Opinion of Advocate General Léger delivered on 12 May 1998

B.S. Levez v T.H. Jennings (Harlow Pools) Ltd. - Reference for a preliminary ruling: Employment Appeal Tribunal, London - United Kingdom

Social policy - Men and women - Equal pay - Article 119 of the EC Treaty - Directive 75/117/EEC - Remedies for breach of the prohibition on discrimination - Pay arrears - Domestic legislation placing a two-year limit on awards for the period prior to the institution of proceedings - Similar domestic actions

Case C-326/96

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Opinion of the Advocate-General

1 By the questions referred to the Court, the Employment Appeal Tribunal essentially asks whether the principle of equal pay for men and women, laid down in Article 119 of the EC Treaty and Directive 75/117/EEC, (1) 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 Article 119 of the Treaty requires Member States to ensure 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'. (2)

4 The material scope of Article 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, Article 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 ensure 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 in February 1991 as manager of a betting shop in Chelmsford, for which she received an annual salary of UKL 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 UKL 10 800 as from that date, her employer maintained that she was being paid the same salary as her predecessor, who had in fact been paid UKL 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.

10 At the level of national law, that principle is protected by the Equal Pay Act 1970 (hereinafter `the Equal Pay Act'), 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 Section 1(1) of the Equal Pay Act, the terms of any contract under which a woman is employed at an establishment in Great Britain are deemed to include an `equality clause'. (3)

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

12 That award was `adjusted', however, after Jennings drew attention to the limitation period laid down in Section 2(5) of the Equal Pay Act, which provides:

`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'.

13 On the basis of that provision, the Industrial 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.

14 Mrs Levez thereupon applied to the Employment Appeal Tribunal, claiming that, in two respects, Section 2(5) of the Equal Pay Act infringed Article 119 of the Treaty, read in conjunction with Articles 2 and 6 of Directive 75/117.

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 - Section 2(5) of the Equal Pay Act fails to ensure full and effective protection for individuals seeking to rely on the principle of equal pay.

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

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 Equal Pay 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 Equal Pay Act or under Article 119.

18 While recognising that `[t]he 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 `[t]he point of principle is, however, an important one. A decision in favour of Mrs Levez could have far-reaching implications for many other cases'. (4) It therefore referred the following questions to this Court:

`(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 -

(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?

(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?'

The replies to the questions

Introduction

19 As the Employment Appeal Tribunal mentions in its second question, the Court 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 ensure the protection of rights conferred on individuals by virtue of the direct effect of Community law.

20 Such independence in procedural matters is subject, however, to two conditions.

21 First, the rules of procedure laid down by domestic law for the exercise of rights derived from Community law must not be less favourable than those governing similar domestic actions.

22 Secondly, the procedural requirements for domestic actions must not make it virtually impossible, or excessively difficult, to exercise rights conferred by Community law. (5)

23 The first condition may be termed `the principle of equivalence' or `the principle of non-discrimination'; the second, `the principle of effectiveness'. (6)

24 In the present case, the Court is called on to define the scope of those two conditions: Question (1) - particularly Question (1)(c) - ultimately concerns the principle of effectiveness and Question (2) clearly concerns the principle of equivalence, although the latter also figures largely in Question (1).

25 In view of the importance attached to it by the Employment Appeal Tribunal - and all the better to set out the line of reasoning and arguments which I propose that the Court should adopt - I shall first consider whether comparison of various types of legal action is a valid basis for determining whether the principle of equivalence has been observed. I shall then specifically address Question (1).

The principle of equivalence

26 The aim of this principle is that domestic law remedies should safeguard Community law `without discrimination'; that is to say, exercise of a Community right before the national courts must not be subject to conditions which are more strict (for example, in terms of limitation periods, conditions for recovering undue payment, rules of evidence) than those governing the exercise of similar rights derived wholly from domestic law.

