CARE3166

12 April 2000

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

MAYO PERCEVAL-PRICE, MONICA DAVEY and MOYA F BROWN

(Applicants) Respondents

and

DEPARTMENT OF ECONOMIC DEVELOPMENT, DEPARTMENT OF HEALTH AND SOCIAL SERVICES and HER MAJESTY'S ATTORNEY-GENERAL FOR NORTHERN IRELAND

(Respondents) Appellants

CARSWELL LCJ

Introduction

The three respondents are all holders of permanent full-time senior posts in tribunals in Northern Ireland. Mrs Perceval-Price is vice-chairman of industrial tribunals and vice-president of the Fair Employment Tribunal, having previously been a full-time chairman of industrial tribunals. Mrs Davey is a full-time chairman of industrial tribunals and a chairman of the Fair Employment Tribunal. Mrs Brown is a Social Security Commissioner, having previously held the post of full-time chairman of the Social Security Appeal Tribunal and the Medical Appeal Tribunal.

Each respondent has lodged a claim with the industrial tribunals that she has been discriminated against by the Department responsible for her tribunal in the terms of her employment, viz the pension rights available to her, in which respect each claims that she has been treated less favourably than a male holder of her post would be treated under the applicable pensions legislation.

The Respondents' Claims

The claims came before an industrial tribunal on 22 March 1999 and succeeding dates, when the preliminary issue was argued whether the tribunal had jurisdiction to hear them. A series of questions was posed by the parties, to which the tribunal gave answers in favour of the respondents' contention that it had jurisdiction to entertain their claims. It set out its answers in a written decision issued on 2 September 1999. By requisition dated 13 October 1999 the appellants requested the tribunal to state a case for the opinion of this court, and on 3 February 2000 the tribunal stated and signed a case setting out a number of questions. The issues argued on the appeal covered three broad grounds:

(i) whether the respondents could bring a claim before the industrial tribunal under the Equal Pay Act (Northern Ireland) 1970 or the Sex Discrimination (Northern Ireland) Order 1976;

(ii) whether they could bring a claim under European Community law;

(iii) if the answer to (ii) is Yes, whether the claim could be brought in the industrial tribunal or whether it had to be brought by judicial review in the High Court.

The tribunal summarised in the case stated the material facts in respect of each respondent relating to the issues then before the tribunal, and set the relevant facts out in more detail in its decision. It annexed to the decision a number of documents containing the terms of service of the respondents and statements of their duties in their respective posts. We shall set out the summaries from the case stated and refer briefly where apposite to the respondents' oral evidence and the terms of the annexed documents.

Mrs Mayo Perceval-Price

The tribunal set out the following findings of fact in the case stated:

"(1) Mrs Mayo Perceval-Price (Mrs Price) was appointed to the post of full-time chairman of Industrial Tribunals with effect from 12 June 1989. The appointment was made by the Department of Economic Development and was for one year only.

(2) With effect from 1 January 1990 the Lord Chancellor appointed Mrs Price to be a member of the panel of chairmen of the Fair Employment Tribunal and she was furnished with copies of a memorandum of conditions of service.

(3) On the expiry of her appointment to the post of full-time chairman of Industrial Tribunals, Mrs Price was re-appointed as a permanent, full-time chairman of Industrial Tribunals by the Department of Economic Development.

(4) With effect from 12 September 1990 Mrs Price was appointed to the post of vice-president of Industrial Tribunals and the Fair Employment Tribunal and was provided with a document entitled `Memorandum of Conditions of Service' and a further document entitled `Statement of Duties'. The last two documents are, respectively, appendices 2 and 3 to the decision given by the Tribunal on 2 September 1999.

(5) As vice-president and chairman of Tribunals, Mrs Price is required to deputise for the president in his absence.

(6) The president would list cases for Mrs Price to hear arranging where and at what time she was to sit.

(7) Mrs Price has a role to play in the listing of sex discrimination cases.

(8) Mrs Price acts as duty chairman as do other full time chairmen. The role of duty chairman is to deal with enquiries from the office from which the Tribunals are administered. Some enquiries involve serious questions concerning matters such as discovery whereas other issues are comparatively trivial."

