Neutral Citation Number: [2022] EAT 163

Case No: EA-2022-000116-VP

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 October 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

THE SECRETARY OF STATE FOR WORK AND PENSIONS **Appellant**

- and –

(1) MR D BEATTIE AND SIXTEEN OTHERS
(2) 20-20 TRUSTEE SERVICES LIMITED
(3) FEDERAL MOGUL LIMITED

Respondents

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- -

Claire Darwin (instructed by **Government Legal Department)** for the **Appellant**
Andrew Short KC and **Bianca Venkata** (instructed by **Walkers Solicitors**) for the **First Respondents**
Naomi Ling (instructed by **Osborne Clarke**) for the **Second Respondent**
The **Third Respondent** did not appear and was not represented

Hearing date: 22 September 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 14:00 on Thursday 27 October 2022

Summary

Age discrimination – non-discrimination rule in occupational pension – section 61 ***Equality Act 2010*** *– exemption under* ***Equality Act (Age Exceptions for Pension Schemes) Order 2010*** *– application of* ***European Union (Withdrawal) Act 2018***

Upon the insolvency of their former employer, because they had not then reached normal pension age, the claimants suffered reductions in their occupational pension benefits as a result of the application of section 138 **Pensions Act 2004**. They complained that this amounted to unlawful age discrimination, being a breach of the non-discrimination rule under section 61 **Equality Act 2010** ("EqA"); they argued that the exception allowed under the **Equality Act (Age Exceptions for Pension Schemes) Order 2010** ("the 2010 Order") ought to be disapplied as it was incompatible with general principles of European Union ("EU") law, alternatively was incompatible with the **Council Directive 2000/78/EC** (the "Framework Directive"). The ET upheld the claimants' claims and disapplied the relevant provision of the **2010 Order**. The secretary of state (who did not appear before the ET) appealed.

Held: *allowing the appeal in part*

Reading the ET's decision fairly and as a whole, it was apparent that its reasoning was based on the principle of non-discrimination/equal treatment, as a general principle of EU law. It had not made the error of treating the **Framework Directive** as directly effective as against the pension scheme trustee, which could not be characterised as an emanation of the state.

Prior to 1 December 2006 (the date of the domestic implementation of the **Framework Directive** as regards age in relation to pensions), the claimants had all left pensionable service, their pension benefits had come into payment, the assessment period had commenced, and the requirement to reduce the claimants' benefits had been imposed. The secretary of state and trustee contended that, in those circumstances, the claimants' rights had become definitive such that the ET's decision was contrary to the no retroactivity principle. The ET had, however, found that there was an on-going

relationship between the claimants and the trustee and that the rights of the claimant had not been permanently fixed prior to the implementation date of the **Framework Directive**. That was a permissible conclusion in this case. Upon the implementation date of the **Framework Directive**, UK domestic law had been brought within the scope of EU law in relation to protection against unequal treatment in pensions such that the principle of non-discrimination/equal treatment, which was a general principle of EU law (embodied at article 21 **Charter of Fundamental Rights of the European Union**; "EU Charter"), had direct effect and, in accordance with the principle of future effects, was to be applied to the on-going relationship between the claimants and the trustee (**Walker v Innospec Ltd and ors** [2017] UKSC 47; [2017] ICR 1077 applied).

As a right or principle set out in the **EU Charter**, which was recognised as having the same legal value as EU Treaties (see article 6 **Treaty on European Union**), the general principle of non-discrimination/equal treatment was to be treated as retained EU law, by virtue of section 4 **European Union (Withdrawal) Act 2018** ("Withdrawal Act"). By section 5(4), however, it had been provided that the EU Charter would no longer be part of domestic law and by schedule 1 paragraph 3(2) it would no longer be open to a court or tribunal to disapply a domestic enactment on the basis that it was incompatible with the general principles of EU law. Schedule 8 paragraph 39(3) provided an exception to section 5(4) and schedule 1 paragraph 3(2) in proceedings that had commenced prior to the relevant completion day under the **Withdrawal Act**. That applied to the claims brought by Mr Hampshire and Mr Farrell but not to the remaining claimants. Although raising a new point on appeal, this fell within the category of exceptional circumstances such that it would be permitted to be argued (see **Secretary of State for Health and ors v Rance and ors** [2007] IRLR 665 EAT). Moreover, for the reasons stated, the ground of appeal relating to the **Withdrawal Act** would be upheld in respect of all claimants but Mr Hampshire and Mr Farrell.