27 The crucial question raised by the present case is whether or not the national rules of procedure laid down in Section 2(5) of the Equal Pay Act - applying to claims relying on the right conferred by Community law to equal pay for equal work, laid down by Article 119 of the Treaty and by Directive 75/117 - are less favourable than other procedural rules governing similar rights derived from domestic law.

28 Those `similar rights derived wholly from domestic law' remain to be identified.

29 That is why the Court is asked, in particular, to clarify the meaning of the expression `similar domestic actions' - in relation to actions for recovery of arrears of remuneration, in reliance on the principle of non-discrimination, as provided for and safeguarded by Article 119 of the Treaty and Directive 75/117 - for the purposes of applying the principle of equivalence.

30 Although in some cases there is no difficulty in identifying `similar' forms of domestic action, in other cases it is clearly necessary to determine the ground of comparison, which in practice involves a policy decision.

31 The greater the desire to facilitate exercise of a Community right, the wider the range of domestic actions accepted as valid comparators.

32 Advocate General Mancini, faced with the same problem, speculated as follows in his Opinion in San Giorgio: (7) `[i]n what circumstances can it be said that similarity exists and that therefore different treatment is prohibited?' In the circumstances of that case, he decided on a broad interpretation of the principle of equivalence or non-discrimination: `I would point out in the first place that the prohibition of discrimination is a general principle of Community law and therefore any weakening of that principle by the imposition of limits must be approached with great caution'.

33 More recently, Advocate General Jacobs, in his Opinion in BP Supergas, pointed out the difficulties involved in such a process: (8) `[i]t is not, in my view, necessary to engage in the difficult and somewhat artificial exercise of seeking a comparable claim under national law'.

34 The Court has not taken a different approach to the Advocates General: when faced with the same problem, it leaves determination of such matters to the national courts. Generally speaking, the Court takes the view that `... in principle, it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law ... comply with the principle of equivalence ...'. (9)

35 While recognising the national courts' jurisdiction in this respect, the Court has nevertheless established a number of guidelines.

36 Palmisani concerned a rule of national law which fixed a one-year limitation period in respect of actions for reparation for loss or damage sustained as a result of the belated implementation of a directive, with effect from the date of the directive's transposition into domestic law. In order to determine whether such a time-limit was consistent with the principle that it must be equivalent to the conditions relating to similar domestic actions, the court making the reference identified three types of procedural rule which could be regarded as `similar'. (10)

The Court took the view that domestic actions pursuing the same `objective' (11) as actions to enforce a Community right, or whose purpose is similar, must be regarded as similar domestic actions.

On that basis, the Court observed that `the ordinary system of non-contractual liability ... is on the whole, in terms of its objective, similar to that introduced [by the provision at issue]'. (12) However, the Court went on to state that `... in order to establish the comparability of the two systems in question, the essential characteristics of the domestic system of reference must be examined' and that that task was for the national court.

37 I propose that the Court adopt the same line of reasoning in the present case.

38 Thus the first point to note is that, in principle, it is for the national court to ensure that the principle of equivalence is observed. It is also for that court to identify `similar domestic actions' in relation to an action brought by a woman for pay arrears due by reason of infringement of an equality clause.

39 It is possible, however, to identify a number of criteria to guide the Employment Appeal Tribunal in its search for national rules of procedure which may be compared with those laid down by the Equal Pay Act.

The meaning of the expression `similar domestic actions'

40 Various comparators have been proposed in the course of the proceedings before the national court and subsequently before the Court of Justice. (13)

41 Thus, the United Kingdom Government submits - as did the amicus curiae before the Employment Appeal Tribunal - that `for the purposes of the non-discrimination requirement, a claim under the Equal Pay Act is a form of action under domestic law which is similar to a claim brought in reliance upon Article 119'. (14)

42 Accordingly, the United Kingdom Government in fact maintains that a comparison should be made between, on the one hand, the procedural rules governing actions relying on the principle of equal pay for men and women without discrimination on grounds of sex - as provided for and safeguarded by Community law - and, on the other hand, those governing an action relying on the same principle, as provided for and safeguarded by domestic law.