The document produced by Mrs Price entitled "Memorandum of conditions of service" contains a statement of her salary and income tax, national insurance and superannuation arrangements, sets out her entitlement to annual leave and specifies certain restrictions on outside activities and political activities. Under the heading of outside activities the document states that –

> "The Vice-President is expected to devote his/her whole time to the duties of his/her office during the normal working day.."

The document entitled "Statement of duties" sets out the duties which the Vice-President is required to carry out, "subject to the overall guidance and supervision of the President". In addition to sitting on tribunal duties she is perform a number of administrative duties relating to the running of the tribunals and their members and staff, to deputise for the President when he is absent and to "carry out any other duties allocated to him/her by the President." The Vice-President and chairmen of tribunals are "expected to carry out their duties to the general satisfaction of the President."

Mrs Monica Davey

The tribunal set out the following findings of fact in the case stated:

> "(1) Mrs Monica Davey (Mrs Davey) was appointed to the post of full-time chairman of Industrial Tribunals and a chairman of the Fair Employment Tribunal with effect from 8 October 1990. The former appointment was made by the Department of Economic Development and the latter appointment by the Lord Chancellor.
>
> (2) A document entitled `Statement of duties of a chairman' (of Industrial Tribunals) and a further document `Statement of duties of a chairman' (of the Fair Employment Tribunal) were sent to Mrs Davey. She also received a document entitled `Memorandum of conditions of service'. She received a separate memorandum for each Tribunal. The various documents provided to Mrs Davey are found at Appendix 4 to the decision of the Tribunal dated 2 September 1999.
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> (3) As a full time chairman of Industrial Tribunals and of the Fair Employment Tribunal. Mrs Davey is listed to sit five days per week and is expected to sit on between 100 and 160 hearings/days per annum.
>
> (4) Mrs Davey is expected to write up her decisions on occasions when cases listed are settled. In the event of a case not settling or if she be engaged in a protracted hearing then to comply with her obligations to produce written decisions promptly, Mrs Davey must write them up in her own time.

(5) In addition Mrs Davey discharges the responsibilities of duty chairman on average twice per week."

Mrs Davey stated in her evidence that the time which she and other chairmen, including Mrs Price, spent in sittings was always recorded. Her written conditions of service were similar, mutatis mutandis, to those produced by Mrs Price, as were the contents of her statement of duties.

Mrs Moya F Brown

The tribunal set out the following findings of fact in the case stated:

"(1) Mrs Brown was appointed as a full-time chairman of Social Security Appeals Tribunal and the Medical Appeals Tribunal with effect from January 1987. Her appointment was made by the Lord Chancellor through the Northern Ireland Court Service. Her post was funded by the Department of Health and Social Services.

(2) The advertisement for the post of chairman of the Medical Appeals Tribunals stipulated that:-

> `The full time chairman will work closely with the president of the Social Security Appeals Tribunals and the Medical Appeals Tribunal. It is anticipated that the successful candidate will spend the majority of his time chairing Tribunal sessions, and the remainder on work connected with the organisation and the management of the Tribunal. This will include the training of part time chairmen, lay members and interviewing of potential lay members ...'.

(3) Mrs Brown was given a document entitled `Note on terms of appointment' which is found at Appendix five to the Tribunal's decision of 2 September 1999.

(4) Consequent to her appointment, Mrs Brown was subject to the president of the Social Security Appeal Tribunal who exercised a jurisdiction in that he fixed the number of days when she would sit and the number of cases she would hear. The president also arranged where Mrs Brown was to sit and how many cases were to be put into her list.

(5) In the course of her working day Mrs Brown had to deal with enquiries from the administrative staff servicing her post.

(6) The Social Security Appeals Tribunal subsequently became the Independent Tribunal Service. Mrs Brown was the only full-time chairman of these Tribunals. In 1998 she was appointed Commissioner and her salary increased.

(7) As a full time chairman, Mrs Brown spent four days each week presiding in Tribunal hearings. She was allowed one day each week to write up her decisions.

(8) As commissioner, Mrs Brown hears appeals from the Social Security Appeals Tribunal and works with the Chief Commissioner, His Honour Judge Martin."

