme at issue in the main proceedings had initially fixed a normal retirement age (Normal Pension Age; ‘NPA’) that was differentiated in respect of men and of women, namely 65 years in respect of the former and 60 years in respect of the latter, the Court held, in essence, in its judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209) that fixing a NPA differentiated by gender constituted discrimination prohibited under Article 119 of the EC Treaty. Following that judgment, Safeway and Safeway Pension Trustees, by announcements made on 1 September 1991 and 1 December 1991 (‘the 1991 announcements’) informed the members of the pension scheme in writing that the scheme would be amended, with effect as of 1 December 1991, by the introduction of a uniform NPA of 65 for all the members. On 2 May 1996, a Trust Deed amending that scheme was adopted, which fixed a uniform NPA of 65, with effect as of 1 December 1991.
- 7 The issue whether the retroactive amendment of the pension scheme at issue in the main proceedings complied with EU law having been raised in 2009, Safeway instigated the main proceedings seeking a finding that a uniform NPA of 65 had been validly established as of 1 December 1991. In those proceedings, Mr Newton was designated to act as the representative of the members.
- 8 By judgment of 29 February 2016, the High Court of Justice (England & Wales), Chancery Division (United Kingdom) held that the retroactive amendment of the pension scheme at issue in the main proceedings infringed Article 119 of the EC Treaty and that, therefore, the pension rights of the members had to be calculated on the basis of a uniform NPA of 60 in respect of the period from 1 December 1991 to 2 May 1996.
- 9 The referring court, seised of an appeal brought by Safeway against that judgment, takes the view that under the national law, the 1991 announcements alone could not validly amend the pension scheme at issue in the main proceedings and that the only valid amendment was that resulting from the Trust Deed of 2 May 1996.
- 10 However, that court states that, under that national law, the amendment clause and the 1991 announcements had the effect of rendering the rights acquired by the members, in respect of the period between 1 December 1991 and 2 May 1996, ‘defeasible’, such that those rights could subsequently, at any point, be reduced with retroactive effect. While holding, therefore, that, in the light of the national law, it was possible for the Trust Deed of 2 May 1996 to have validly raised the NPA of women to 65 and to have maintained that of men at that age in respect of that period, that court raises the issue whether such an approach complies with Article 119 of the EC Treaty, as interpreted by the Court of Justice.
- 11 In those circumstances the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Where the rules of a pension scheme confer a power, as a matter of domestic law, upon the amendment of its Trust Deed, to reduce retrospectively the value of both men’s and women’s accrued pension rights for a period between the date of a written announcement of intended changes to the scheme and the date when the Trust Deed is actually amended, does Article 157 [TFEU] (previously and at the material time Article 119 of the [EC Treaty]) require both men’s and women’s accrued pension rights to be treated as indefeasible during that period, in the sense that their pension rights are protected from retrospective reduction by the use of the domestic law power?’

