



Key Issues:	Equal Pay – Pension Scheme – Retroactive Equalisation - Preliminary Ruling
Case:	Safeway Ltd v Newton & Safeway Pension Trustees Ltd
Reference:	Case C-171/18, CJEU (Grand Chamber), 7 October 2019
Legislation:	Article 119 (now 141), EC Treaty

Background

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'.

Whereas the Safeway pension scheme 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 of Justice of the EU (CJEU) held, in essence, in its judgment of 17 May 1990, *Barber* (C-262/88) 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.

The issue whether the retroactive amendment of the pension scheme 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.

By judgment of 29 February 2016, the High Court of Justice (England & Wales, Chancery Division) 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.

Safeway appealed and the Court of Appeal (England & Wales, Civil Division) decided to stay the proceedings and to refer a question to the CJEU for a preliminary ruling.

Consideration by CJEU

It is settled case-law of the CJEU 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).

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.

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.

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 above.

The CJEU held that:

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.

Why is this decision important?

The effects of *Barber* (1990) are still being felt by pension scheme trustees and members alike. The obligation to equalise the rights of their pension scheme members requires careful consideration and good legal advice. A decision to “equalise downward” with retroactive effect may be attractive to trustees but, as in this case, it may not be the right one.

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