Mrs Brown produced a written document containing terms of appointment of full-time chairmen of Social Security Appeal Tribunals and Medical Appeal Tribunals, which were similar in content to those received by the other two respondents.

In relation to the respondents' position as holders of judicial office, the tribunal made further findings set out in paragraph 2D of the case stated:

"(1) Each applicant confirmed that she had been appointed to a judicial office created by statute and could therefore properly be described as the holder of a `statutory office'.

(2) By virtue of appointment to judicial office, each applicant exercised an independent jurisdiction in the resolution of the cases which she had to decide.

(3) None of the applicants would tolerate any breach of her judicial independence even by the president of the Tribunals with whom she worked. Mrs Davey recognised herself as serving the country in a judicial capacity and that her independence was an indispensable hallmark of judicial office.

(4) Mrs Price and Mrs Brown acknowledged they had a duty to serve the ends of justice.

(5) In addition to the judicial role, Mrs Price and Mrs Davey discharged administrative functions. The administrative duties performed by them related to the preparation of cases for hearings.

(6) The chairmen of Tribunals have no access to any complaints procedure or grievance procedure.

(7) Chairmen of Tribunals are not subject to any Civil Service disciplinary procedure and cannot appeal any question concerning their work or their appointments to the Civil Service Appeals Procedure.

(8) The applicants have no access to the ombudsman.

(9) The applicants have no responsibility to any Select Committee of the Northern Ireland Assembly and are not responsible to any committee of the House of Commons."

At the hearing in the industrial tribunal the parties agreed on six questions which they placed before the tribunal and requested it to answer. Counsel for the appellants also formulated a seventh, but the respondents' counsel did not agree that it was appropriate. The tribunal, which concluded that it had jurisdiction to hear the complaints, gave answers to the first six questions and declined to answer the seventh. The questions and the tribunal's answers were as follows:

"QUESTION 1: Does each of the applicants hold a statutory office within the meaning of Section 1(9) of the Equal Pay Act (NI) 1970?

ANSWER: Yes

QUESTION 2: Does each of the applicants hold a statutory office within the meaning of Article 82(2) of the Sex Discrimination (NI) Order 1976?

ANSWER: Yes

QUESTION 3: If the answer to 1 and 2 is yes, is each of the applicants precluded from bringing claims under domestic legislation in relation to equal pay and sex discrimination to an Industrial Tribunal by reason of the fact that they hold statutory office within the meaning of those provisions?

ANSWER: No

QUESTION 4: Can the provisions of the Equal Pay Act (NI) 1970 and the Sex Discrimination (NI) Order 1976 be read and interpreted in conjunction with European law in conformity with the judgement of the ECJ in *Marleasing* so as to entitle the applicants to bring claims in relation to equal pay and sex discrimination to an Industrial Tribunal?

ANSWER: Yes

QUESTION 5: Given the principles of equal pay for men and women and equal treatment between men and women which are enshrined in the law of the European Union, and given that the Respondents are emanations of the state, can the Applicants rely directly before an Industrial Tribunal on:-

A. Article 119 of the Treaty of European Union;

B. Directive 75/117/EEC - the Equal Pay Directive;

C. Directive 76/207/EEC - the Equal Treatment Directive;

to pursue their claims in relation to equal pay and sex discrimination in the Industrial Tribunal?

ANSWER: Yes

QUESTION 6: If the answer to 1 and 2 is yes, and if the answer to question 5 is yes, does the fact that the Applicants are holders of statutory office preclude them from relying directly upon the provisions of

A. Article 119 of the Treaty of European Union;

B. Directive 75/117/EEC - the Equal Pay Directive;

C. Directive 76/207/EEC - the Equal Treatment Directive;

to pursue their claims in relation to equal pay and sex discrimination in the Industrial Tribunal?

ANSWER: No

QUESTION 7: In the alternative to the issues set out above, is the true nature of the complaint of the Applicants either:-

(A) a claim in tort in relation to the circumstances surrounding the election of the Applicant to transfer into the 1993 Act scheme and/or;

(B) a challenge by way of Judicial Review?

ANSWER: The Tribunal declined to answer this question."

In the case stated the tribunal posed four questions for the opinion of this court:

"(1) Was the Tribunal correct in law in deciding that it has jurisdiction to entertain and decide each of the claims brought in these proceedings by each of the applicants?