Consideration of the question referred

- 12 As a preliminary point, it must be observed, as is apparent from the order for reference, that the dispute in the main proceedings concerns only the pension rights accrued by the members of the pension scheme at issue in the main proceedings in the period between 1 December 1991 and 2 May 1996. In those circumstances, the question referred must be examined in the light of Article 119 of the EC Treaty, which was in force during that period.
- 13 By its question, the referring court asks, in essence, whether Article 119 of the EC Treaty must be interpreted as precluding a pension scheme from adopting, in order to end discrimination contrary to that provision resulting from the fixing of an NPA differentiated by gender, a measure which equalises, with retroactive effect, the NPA of members of that scheme to that of the persons within the previously disadvantaged category, in respect of the period between the announcement of that measure and its adoption, where such a measure is authorised under national law and under the Trust Deed governing that pension scheme.
- 14 In order to answer that question, it must be recalled that, in the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), the Court held, essentially, that fixing an NPA differentiated by gender in respect of the pensions paid by a pension scheme constitutes discrimination prohibited under Article 119 of the EC Treaty.
- 15 The Court has also ruled on the consequences to be inferred from a finding of such discrimination, inter alia in the judgments of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348); of 28 September 1994, *Avdel Systems* (C-408/92, EU:C:1994:349); and of 28 September 1994, *van den Akker* (C-28/93, EU:C:1994:351). As is apparent from that case-law, those consequences differ depending on the periods of service concerned.
- 16 As regards, first, periods of service prior to 17 May 1990, that is, the date on which the judgment in *Barber* (C-262/88, EU:C:1990:209) was delivered, pension schemes are not required to apply a uniform NPA, the Court having limited the temporal effects of that judgment by excluding application of Article 119 of the EC Treaty to pension benefits payable in respect of those periods (see, to that effect, judgments of 28 September 1994, *Coloroll Pension Trustees*, C-200/91, EU:C:1994:348, paragraph 34; of 28 September 1994, *Avdel Systems*, C-408/92, EU:C:1994:349, paragraph 19; and of 28 September 1994, *van den Akker*, C-28/93, EU:C:1994:351, paragraph 12).
- 17 As regards, secondly, the periods of service between 17 May 1990 and the adoption, by the pension scheme concerned, of measures reinstating equal treatment, the persons in the disadvantaged category must be granted the same advantages as those enjoyed by the persons in the favoured category, those advantages, failing the correct implementation of Article 119 of the EC Treaty in national law, remaining the only valid point of reference (see, to that effect, judgments of 28 September 1994, *Coloroll Pension Trustees*, C-200/91, EU:C:1994:348, paragraphs 31 and 32; of 28 September 1994, *Avdel Systems*, C-408/92, EU:C:1994:349, paragraphs 16 and 17; and of 28 September 1994, *van den Akker*, C-28/93, EU:C:1994:351, paragraphs 16 and 17).
- 18 So far as concerns, thirdly, periods of service completed after the adoption, by the pension scheme concerned, of measures reinstating equal treatment, Article 119 of the EC Treaty does not preclude the advantages of the persons previously favoured from being reduced to the level of the advantages of the persons previously within the disadvantaged category, that provision requiring only that men and women should receive the same pay for the same work without imposing any specific level of pay (see, to that effect, judgments of 28 September 1994, *Coloroll Pension Trustees*, C-200/91, EU:C:1994:348, paragraph 33; of 28 September 1994, *Avdel Systems*, C-408/92, EU:C:1994:349, paragraph 21; and of 28 September 1994, *van den Akker*, C-28/93, EU:C:1994:351, paragraph 19).

- 19 In the present case, the dispute in the main proceedings concerns exclusively the issue whether the pension rights of the members of the pension scheme at issue in the main proceedings in relation to the period from 1 December 1991 to 2 May 1996 must be calculated on the basis of a uniform NPA of 60 or 65. In that context, the referring court essentially asks whether, in the light of the case-law referred to in paragraph 17 above, the Trust Deed of 2 May 1996 could validly, in respect of that period, retroactively equalise the NPA of those members to that of the persons within the previously disadvantaged category, namely male workers.
- 20 In that regard, in the first place, inasmuch as the question referred and the grounds of the order for reference concern the equalisation, by that trust deed with retroactive effect as of 1 December 1991, of the NPA of the members of the pension scheme at issue in the main proceedings to that of the persons in the previously disadvantaged category, that question must be understood as being based on the premiss that the measures reinstating equal treatment were not adopted until 2 May 1996, by means of that trust deed.
- 21 Before the Court of Justice, Safeway and the Commission called that premiss into question, essentially submitting that the 1991 announcements and the management of the pension scheme at issue in the main proceedings on the basis of the application of a uniform NPA of 65 as of 1 December 1991 must be regarded as measures which reinstated equal treatment with effect as of that date.
- 22 While it is, as a rule, for the referring court, which has direct knowledge of the dispute at issue in the main proceedings and which alone has jurisdiction to interpret domestic law, to determine the date at which the measures reinstating equal treatment were adopted, such measures must nevertheless meet the requirements of EU law, and accordingly the Court of Justice may provide the national court with a relevant ruling on the interpretation of that law (see, to that effect, judgments of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 36, and of 30 June 2016, *Ciup*, C-288/14, not published, EU:C:2016:495, paragraph 33).
- 23 On that basis, it is settled case-law of the Court that Article 119 of the EC Treaty produces direct effects by creating rights for individuals which the national courts are responsible for safeguarding (see, to that effect, judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraph 24, and of 28 September 1994, *van den Akker*, C-28/93, EU:C:1994:351, paragraph 21).
- 24 Having regard to the direct effect of Article 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, judgment of 28 September 1994, *Avdel Systems*, C-408/92, EU:C:1994:349, paragraphs 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, judgments of 2 December 2009, *Aventis Pasteur*, C-358/08, EU:C:2009:744, paragraph 47, and of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraphs 36 to 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 Article 119 of the EC Treaty, the measures adopted with a view to ending discrimination contrary to that provision must satisfy the requirements set out in paragraphs 24 and 25 above.