The secretary of state had also sought to take a new point on appeal in respect of the possible justification for the exception under the **2010 Order**. This, however, was a point that would require

further factual enquiry and evaluation by the ET and, considering this matter under rule 3(10) **EAT Rules**, permission was not given for this to proceed to a full hearing.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises the question whether the Employment Tribunal ("ET") was correct to disapply the **Equality Act (Age Exceptions for Pension Schemes) Order 2010** (as amended) ("the 2010 Order") in these cases. That, in turn, requires consideration of the basis for the ET's decision, and whether that was dependent upon **Council Directive 2000/78/EC** (the "Framework Directive") or was determined applying general principles of European Union ("EU") law; if the former, there is a question as to whether the ET thereby erred in treating the **Framework Directive** as having direct effect; in either case, a further issue is raised as to the potential application of the **European Union (Withdrawal) Act 2018** ("the Withdrawal Act"). Additionally, however its reasoning is to be interpreted, there is a dispute as to whether the ET was correct to find that there was a continuing basis for the claims after 2 December 2006 (the date for implementation of the **Framework Directive**). More generally, it is questioned whether the issue of direct effect and/or the application of the **Withdrawal Act** can be raised at this stage, if not taken below. Finally, there is an outstanding question of permission to appeal relating to one of the grounds of challenge.

2. The **2010 Order** was made by the then secretary of state for work and pensions in August 2010. With the permission of Judge Keith (who considered this matter on the initial "sift"), it is the secretary of state (who has continuing responsibility for the **2010 Order**) who now brings this appeal, albeit the secretary of state was not a party below.

3. The appeal is brought against the judgment of the London Central ET, Employment Judge Gordon Walker, sitting alone, on 10 January 2022. The case concerns a defined benefit occupational pension scheme: the T & N Retirement Benefits Scheme (1989) ("the

scheme"). The claimants (the first respondents to the appeal) are all pensioner members of the scheme, save for one claimant who is the widow of a former contributing member (this gives rise to no material difference between the claimants for present purposes and, for ease of reference in the litigation, the claimants have been referred to simply as members of the scheme). The second respondent to the appeal is the trustee of the scheme ("the trustee") and the responsible person for the purposes of section 61 of the **Equality Act 2010** ("the EqA"). The third respondent is the scheme's principal employer ("the employer"); it has been insolvent since 2006 and is a party to these proceedings solely to comply with section 120(5) **EqA**. Proceedings against the employer have been stayed in the ET and it has played no part in this appeal.

4. Mr Short KC and Ms Venkata appeared for the claimants before the ET as they do before the EAT; the trustee was represented by leading counsel at the hearing below but now appears by Ms Ling; the secretary of state played no part in the ET proceedings but is represented on the appeal by Ms Darwin.

Background

5. There was no material dispute of fact between the parties, and I take the following history from the record provided by the ET and from earlier litigation in relation to the scheme.

The background facts and the application of section 138 ***Pensions Act 2004***

6. The employer in this case had entered administration on 1 October 2001. On 11 October 2001, the Pensions Regulator appointed the second respondent as an independent trustee. The claimants had each left pensionable service and their pension benefits had come into payment no later than 31 January 2005.

7. On 10 July 2006, the employer entered into a company voluntary arrangement. When a sponsoring employer of an eligible defined benefit pension scheme becomes insolvent, the pension scheme enters into a period of assessment ("the assessment period") during which the funding level of the scheme is assessed to determine whether the Pensions Protection Fund ("PPF") must assume responsibility for the scheme in accordance with section 127(2) of the **Pensions Act 2004** (the "PA 2004"). One of the conditions that must be satisfied for the PPF to assume responsibility for a scheme is that the value of the assets of the scheme at the relevant time is less than the amount of the protected liabilities at that time (see section 127(2)(a) **PA 2004**).

8. In the present case, the assessment date was 10 July 2006; the scheme remained in assessment at the time of the ET hearing.

9. The PPF was established by the **PA 2004** to protect the rights of employees in defined benefit schemes in the event of the insolvency of an employer; it was intended to meet the obligations of the United Kingdom ("UK") under **Directive 2008/94/EC** ("the Insolvency Directive"), which codified the earlier **Directive 80/987/EEC**. The PPF is funded by the imposition of various levies on the pensions industry and is managed by the board of the PPF. The compensation payable by the PPF is set out at schedule 7 of the **PA 2004**. The level of compensation differs depending on whether a member has reached normal pension age ("NPA") under the relevant scheme at the time the assessment period begins. The **PA 2004** does not provide for a reduction of the claims of those employees who have already attained NPA at the time of the employer's insolvency. By contrast, those who have not yet reached NPA are entitled to only 90% of the value of their accrued entitlement and their claim will be subject to a prescribed compensation cap; there are also limits on the annual cost of living increases allowed in the period before the member reaches NPA, with no increases allowed for service prior to 6 April 1997.