(2) Was the Tribunal correct in law in deciding that each applicant is a `worker' within Article 119 of the European Community Treaty?

(3) Did the Tribunal err in law in giving its answers to question 3-6 above as posed by the parties?

(4) Was the Tribunal correct in law to decline to answer question 7 as posed?"

The Statutory Provisions

The Equal Pay Act (Northern Ireland) 1970 (the 1970 Act) contains provisions designed to ensure that women are paid on equal terms with men for carrying out the same or

like work. The respondents claim that they have been deprived of equality with men in respect of their pension rights, and that they are entitled to pursue a remedy in the industrial tribunal by virtue of section 2(1) of the Act. The appellants have not conceded that the respondents have a valid claim under the 1970 Act and have reserved their right to cross-examine the respondents and their witnesses on this issue when the substantive issue of the validity of the claims comes on for hearing.

Section 1(1) defines women's rights to claim the protection of the Act by reference to employment:

> "1(1) If the terms of a contract under which a woman is employed at an establishment in Northern Ireland do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one."

By section 1(7) "employed" means –

> "employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour."

Section 1(9) contains specific provision for persons in the public service who are traditionally not regarded as having been employed under a contract of service:

> "1(9) This section shall apply to -
> (a) service for purposes of a Minister of the Crown or government department, other than service of a person holding a statutory office, or
>
> (b) service on behalf of the Crown for purposes of a person holding a statutory office or purposes of a statutory body,
>
> as it applies to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service."

The respondents' alternative head of claim in domestic law is under the Sex Discrimination (Northern Ireland) Order 1976 (the 1976 Order). Article 8 makes it unlawful for a person, in relation to employment at an establishment in Northern Ireland, to

discriminate against a woman in any of various ways. "Discrimination" is defined in Article 3, but the meaning of the term is not in issue in the present appeal. "Employment" is defined by Article 2(1) in the same terms as in the 1970 Act. Article 82(2) contains the same inclusion of public servants as in the 1970 Act, with the same exception of statutory officers.

Community Law

It was not in dispute that each respondent was a statutory officer within the meaning of the terms in the 1970 Act and the 1976 Order. The parties accordingly agreed that the tribunal's answers to questions 1 and 2 put before it were correct. The tribunal went on to hold, however, that it was possible to interpret those enactments, in order to conform with Community law, in such a way as to allow the respondents to pursue their claims under them in domestic law in the industrial tribunal. That conclusion and the correctness of the answers given by the tribunal to questions 3 and 4 were disputed by the appellants. The respondents claimed in the alternative that if their claim in domestic law was barred, they were entitled to make a direct claim under Community law and that their claims should be heard by an industrial tribunal. They therefore contended that the tribunal had given correct answers to questions 5 and 6. The appellants did not concede that the respondents had valid claims under Community law. The essence of the case made on behalf of the appellants was that if the respondents had valid claims, those claims must be brought in the High Court by judicial review and the industrial tribunal did not have jurisdiction to hear them. They accordingly submitted that the tribunal had given incorrect answers to questions 5 and 6 and that it should have answered question 7(B) in the affirmative.

Article 119 of the EEC Treaty (now re-numbered Article 141) provides:

> "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 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.
>
> 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."

Directive 75/117/EEC, commonly known as the Equal Pay Directive, required Member States to introduce legislation to provide for equal pay for men and women in accordance with the provisions of the Directive. Article 2 contains the fundamental obligation imposed by the Directive:

> "Member States shall 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."

Directive 76/207/EEC, commonly known as the Equal Treatment Directive, made further provision to ensure the equal treatment of men and women. The respondents claim that they have not been guaranteed the same conditions as men, without discrimination, contrary to Article 5 of the Directive. This Directive is also framed in terms of "employment", as appears from Article 1(1):

> "The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as `the principle of equal treatment`."