- 27 In the present case, it appears that the measures taken by the pension scheme at issue in the main proceedings prior to the adoption of the Trust Deed of 2 May 1996 do not satisfy those requirements.
- 28 As is apparent from the order for reference, the pension scheme at issue in the main proceedings was not validly amended, from the viewpoint of national law, until the adoption of that trust deed. In this connection, the referring court held, in a judgment delivered on 5 October 2017 in the main proceedings, that the wording of the amendment clause allows only amendments made by means of a trust deed and that national law precludes an interpretation of that clause which departs from that wording, given the need to protect the beneficiaries of that pension scheme and to enable them to know their rights.
- 29 The order for reference also seems to show that the sole legal effect of the amendment clause and the 1991 announcements was to reserve to the authorities with responsibility for the pension scheme at issue in the main proceedings the power to equalise retroactively the NPA of the members of that scheme to that of the male members, by means of the adoption of a trust deed at any subsequent point.
- 30 The introduction of such a power, which could be exercised at a point dependent on the discretionary choice of those authorities, cannot be regarded either as having ended the discrimination at issue in the main proceedings or as having allowed the members to know precisely their rights.
- 31 As regards the management of the scheme as of 1 December 1991, it is apparent from paragraph 25 above that the introduction of a mere practice, which has no binding legal effects with regard to the persons concerned, does not meet the requirements of the principle of legal certainty and cannot therefore be regarded as a measure reinstating the equal treatment required under Article 119 of the EC Treaty.
- 32 In those circumstances it appears that, in the context of the pension scheme at issue in the main proceedings, measures meeting the requirements of EU law stated in paragraphs 24 and 25 above were not taken until 2 May 1996, by means of the Trust Deed adopted at that date.
- 33 In the second place, with regard to the issue whether Article 119 of the EC Treaty allows a measure, such as that provided for in that trust deed, consisting in equalising with retroactive effect as of 1 December 1991 the NPA of the members of a pension scheme to the NPA of persons in the previously disadvantaged category, according to settled case-law of the Court, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category (judgments of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 46, and of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 79 and the case-law cited).
- 34 The Court has already held that that principle precludes a pension scheme from eliminating discrimination contrary to Article 119 of the EC Treaty by removing, with retroactive effect, the advantages of the persons within the favoured category (see, to that effect, judgment of 28 September 1994, *Avdel Systems*, C-408/92, EU:C:1994:349, paragraphs 5, 13, 14, 17 and 18).
- 35 The referring court nevertheless raises the issue whether that case-law also applies to situations, such as that at issue in the main proceedings, in which, under national law and the Trust Deed governing the pension scheme at issue, the pension rights concerned are defeasible.
- 36 While the Court has not expressly settled that issue, there is however no support in that case-law for a power, in such situations, to equalise with retroactive effect the conditions applicable to the rights of members of a pension scheme to those applicable to the rights of the persons within the previously disadvantaged category. On the contrary, as the Advocate General observed in point 64 of his

Opinion, to acknowledge such a power would deprive that case-law of its effect, to a broad extent, inasmuch as it would then be applicable only to cases in which such retroactive equalisation is in any event already prohibited under national law or the Trust Deed governing the pension scheme.