43 However straightforward that line of reasoning may appear, it presupposes that two separate principles of equal pay for men and women without discrimination on grounds of sex can exist concurrently at two different levels, national and Community. However, this is clearly not so. The protection provided for by the Equal Pay Act and that on which employees may rely on the basis of Article 119 of the Treaty, and incidentally Directive 75/117, reflect one and the same principle.

44 Moreover, this is borne out by the fact that, as the United Kingdom Government acknowledges, (15) the Equal Pay Act in fact constitutes the binding national measure transposing Directive 75/117, which gives effect to the principle laid down in Article 119 of the Treaty.

45 Nor is that invalidated by the fact that the Equal Pay Act was adopted in 1970, that is to say, before the United Kingdom's accession to the Community and before the Directive was adopted. When Directive 75/117 was adopted, the Equal Pay Act nevertheless constituted for the United Kingdom the means of complying with its new obligations without having to adopt new legislation specifically to transpose the Directive into domestic law. The Employment Appeal Tribunal also points out that the Equal Pay Act was again `... amended in 1983 in order to comply with Article 119 of the Treaty, particularly as regards equal value claims'. (16) Thus the Equal Pay Act is clearly the national implementing measure for the Community principle that, in matters of pay, there should be no discrimination on grounds of sex.

46 It follows that actions brought under the Equal Pay Act are brought under a measure transposing into national law Directive 75/117, which gives effect to the principle of non-discrimination laid down in Article 119 of the Treaty.

47 Accordingly, an action brought under the Equal Pay Act and an action brought under Article 119 of the Treaty are not merely similar, as the United Kingdom Government maintains: their scope is identical, that is to say, they amount to one and the same form of action.

48 The fact that they are not two separate forms of action means that it cannot plausibly be contended that the principle of equivalence is observed here inasmuch as the same procedural rules - namely, the limitation period laid down by Section 2(5) of the Equal Pay Act - apply to two comparable forms of action, one relying on a right conferred by Community law, the other on a right acquired under domestic law. It is only logical that, as the Employment Appeal Tribunal points out in Question 1(a), `that rule of national law applies to all claims for equal pay without sex discrimination'.

49 That ground of comparison cannot therefore be accepted.

50 The United Kingdom Government suggested yet another approach, which may be termed `transversal' in that it compares the procedural rules applying in the present case with those governing other actions seeking to enforce the principle of equal pay for men and women across the board, in other fields of law such as social security law. The questions referred by the Employment Appeal Tribunal also refer to the protection given by the Sex Discrimination Act 1975 transposing Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. (17)

51 However, comparison on that basis does not appear any more appropriate in this case. Yet again, the procedural rules governing actions relying on the principle of equal treatment for men and women in matters other than pay do not essentially differ according to whether the right relied on derives from Community law or domestic law. The relevant right is always one and the same - a Community right which has been transposed into domestic law.

52 The French Government and the Commission submitted, as did Mrs Levez, that if a comparison is to be made, the field of domestic law with protection most akin to that of the Equal Pay Act is that of the Race Relations Act 1976. (18)

53 Albeit not entirely unfounded, this approach, which is also `transversal' - in that it does not focus on a particular branch of law, but rather on the broadest possible interpretation of a principle (the general principle of non-discrimination) which is likely to inform all branches of law - should not, in my view, be adopted in this case.

54 Admittedly it is arguable on the basis of the criteria adopted by the Court in Palmisani that actions based on the Equal Pay Act and the Race Relations Act have a similar purpose: in both cases, the plaintiff seeks to rely on the principle of non-discrimination, whether on grounds of sex or on grounds of race.

55 However, if the relevant criterion is to be the general principle of non-discrimination, it is not clear why the chosen comparator should illustrate that principle only as it applies to race. The principle of non-discrimination

has many applications, which are protected and generally taken into account at the national level, in relation - to mention only a few examples - to nationality, sex, religion, handicap, age ... Why, then, base a comparison on only one of those applications?