The appellants did not dispute that if the appellants' claim was validly made under the terms of Article 119 or the Directives, they could advance them by direct action in the appropriate forum. As the Court of Justice held in *Defrenne v Sabena* [1976] ICR 547, applying the principle laid down in the *van Gend en Loos* case, a claim may be made directly in the domestic court for a breach of Article 119. The appellants also accepted that since the Departments responsible for the tribunals and the Social Service Commissioners are emanations of the state, the respondents have directly enforceable claims if their rights under these Community provisions have been infringed. They submitted, however, that (a) the respondents do not come within the terms of Article 119 or the Directives, since they are not "workers" and as holders of statutory office are not in employment as employees (b) their claims are matters of public law which should be brought by means of judicial review in the High Court and do not lie in the industrial tribunals.

Are the Respondents "workers"?

In order to come within the provisions of Community law to which we have referred, the applicant have to establish that in Community law they would be classed as "workers" who are in "employment". The Court of Justice has declared that the term "workers" has a Community meaning in the context of Article 48 of the Treaty (now re-numbered Article 39) and may not be interpreted differently by national legal systems: see paragraph 16 of its judgment in *Lawrie-Blum v Land Baden-Wuerttemberg* [1986] ECR 2121. The criterion for application of Article 48, as the Court said at paragraph 15 of the judgment, is the existence of an employment relationship, regardless of the legal nature of that relationship and its purpose. It went on to say at paragraph 17:

> "That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services

> for and under the direction of another person in return for which he receives remuneration."

Counsel for the appellants correctly pointed out that the term "worker" is capable of bearing a different meaning in different parts of the Treaty and in other Community legislation. We do not see any compelling reason, however, why it should have a narrower meaning in the context of equality of pay and opportunity than that which it bears in the context of the free movement of workers within the Community. The object of Article 119 and the directives is to give protection against inequality and discrimination to those who may be vulnerable to exploitation. The term "workers" should be construed purposively, as the Tribunal held, by reference to the object of the legislation. In the course of the argument before us emphasis was laid on the extent to which the respondents and holders of judicial office in general could be said to be under the direction of another person. We consider that the differences in the formality of expression of the terms and conditions of service and the extent of administrative direction of their patterns of work are not conclusive as criteria, for they reflect only differences in emphasis in the way that the same conditions are expressed. All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the President of the industrial tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment, as servants of

the State, even though as office holders they do not come within the definition of employment in domestic law.

This issue has not to our knowledge been the subject of any decided case in our domestic law. It was considered by the Court of Session in *Stevenson v Lord Advocate* 1999 SLT 382, when the Lord Ordinary Lord Kirkwood expressed the opinion with some caution that a sheriff might constitute a "worker" within Article 119. On appeal the First Division decided the matter without determining the issue. The tribunal in the present case took the view that the term "worker" in the context of Community law must be interpreted broadly and in a purposive fashion, an approach with which we agree. The object of the Community legislation, protection against inequality of treatment or discrimination, seems to us to require the inclusion within the definition of all persons who are engaged in a relationship which is broadly that of employment rather than being self-employed or independent contractors. This being so, we are of opinion that the respondents come within the terms of Article 119 and the directives as workers in employment.

Interpretation to accord with Community Law

It is a well established consequence of the principle of supremacy of Community law that it is the duty of a national court, where there is a conflict between domestic law and a directly effective provision of Community law, to interpret domestic law where possible so as to accord with Community law, and where that cannot be done to disapply the conflicting provision of domestic law. So Peter Gibson LJ stated in *Barry v Midland Bank plc* [1998] 1 All ER 805 at 809:

> "It is common ground that there is a defence to a claim based on art 119 where the employer can establish that a difference in pay is objectively justified. It is also common ground that although the 1970 Act preceded the United Kingdom's entry into the European Community, (1) the 1970 Act must be interpreted so as to be consistent with the provisions of art 119, if it is possible for that to be done without distortion of

> the language of the 1970 Act, and (2) if and in so far as a provision of the 1970 Act is, on its proper interpretation, incompatible with art 119, then that article, being directly applicable, has primacy and the provision of the 1970 Act must be disapplied to that extent in order to give effect to art 119."

The tribunal held that when one interpreted the provisions of national law to accord with Community law it was possible to reach the conclusion that the exception in the 1970 Act and the 1976 Order for the service of a person holding statutory office did not apply. In so concluding the tribunal relied upon the decision of the Court of Justice in *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1992] 1 CMLR 305. The appellants challenged the correctness of applying *Marleasing* in such a way as effectively to delete the exception from the domestic statutes.