- 37 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.
- 38 With regard to those requirements, it is settled case-law that as a general rule the principle of legal certainty precludes a measure implementing EU law from having retroactive effect. It may only exceptionally be otherwise, where an overriding reason in the public interest so demands and where the legitimate expectations of those concerned are duly respected (see, to that effect, judgment of 26 April 2005, *‘Goed Wonen’*, C-376/02, EU:C:2005:251, paragraphs 33 and 34 and the case-law cited).
- 39 In addition to that principle, regard must be had to the requirements flowing, more specifically, from Article 119 of the EC Treaty, which are applicable to the authorities with responsibility for a pension scheme as soon as discrimination contrary to that provision has been found to exist.
- 40 In respect of the obligation, pending the adoption of measures reinstating equal treatment, to grant to persons within the disadvantaged category the same advantages as those enjoyed by persons in the favoured category, the Court has already held that that is justified, inter alia, by the fact that Article 119 of the EC Treaty is connected to the objective of the harmonisation of working conditions while maintaining improvement, which follows from the preamble to that Treaty and Article 117 thereof (see, to that effect, judgments of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraphs 10, 11 and 15, and of 28 September 1994, *Avdel Systems*, C-408/92, EU:C:1994:349, paragraphs 15 and 17).
- 41 It would be contrary to that objective, to the principle of legal certainty and to the requirements set out in paragraphs 17, 24 and 34 above to allow the authorities with responsibility for the pension scheme concerned to eliminate discrimination contrary to Article 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 the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209) 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.
- 42 The same applies in a situation where the members of the pension scheme concerned have been informed by means of an announcement without the force of an amendment that, in order to achieve equal treatment, the NPA of the members of that pension scheme will be equalised to that of the persons within the previously disadvantaged category.
- 43 That said, as is apparent from paragraph 38 above, it is possible that measures seeking to end discrimination contrary to EU law may, exceptionally, be adopted with retroactive effect provided that, in addition to respecting the legitimate expectations of the persons concerned, those measures are in fact warranted by an overriding reason in the public interest. In particular, according to settled case-law, the risk of seriously undermining the financial balance of the pension scheme concerned

may constitute such an overriding reason in the public interest (see, to that effect, judgments of 11 January 2007, *ITC*, C-208/05, EU:C:2007:16, paragraph 43, and of 7 March 2018, *DW*, C-651/16, EU:C:2018:162, paragraph 33).

- 44 In the present case, although the referring court mentions in the order for reference that the financial consequences of the dispute in the main proceedings amount to approximately GBP 100 million, it does not state that the retroactive equalisation of the NPA of the members of the pension scheme at issue in those proceedings to that of the persons within the previously disadvantaged category was necessary to prevent the financial balance of that pension scheme from being seriously undermined. Since the file before the Court does not include any other information such as to establish that the measure concerned was in fact warranted by an overriding reason in the public interest, there seems to be no objective justification for that measure. It is nevertheless for the referring court to verify that such is the case.
- 45 Having regard to the foregoing considerations, the answer to the question referred is that Article 119 of the EC Treaty must be interpreted as precluding, in the absence of an objective justification, a pension scheme from adopting, in order to end discrimination contrary to that provision resulting from the fixing of an NPA differentiated by gender, a measure which equalises, with retroactive effect, the NPA of members of that scheme to that of the persons within the previously disadvantaged category, in respect of 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 governing that pension scheme.

Costs

- 46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 119 of the EC Treaty (now, after amendment, Article 141 EC) must be interpreted as precluding, in the absence of an objective justification, a pension scheme from adopting, in order to end discrimination contrary to that provision resulting from the fixing of a normal pension age differentiated by gender, a measure which equalises, with retroactive effect, the normal pension age of members of that scheme to that of the persons within the previously disadvantaged category, in respect of 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 governing that pension scheme.

Lenaerts	Silva de Lapuerta	Arabadjiev
Prechal	Vilaras	Xuereb
Rossi	Rosas	Juhász
Ilešič	Malenovský	von Danwitz
Piçarra		

Delivered in open court in Luxembourg on 7 October 2019.

A. Calot Escobar
Registrar

K. Lenaerts
President