56 Secondly, and more importantly, I fear that the underlying argument rests on a false premiss. To adopt a `transversal' approach - along the lines proposed by the French Government and the Commission, and to a limited extent, those suggested by the United Kingdom, already mentioned - would shift the emphasis of the problem.

57 Now that this case has come before the Employment Appeal Tribunal, the central issue is no longer whether Mrs Levez was the victim of discrimination. That question has already been disposed of at first instance. It remains only to determine whether the relevant national rules of procedure offer a remedy for treatment constituting discrimination under Community law which is no less favourable than that available for discrimination under domestic law. However, to proceed by comparing the `outcome' reserved for discrimination on grounds of sex with that for discrimination on grounds of race is to continue to assume that the issue central to Mrs Levez's claim is one of discrimination.

58 However, that is not so.

59 In bringing her action, Mrs Levez is seeking a specific remedy; she is not merely seeking judicial confirmation that she has been the victim of discrimination, which is not, as such, the object of her complaint. The prior finding of discrimination in her case only served to justify the bringing of this action.

60 The action brought by Mrs Levez is for payment of salary arrears. Those arrears were regarded by the Industrial Tribunal hearing the case at first instance as due by reason of breach of the equality clause, one of the terms of the employment contract pursuant to the Equal Pay Act. However, it is easy to imagine other reasons why an employee would be due arrears of remuneration.

61 To my mind, it is precisely those other circumstances on which claims for salary arrears could be founded that are the most likely to provide appropriate comparators.

62 It is thus necessary to compare claims for arrears of remuneration relying on the Community principle of equal pay for men and women, such as this one, with other actions for recovery of salary arrears, the legal basis for which is not to be found in Community law, but provided for and safeguarded by the domestic legal system, particularly in the field of employment law.

63 Let us imagine, for example, the situation of a man whose employment contract provides for remuneration on a profit-sharing basis, consisting in a fixed salary with a monthly bonus depending on results. If the employer did not pay him that bonus - part of his remuneration - he would be entitled to bring a claim for recovery of arrears, due in his case not because of an infringement of the principle of equal pay, but because of the employer's breach of his obligations under the employment contract.

64 It is also useful at this point to refer to the Race Relations Act, as the Commission and the French Government suggested. The situation of a man bringing a claim for recovery of salary arrears because of discrimation on grounds of race would also be comparable to the situation just described.

65 It is my view that, in the circumstances of this case, Mrs Levez's situation is closest to that of an employee bringing a claim for recovery of salary arrears. Rather than a `transversal' comparison, it seems to me that a `vertical' comparison - with similar claims for salary arrears, arising in the field of employment law - is the more appropriate.

66 Moreover, the case-law of the Court supports this approach.

67 Thus, in Gillespie and Others, (19) it is by reference to the fact that, throughout maternity leave, the women employees remained linked `just like any other worker' to their employer by a contract of employment or an employment relationship, that the Court took the view that they should receive any pay rise awarded before or during that period. In so doing, the Court adopted the `vertical' approach - focusing on employment law and, specifically, on the contract of employment - rather than a `transversal' approach, concentrating on discrimination on grounds of sex. In fact, the Court held that the plaintiffs should be awarded the pay rises in question, like their colleagues, not because the women in question were the victims of discrimination, but because they were employees whose rights had been disregarded.

68 Similarly, in Draehmpaehl, (20) it was after comparing the provisions of national law at issue - which prescribed an upper overall limit for the compensation which could be obtained in the event of discrimination on grounds of sex in the making of an appointment - with `other provisions of domestic civil law and labour law' (which did not prescribe such limits) that the Court held that the principle of equivalence had not been complied with in the circumstances of the case.

69 Consequently, it is my view that the term `a similar domestic action' - in relation to a claim for pay arrears in reliance on the Community right to non-discrimination on grounds of sex in respect of the same work - must apply to a claim for pay arrears in reliance on provisions of domestic law, particularly employment law.