The decision in *Marleasing* was concerned with the effect of Article 11 of the First Directive, which contains an exhaustive list of the cases in which the nullity of a company may be declared. That directive had not been incorporated into Spanish domestic law at the material time. The relevant Spanish statute concerning public limited companies lacked a specific rule as to nullity applicable to those companies, but it was contended that the provisions relating to the nullity of contracts should be applied by analogy. If so applied, those provisions would have permitted the nullity of a company on grounds rather wider than those contained in the directive. The Court of Justice ruled in paragraphs 8 and 9 of its judgment that –

> "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 EEC.
>
> It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the

> nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question."

It may be seen from the decision in *Marleasing* that there was a true issue of interpretation in that case. The Spanish court could interpret the provision of domestic law so as not to apply all of the nullity provisions relating to contracts to the nullity of public limited companies. The statutory provisions with which we are concerned in the present case do not in our view admit of the same approach. It is not in our view possible to interpret section 1(9) of the 1970 Act or Article 82(2) of the 1976 Order in any way but in its plain meaning, that persons holding statutory offices are excluded from the application of the legislation. To hold otherwise would amount to deletion of portions of the legislation, not interpretation. We therefore cannot agree with the reasoning of the tribunal when it purported to interpret the Act and the Order in a way which would include the respondents.

Disapplying Provisions of National Law

The same effect can and in our view should be achieved, however, by a similar but divergent route, that of disapplying provisions inconsistent with the requirements of applicable Community law. The principle is conveniently summarised in Brealey & Hoskins, *Remedies in EC Law,* 2nd ed, p 53:

> "The entry into force of a Community measure which is directly applicable or directly effective:
>
> (a) renders any conflicting provision of national law automatically inapplicable;
>
> (b) precludes the valid adoption of new national legislative measures to the extent to which they would be incompatible with the Community measure;
>
> (c) imposes an obligation on national courts, of their own motion if necessary, to refuse to apply any national legislative measure, even a subsequent one, which is incompatible with the Community measure."

The principle was laid down by the Court of Justice in *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629. In paragraphs 17 and 21 of its judgment the court stated:

> "17. Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provision.
>
> ...
>
> 21. It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."

This was supplemented in *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] 2 All ER 584 at 593, where the Advocate General stated that where there is a conflict between provisions of Community law and national law, the national court should not declare the national law void but should not apply the conflicting provisions. The Court held in paragraph 55 that the provision in the Equal Treatment Directive 76/207 was sufficiently precise and unconditional –

> "to be capable of being relied on by an individual before a national court in order to avoid the application of any national provision which does not conform to art 5(1)"

In *Johnston v Chief Constable of the RUC* [1986] 3 All ER 135 the Secretary of State's certifying power was held incompatible with Community law. The consequence, as Advocate General Darmon observed in his opinion (page 149h) was that -

> "a national court cannot ... hold itself bound by a provision of national law which purports to exclude on the grounds of

> public order all judicial review of the implementation of Community legislation."

The certifying power contained in Article 53 of the Sex Discrimination (Northern Ireland) Order 1976 was accordingly disapplied and Mrs Johnston's claim proceeded in the industrial tribunal as if that power did not exist. Acceptance of the applicability of the principle may be seen in decisions in domestic law. In *Biggs v Somerset County Council* [1995] ICR 811 Mummery J stated at page 827, in giving the judgment of the Employment Appeal Tribunal:

> "Thus, in the exercise of its statutory jurisdiction, the industrial tribunal is bound to apply and enforce relevant Community law, and disapply an offending provision of United Kingdom domestic legislation to the extent that it is incompatible with Community law, in order to give effect to its obligation to safeguard enforceable Community rights."

In the passage which we have already quoted from *Barry v Midland Bank plc* the Court of Appeal affirmed the same principle, although the applicant's claim failed on other grounds both in that case and in *Biggs*. A similar expression of opinion may be found in the speech of Lord Hoffmann in *R v Secretary of State for Employment, ex parte Seymour-Smith* [1997] IRLR 315 at paragraph 15.