10. Pursuant to section 138 **PA 2004**, during the assessment period, the benefits payable from a scheme must be reduced so that they do not exceed the compensation that would be payable by the PPF. There are also other provisions relevant to the relationship between the PPF and a pension scheme during an assessment period. In the present case, on 9 July 2006 (the day before the assessment period began) the scheme's actuary undertook a valuation of the scheme pursuant to section 143 **PA 2004**. From 10 July 2006, as they had not reached NPA, the claimants' pension payments were reduced in accordance with the provisions of **PA 2004**. The impact of that reduction for the individuals concerned was significant, with benefits being reduced to less than 50% of their accrued rights under the scheme.

11. In September 2011, the section 143 valuation was approved by the PPF and it was determined that the scheme had sufficient assets to cover more than 100% of the PPF level of compensation as it was then understood. In October 2011, scheme benefits were insured, under a bulk annuity contract, equivalent to just over the PPF compensation level.

The Hampshire Litigation

12. One of the claimants, Mr Hampshire, brought a legal challenge against the PPF level of compensation, arguing that the reduction of his benefit to below 50% of his accrued rights was contrary to article 8 of the **Insolvency Directive**, as interpreted by earlier decisions of the Court of Justice of the European Union. In 2019, in **Hampshire v PPF** (Case C-17/17) [2019] ICR 327; [2019] Pens LR 1, the ECJ confirmed that article 8 required member states to ensure that every employee of an insolvent employer received benefits corresponding to at least 50% of the value of their accrued pension entitlement. It further held that the PPF was to be regarded as an emanation of the state for the purposes of

establishing whether the **Insolvency Directive** had direct effect, holding (relevantly) as follows:

> "64. The [PA 2004] … contains a clear definition of who is responsible for the valuation of the assets and protected liabilities of supplementary occupational pension schemes and who bears the burden of ensuring the minimum protection provided for in article 8 of Directive 2008/94.
>
> 65. Therefore, in the United Kingdom, the responsibility for fulfilling the obligation on member states to protect the interests of employees as regards their accrued entitlement to old-age benefits under a supplementary occupational pension scheme lies with the PPF.
>
> 66. As regards whether the PPF is a body belonging to the state or whether it may be treated as comparable to the state, within the meaning of the case law …, it should be noted that the PPF is required to perform a task in the public interest and has been given, for that purpose, special powers, since it imposes levies on eligible supplementary occupational pension schemes and has the right to issue those schemes with the necessary directions in connection with their winding up. In addition, by approving the valuation of the protected liabilities of a supplementary occupational pension scheme, the Board of the PPF sets the level of protection of each employee as regards his accrued entitlement to old-age benefits, both where the PPF assumes responsibility for the scheme and where the scheme may be wound up outside the PPF.
>
> 67. Accordingly, the conditions are fulfilled for an employee to be able, in a situation such as that of Mr Hampshire, to invoke article 8 of Directive 2008/94 against the Board of the PPF."

13. The proceedings brought by Mr Hampshire under the **Insolvency Directive** did not involve the trustee and the ECJ noted that the dispute in that case "*does not concern whether Mr Hampshire may demand directly from [the scheme] or from its trustees payment of compensation corresponding to at least 50% of his accrued pension entitlement*"; it further observed:

> "69. … the purpose of the dispute is to determine whether article 8 of Directive 2008/94 may be invoked to require the Board of the PPF to conduct a revaluation of the protected liabilities. In that respect, the impact that a new calculation of the PPF compensation might have on [the scheme] would be a mere adverse repercussion on the rights of third parties and does not justify a failure to recognise that that provision has direct effect and may be relied on against a body which must be regarded as an emanation of the state …"

14. Following the ruling of the ECJ (and pending a legislative response), the PPF's interim solution was to conduct a one-off actuarial valuation of the pension benefits payable to a member from the insolvency date under the scheme and to compare this with what the PPF would have paid the member over time. The PPF compensation would be uplifted ("the Hampshire uplift") if it was estimated to be less than 50% of what the scheme would have paid the member over time; the re-calculations otherwise continued to apply the relevant caps to, or in respect of, those who were below NPA at the assessment date. Accordingly, the trustee re-calculated affected members' benefits to include the Hampshire uplift and the revised benefits were then paid on an on-going basis from the trustee's cash reserve.