70 It is by reference to a similar domestic action, thus construed, that it remains to determine whether the procedural rules governing such an action are more favourable than those laid down by domestic law - under Section 2(5)) of the Equal Pay Act - to govern the exercise of rights derived from Community law.

The `more favourable' character of a similar domestic action

71 It is clear from the order for reference and from the questions themselves that the limitation period stipulated by the Equal Pay Act does not apply to any other form of action. Question (1)(a) accordingly refers to the fact that `that rule of national law applies to all claims for equal pay without sex discrimination, but to no other claims'.

72 It is not for me to proceed at this stage to compare the various rules of procedure governing claims for arrears of remuneration in order to verify the truth of that statement. It is for the Employment Appeal Tribunal, which is acquainted with the mechanisms governing forms of action under domestic law, to determine whether similar actions are being treated differently, depending on whether the cause of action is discrimination on grounds of sex, and therefore safeguarded by Community law, or whether the action is one not linked to Article 119 of the Treaty.

73 Suffice it to say that, although a rule of procedure such as that at issue may at first sight appear less favourable than a rule under which the period in respect of which arrears may be claimed can be extended to up to six years before the date on which the claim is brought (21) - or, a fortiori, a rule which does not prescribe any such limitation period (22) - it seems to me that this is not the only factor to be taken into account.

74 In fact, it appears from the information in the documents before the Court that claims brought under the Equal Pay Act may, in other respects, be regarded as subject to time-limits which are more favourable than those applying to similar domestic actions.

75 Thus, the initiation of proceedings such as those brought by Mrs Levez is not subject to any time-bar, whereas, as a general rule, similar domestic actions must, if they are to be admissible, be brought within three months of the termination of the employment relationship, (23) or the act of racial discrimination. (24)

76 However, it should be borne in mind that although those other forms of action appear to be subject to stricter time-limits than the claim at issue, it seems that the court applying those time-limits has discretion to extend them, which it does not appear to have under the Equal Pay Act.

77 Once again, I would emphasise that the question here is not whether the conditions governing similar domestic actions are more favourable, which requires a thorough knowledge of the national rules of procedure and their implementation by the courts. I would merely point out that, should the Employment Appeal Tribunal find that, not only is it impossible in an action under the Equal Pay Act - unlike other similar domestic actions - to recover arrears of remuneration in respect of a period earlier than two years before the date on which a claim is brought, but also the time-limit for bringing such a claim is only in appearance more favourable than that applying to other forms of action, since in the latter case the courts are empowered to extend the time-limits, it can only conclude that the principle of equivalence between actions based on a Community right and those based on a domestic law right is thereby contravened.

78 In answer to the second question, I therefore conclude that Community law - and in particular Article 119 of the Treaty - precludes application of a national rule of procedure solely to claims for arrears of remuneration relying on the principle of equal pay for men and women in respect of the same work, if that rule is less favourable than the rules governing similar domestic actions for recovery of salary arrears based, in particular, on provisions of national employment law.

The principle of effectiveness and the powers of the courts

79 It should be noted at the outset that the Employment Appeal Tribunal need consider this aspect - which is specifically the subject of Question 1 - only if, on the basis of the criteria set out above, it takes the view that it can apply the national rule at issue without compromising the principle of equivalence. In that event, it would remain for the Tribunal to satisfy itself that there was no contravention of the second condition attached by the Court of Justice to the Member States' independence in matters of procedure.

On the other hand, if, on the basis of the criteria set out above, the Employment Appeal Tribunal decided, in the light of the case-law of the Court, (25) that it should not apply the provision at issue because it was contrary to Community law, there would be no need to consider the question concerning the principle of effectiveness.

80 Leaving to the national court the task of applying the principle of equivalence, I shall move on to consider the other question.