The conflicting provisions in domestic law can be simply isolated. They consist of the phrase in section 1(9) of the 1970 Act and Article 82(2) of the 1976 Order, "other than service of a person holding a statutory office". This exception is, for the reasons which we have given, inconsistent with the requirements of Article 119 of the Treaty and the directives. It has to be disapplied, that is to say, the courts should in applying the provisions of the Act and Order disregard the phrase.

If we follow this course, then the applicants are included within the remaining wording of section 1(9) and Article 82(2) and are entitled to advance their claims for equal pay and in respect of the discrimination which they allege. The appellants argued that the respondents could not pursue their claims in the industrial tribunal, but must bring proceedings in the High Court by way of judicial review, notwithstanding the procedural

advantages possessed by industrial tribunals in determining disputes involving such subject-matter. The foundation of their argument was that the phrase which we have found inconsistent with Community law operated only as a matter of procedure, to deprive the respondents of a remedy. Since Community law permits Member States to prescribe procedural matters for themselves, subject only to certain constraints (see the decisions of the Court of Justice in *SCS Peterbroeck van Campenhout & Cie v Belgium* [1986] All ER (EC) 242 and *Van Schijndel v Stichting-Pensionfonds voor Fysiotherapeuten* [1996] All ER (EC) 259), and the claims involved matters of public law, the respondents were on this argument bound to bring their claims in the High Court by judicial review and the industrial tribunal did not have jurisdiction. They relied on the EAT's decision in *Franklin v Home Office* (1999, unreported) as authority for the proposition that a racial discrimination claim in respect of a statutory office cannot be heard in an industrial tribunal.

We consider that the appellants' argument is misconceived. We do not regard the phrase in question as barring only the respondents' remedy. It constitutes an exception to the cover of the 1970 Act and the 1976 Order, in consequence of which the respondents are deprived of their substantive right to the protection of the equal pay and discrimination provisions. In our view the Act and Order have to be read as if that exception were deleted. When that is done, the respondents are included within its terms and can properly seek to advance their claims in the industrial tribunal, the forum which is given statutory jurisdiction to deal with such matters. Support for this conclusion may be found in *Secretary of State for Scotland v Wright and Hannah* [1991] IRLR 187 and the authorities cited in Lord Mayfield's judgment in that case, notably *Albion Shipping Agency v Arnold* [1981] IRLR 525 and *Stevens v Bexley Health Authority* [1989] IRLR 240. In *Ex parte Seymour-Smith* at paragraph 24 Lord Hoffmann stated, in an observation which in our view applies equally to claims for equal pay or in respect of discrimination:

> " … a person claiming to be entitled as a matter of private law to compensation for unfair dismissal should ordinarily bring her proceedings in the industrial tribunal, even if they will raise an issue of incompatibility between domestic and Community law."

The decision in *Franklin v Home Office* on which the appellants relied is not of any assistance. It was a claim in which racial discrimination was alleged, in respect of which there was no incompatibility with any provision of Community law. The applicant based his challenge on the duty contained in section 76 of the Race Relations Act 1976 (the analogue of Article 83 of the 1976 Order). That clearly made the claim a matter of public law which had to be pursued by means of judicial review and there was no basis on which the applicant could bring the claim in the industrial tribunal when it concerned appointment to a statutory office.

Conclusion

We accordingly agree with the conclusion reached by the Tribunal, although with some variation from its reasoning. We would answer the questions posed to the Tribunal as follows:

1. Yes.
2. Yes.
3. Yes.
4. No.
5. Yes.
6. No.
7. No.

The answers which we give to the questions of law posed in the case stated are therefore as follows:

(1) Yes.

(2) Yes.

(3) Yes, in respect of the answers to questions 3 and 4.

(4) The answer to question 7 should have been "No".

The appeal will be dismissed.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

MAYO PERCEVAL-PRICE, MONICA DAVEY and MOYA F BROWN

(Applicants) Respondents

and

DEPARTMENT OF ECONOMIC DEVELOPMENT, DEPARTMENT OF HEALTH AND SOCIAL SERVICES and HER MAJESTY'S ATTORNEY-GENERAL FOR NORTHERN IRELAND

(Respondents) Appellants

JUDGMENT

OF

CARSWELL LCJ