15. Notwithstanding this re-calculation, the claimants still suffered significant reductions in the sums paid as compared with those to which they would otherwise have been due under the scheme. Such reductions were not suffered by those who had reached NPA by the date of the employer's insolvency and the claimants considered this failed to properly secure compliance with the protections afforded under the **Insolvency Directive** and, therefore, with the ruling in the Hampshire litigation. They also complained that this difference in treatment, between those who had reached NPA at the date of insolvency and those who had not, amounted to unlawful discrimination on the grounds of age.

The Hughes Litigation

16. These matters were the subject of subsequent proceedings, in which (relevantly) judicial review was sought of the PPF's methodology for implementation of the Hampshire uplift. In July 2021, in **R (Hughes) v PPF** [2022] ICR 215; [2021] Pens LR 17 the Court of Appeal held that the application of a cap in calculating PPF compensation payable to those who were not at, or over, NPA when the scheme entered an assessment period amounted to unlawful age discrimination.

17. In reaching that decision, the Court of Appeal was clear that this was a matter that engaged principles of EU law, essentially reasoning as follows:

> "177. … the [Insolvency] Directive is based upon treaty provisions which contemplate shared and complementary jurisdiction as between the EU and the member states and which require both to adhere to fundamental rights. The legal scope of the Directive as defined in article 1 is broad and is not limited to the setting of minimum standards. Equally, article 8, the provision in issue, is crafted in broad terms embracing subject matters extending beyond pension rights and, in so far as it permits minimum rights, these are hedged around and are strictly controlled by the terms of the Directive.
>
> 178 … article 8 covers more than pension rights and that action by member states in that area of social rights involves member states acting within the scope of EU law. As such when they do so they are implementing EU law and must adhere to established principles which, at the relevant time, included the Charter [of Fundamental Rights of the European Union]."

18. Upholding the decision of the judge at first instance in this respect, the Court of Appeal agreed that the statutory cap on compensation amounted to unjustified discrimination on the grounds of age, contrary to the principles of EU law, and must be disapplied.

19. Following that judgment, the removal of the cap on compensation thus required a further re-calculation of benefits for affected members of the scheme ("the Hughes uplift"). As at the date of the ET hearing, the trustee was in the process of calculating the Hughes uplift for affected members, including the claimants, but it was agreed that arrears of pension benefits, to include the Hampshire and Hughes uplifts, would be backdated to 10 July 2006 (the start of the assessment period). I understand that the arrears have now been paid, together with interest at bank base rate compound; the claimants' claims in the current proceedings relate to potential awards for injury to feelings and additional sums by way of interest.

These proceedings

20. On 1 November 2019, two of the claimants (Mr Hampshire and Mr Farrell) lodged their claims against the trustee and the employer in the current proceedings. On 9 August 2021,

the remaining claimants lodged their claims. It is the claimants' case that the reduced and/or capped compensation paid by the trustee amounted to direct age discrimination and a breach of the non-discrimination rule included within the rules of the scheme by virtue of section 61 **EqA**. The claimants compare themselves to members of the scheme who had reached NPA by the assessment date.

21. By section 61 **EqA**, it is provided (so far as relevant):

> "61 Non-discrimination rule
>
> (1) An occupational pension scheme must be taken to include a non-discrimination rule.
>
> (2) A non-discrimination rule is a provision by virtue of which a responsible person (A)— (a) must not discriminate against another person (B) in carrying out any of A's functions in relation to the scheme; ….
>
> (3) The provisions of an occupational pension scheme have effect subject to the non-discrimination rule.
>
> (4) The following are responsible persons— (a) the trustees or managers of the scheme; (b) an employer whose employees are, or may be, members of the scheme; …
>
> …
>
> (7) A breach of a non-discrimination rule is a contravention of this Part for the purposes of Part 9 (enforcement).
>
> (8) It is not a breach of a non-discrimination rule for the employer or the trustees or managers of a scheme to maintain or use in relation to the scheme rules, practices, actions or decisions relating to age which are of a description specified by order by a Minister of the Crown.
>
> ..."

22. The **EqA** was accompanied by the **2010 Order**, into which a temporal limitation was inserted by the **Equality Act (Age Exceptions for Pension Schemes) (Amendment) Order 2010**. By article 3 of the **2010 Order** (as amended) it is provided:

> "Occupational pension schemes: excepted rules, practices, actions and decisions

> 3. It is not a breach of the non-discrimination rule for the employer, or the trustees, or managers of a scheme, to maintain or use in relation to the scheme, (a) … (b) rules, practices, actions or decisions as they relate to rights accrued, or benefits payable, in respect of periods of pensionable service prior to 1st December 2006 that would breach the non-discrimination rule but for this paragraph."