81 Question 1 (26) really consists of two questions. Essentially, the Court is asked whether the fixing of a time-limit such as that laid down by Section 2(5) of the Equal Pay Act makes it impossible to exercise rights conferred by Community law - that is to say, whether such a rule is consistent with the principle of effectivity - particularly when that time-limit cannot be extended by the court or tribunal concerned, even in the case of deceit on the part of the employer - in which case it is necessary, secondly, to consider the discretion enjoyed by the national courts.

82 It should be recalled that the principle of effectiveness limits the scope of the principle that the Member States should enjoy independence in procedural matters, in so far as it requires that the rules governing domestic actions should not make it virtually impossible or excessively difficult to exercise rights conferred by Community law.

83 On that point, the Court has stated - in the most recent of a long line of cases - that `[a]s regards the compatibility of a time-limit ... [in the form of a time-bar] with the principle of the effectiveness of Community law, the setting of reasonable limitation periods for bringing proceedings satisfies that requirement in principle, inasmuch as it constitutes an application of the fundamental principle of legal certainty ...'. (27) Such a rule is justified, the Court has said, because it serves `... to ensure that the legality of administrative decisions cannot be challenged indefinitely'. (28)

84 Subsequently, the Court has consistently transposed the rule laid down in Steenhorst-Neerings - concerning time-limits for bringing proceedings before the national courts - to situations such as that in the present case, where national legislation limits the period in respect of which arrears may be paid, pointing out that such a rule `... does not affect the right of individuals to rely on ... [Community law] in proceedings before the national

courts ...; [i]t merely limits the retroactive effect of claims made for the purpose of obtaining the relevant benefits. (29)

85 The Court confirmed that approach in Johnson, (30) stating that `[n]or does [a] rule which merely limits the period prior to the bringing of a claim in respect of which arrears of benefit are payable make it virtually impossible for an action to be brought by an individual relying on Community law'.

86 As in those examples, the case currently before the Court concerns a national rule which does not constitute a bar to proceedings; it `merely limit[s] the period prior to the bringing of the claim in respect of which arrears ... are payable'. (31)

87 In fact, Section 2(5) of the Equal Pay Act did not prevent Mrs Levez from relying on Community law; its effect was to limit the period in respect of which the pay arrears deemed due could be awarded.

88 In accordance with the case-law of the Court, the national rule at issue must therefore be regarded as not having the effect of making it virtually impossible or excessively difficult to exercise rights deriving from Community law.

89 However, in the circumstances of this case, that conclusion seems odd.

90 The point that cannot be overlooked is that the judgments in Steenhorst-Neerings, Johnson and Alonso-Pérez concerned the payment of social security benefits. (32) To be more precise, on each occasion the measure at issue was a `national rule restricting the retroactive effect of a claim for [social] benefits'. (33)

91 The approach adopted by the Court inevitably took account of the national social policy objective underlying the introduction of such a rule. It stated that such a rule of procedure `... serves to ensure sound administration, most importantly so that it may be ascertained whether the claimant satisfied the conditions for eligibility ... It also reflects the need to preserve financial balance in a scheme in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during that same year'. (34)

92 Obviously, those are not the objectives pursued by the provision of the Equal Pay Act at issue here. As the United Kingdom Government recognises, it serves rather `... to prevent the courts and tribunals being required to adjudicate upon old claims'. (35) The time-limit at issue is thus justified at national level by the desire to encourage plaintiffs to demonstrate the necessary diligence to enforce their rights as soon as possible.

93 Accordingly, in special circumstances such as these, where there is an element of deceit, the objective pursued by the time-limit at issue is no longer valid.

94 Mrs Levez cannot be told that she should have been more prompt in bringing an action to safeguard her rights in order to have avoided subsequent disappointment at not having recovered all the arrears to which she was entitled, since the reason for her delay in bringing an action lay in the fact that her employer had concealed from her the discrimination of which she was a victim. (36)

95 In the case of Mrs Levez, strict enforcement of the limit set by Section 2(5) of the Equal Pay Act does not entail very serious financial consequences, since she `only' loses the arrears due in respect of the period between February 1991 and September 1991. There are situations, however, in which the financial consequences could be much more serious. (37) There are also situations in which strict enforcement of that rule would prevent employees deceived by their employers from receiving any arrears at all. (38)

96 These considerations lead me to conclude that, although a rule such as that at issue does not make it virtually impossible or excessively difficult to exercise a right derived from Community law, any lack of flexibility in its enforcement - that is to say, if no allowance can be made for special circumstances, such as deceit on the part of an employer - could lead to a breach of the principle of effectiveness.

97 I am therefore of the opinion that, although the introduction of a retroactive limit such as that laid down in Section 2(5) of the Equal Pay Act is not in itself open to criticism, if the national court has no power to extend the limit set and so mitigate the rule's application in order to take account of special circumstances in particular cases, such a rule can make it virtually impossible or excessively difficult to enforce a right derived from Community law.

98 Furthermore, according to the information given in the order for reference, the Employment Appeal Tribunal considers that, on the other hand, it has a power of extension when implementing the procedural rules applying to similar domestic actions. However, should it prove possible in fact for the courts, in the context of claims for pay arrears based on provisions of domestic law, particularly employment law, to take account of circumstances such as deceit on the part of the employer in order to relax the legal time-limit, that course of action should also be open in the present case if the principle of equivalence is not to be breached.

99 I conclude, therefore, that the fact that the national court is precluded from taking account in individual cases of special circumstances justifying the delay in bringing an action, in order to extend the retroactive limitation period laid down in Section 2(5) of the Equal Pay Act, is contrary to the principle that Community law must be effective, and certainly to the principle of equivalence.

Conclusion

100 In the light of the foregoing, I propose that the Court reply to the Employment Appeal Tribunal as follows:

(1) Community law, in particular Article 119 of the EC Treaty, precludes the application, to a claim for arrears of remuneration in reliance on the principle of equal pay for men and women in respect of the same work, of a national rule of procedure which limits the period prior to the lodging of that claim in respect of which the arrears

due may be obtained, where that rule is less favourable than those governing similar domestic actions for recovery of salary arrears in reliance on provisions of national law, in particular employment law.

(2) Community law, in particular Article 119 of the Treaty, also precludes the application of such a national rule of procedure where the national courts, in applying that rule, cannot take into account special circumstances justifying a delay in lodging the claim, so as to extend the limitation period specified.

(1) - Council Directive 75/117/EEC of 10 February 1975 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 L 45, p. 19).

(2) - Case 43/75 Defrenne [1976] ECR 455, paragraphs 12 and 24.

(3) - The appellant in the main proceedings emphasises in her written observations (footnote 4) that all provisions in the 1970 Act referring to women apply equally to men.

(4) - Order for reference, p. 2.

(5) - See, in particular, Case 33/76 Rewe [1976] ECR 1989, paragraph 5, and Case 45/76 Comet [1976] ECR 2043, paragraph 13; Case 68/79 Just [1980] ECR 501, paragraph 25; Case 199/82 San Giorgio [1983] ECR 3595, paragraph 12; Case C-208/90 Emmott [1991] ECR I-4269, paragraph 16; Case C-62/93 BP Supergas [1995] ECR I-1883; Case C-188/95 Fantask and Others [1997] ECR I-6783, paragraph 47; and Case C-246/96 Magorrian and Cunningham [1997] ECR I-7153, paragraph 37.

(6) - See by way of analogy the terms used for the two conditions applicable where reference is to be made to national law on liability, as regards the liability of Member States, in Case C-261/95 Palmisani [1997] ECR I-4025, paragraph 27.

(7) - Point 11, at pp. 3633, 3634.

(8) - Paragraph 58.

(9) - Palmisani, paragraph 33.

(10) - Ibid., paragraph 32.

(11) - Ibid., paragraph 34.

(12) - Ibid., paragraph 38.

(13) - Those various criteria are also mentioned in Question (1)(b) and at the end of Question (2).

(14) - Paragraph 3.3 of its Observations.

(15) - At paragraph 3.6 of its Observations, it points out that `...at the time the United Kingdom joined the Community in 1973, there was legislation already enacted and due to come into force ... which gave effect to the right to equal pay without sex discrimination'. At paragraph 3.32 of its Observations, it states that `...the provisions of the Equal Pay Act ... in the employment field correspond to Community law rights contained either in Article 119 or in the Equal [Pay] Directive'.

(16) - Order for reference, p. 16.

(17) - Council Directive of 9 February 1976 (OJ 1976 L 39, p. 40).

(18) - This legislation is a safeguard in the United Kingdom against racial discrimination in employment. It covers discrimination on grounds of colour, race, nationality or ethnic or national origins (paragraph 3.29 of the Observations of the United Kingdom Government).

(19) - Case C-342/93 [1996] ECR I-475, paragraphs 21 and 22.

(20) - Case C-180/95 [1997] ECR I-2195, paragraphs 28 and 41.

(21) - The six-year time-limit applies under domestic law by operation of Section 5 of the Limitation Act 1980 to claims in respect of breach of the employment contract (order for reference, pp. 6 and 13). In such cases, time starts to run from the date on which the cause of action accrued (order for reference, p. 13).

(22) - There does not appear to be any limit on the period in respect of which pay arrears can be claimed under the Race Relations Act 1976, provided that such claims are brought within three months of the termination of the contract (order for reference, p. 14).

(23) - At paragraph 3.34 of its Observations, the United Kingdom Government gives the following information. In respect of the jurisdiction of the Industrial Tribunals to deal with breaches of the contract of employment, the time-limit is laid down by Article 7 of the Industrial Tribunals Extensionof Jurisdiction (England and Wales) Order 1994 and Article 7 of the Industrial Tribunals Extension of Jurisdiction (Scotland) Order 1994.

(24) - Section 68(1) and (7) of the Race Relations Act 1976.

(25) - In particular, Case 106/77 Simmenthal [1978] ECR 629.

(26) - In fact, Question (1)(c) since the factors addressed at (a) and (b) form part of the query set out in Question (2).

(27) - Palmisani, paragraph 28. See also Rewe, paragraph 5, Comet, paragraph 17, and San Giorgio, paragraph 12.

(28) - Case C-338/91 Steenhorst-Neerings [1993] ECR I-5475, paragraph 22.

(29) - Ibid., paragraph 21.

(30) - Case C-410/92 [1994] ECR I-5483, paragraph 23. See also Case C-394/93 Alonso-Pérez [1995] ECR I-4101, paragraph 30.

(31) - Johnson, paragraph 30.

(32) - The first two judgments specifically concerned the implementation of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24). The judgment in Alonso-Pérez concerned Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416).

(33) - Steenhorst-Neerings, paragraph 16.

(34) - Ibid., paragraph 23.

(35) - Paragraph 1.3 of its Observations.

(36) - Thus, if Mrs Levez had brought her action in February 1993 rather than in September 1993, she would have been awarded all the arrears to which she was entitled. She was unable to do so, however, because she was still unaware that she had been discriminated against.

(37) - Consider, for instance, the case of a woman in the same situation as Mrs Levez, discriminated against in terms of salary, a fact hidden from her by her employer, but for a period of fifteen years rather than a little over two years. Rigid application of the provision at issue would, at best, restrict any possible award of arrears to the last two years before she discovered the discrimination; arrears in respect of the previous thirteen years, albeit due, could never be awarded.

(38) - Consider, for example, the situation of a woman who has for years been discrimated against in terms of pay who finally, over the two years preceding her initiation of proceedings, is paid on a non-discriminatory basis. If she does not discover the discrimination until the end of those two years, and even if she brings an action immediately, strict enforcement of the rule at issue would mean that, even if the discrimination were proved, she could not be awarded any arrears at all.