23. It was common ground before the ET that if article 3 were applied it would exclude the claimants' claims. It was the claimants' case, however, that article 3 was part of the legislative regime in the UK that purported to give effect to the **Framework Directive**, which required that member states extend protection against age discrimination in this context from 2 December 2006 at the latest. Regardless of the status of the respondent, the claimants contended that article 3 was inconsistent with the general principles of EU law and, by analogy with the approach of the Supreme Court in **Walker v Innospec Ltd and ors** [2017] UKSC 47; [2017] ICR 1077 (which concerned a temporal limitation under the **EqA** relating to pension discrimination on the ground of sexual orientation), should be disapplied; an approach that was not affected by the **Withdrawal Act**. As the claimants put their case in their initial pleading before the ET:

> "… the principle of non-discrimination on the grounds of, inter alia, age is a general principle of EU law, embodied in Article 21 of the Charter of Fundamental Rights of the European Union." (see paragraph 32 details of claim)

As such, the claimants contended that their right not to be discriminated against was directly effective against the trustee.

24. Alternatively, the claimants contended that, for the duration of the assessment period, the trustee was to be regarded as an emanation of the state such that the **Framework Directive** was to be given direct effect as against the trustee. It was the claimants' case that the trustee during the assessment period had statutory obligations under the **PA 2004** which mirrored those of the PPF; they contended that during that period it was thus responsible

for discharging the UK's obligations under the **Insolvency Directive** in relation to the scheme.

25. The trustee did not accept the claimants' case as to the applicability of the **Framework Directive**, albeit that it took no point under the **Withdrawal Act** (see footnote 15 in the trustee's written submissions below). In its pleaded case, the trustee made clear that it did not accept the claimants' case as based on general principles of EU law (as put at paragraph 32 of the details of claim, see paragraph 23 above); in this regard the trustee contended that the case of **Walker v Innospec** was distinguishable. The trustee also expressly denied the contention that it was to be treated as an emanation of the state, making clear that it:

> "… does not accept that it, as a trustee of a private pension scheme in an assessment period, has statutory obligations mirroring those of the PPF, nor that it is responsible for discharging the United Kingdom's obligations under the EU Insolvency Directive …" (see paragraph 27 of the trustee's grounds of resistance)

Walker v Innospec

26. Given the claimants' reliance on the Supreme Court's reasoning in **Walker v Innospec** in these proceedings, it is helpful to look at that decision at this stage.

27. Mr Walker's employment with Innospec commenced in January 1980 and ended on his early retirement on 31 March 2003. On 2 December 2003, the UK, as a member state of the EU, was required to implement the **Framework Directive** insofar as it related (relevantly) to prohibiting discrimination on the ground of sexual orientation; the UK sought to comply with its obligations in this regard by means of the **Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661**, now incorporated into the **EqA**.

28. Since 1993, Mr Walker had lived with his (male) partner. On 5 December 2005 (the day the **Civil Partnership Act 2004** came into force) they applied for a civil partnership and their civil partnership was registered on 23 January 2006. Shortly thereafter, Mr Walker asked for confirmation that, in the event of his death, his civil partner would receive a spouse's pension under the Innospec pension scheme. When introducing civil partnerships, however, parliament had included an exception to the prohibition on discrimination in the context of employment; as set out at para 18 of schedule 9 of the **EqA**, that provided:

> "(1) A person does not contravene this Part of this Act, so far as relating to sexual orientation, by doing anything which prevents or restricts a person … from having access to a benefit, facility or service - (a) the right to which accrued before 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force), or (b) which is payable in respect of periods of service before that date."

Relying on that exception, Mr Walker's request was refused on the basis that his service pre-dated 5 December 2005.

29. Mr Walker brought ET proceedings complaining that Innospec had discriminated against him on the ground of his sexual orientation. He won in the ET but Innospec successfully challenged that decision before the EAT and Court of Appeal. On further appeal to the Supreme Court, however, Mr Walker was vindicated.

30. In rejecting Mr Walker's arguments in the Court of Appeal, Lewison LJ had relied on two principles of EU law, described as the "no retroactivity" principle and the "future effects" principle. When the case reached the Supreme Court, Lord Kerr JSC (with whom Lady Hale DP and Lord Reed JSC agreed) considered what was meant by those principles, observing:

> "24. The policy behind the no retroactivity principle is … the need to ensure 'legal certainty' and to protect the 'legitimate expectations' of those who have relied on the law as it previously stood. The future effects principle is simply the other side of the same coin. It is a method developed by the CJEU to avoid

> any retrospective effect and to ensure the immediate application of legislation to ongoing legal relationships. The principle is necessary because it is not always easy to identify the point at which a right accrues. Employment provides a paradigm example. How should a new EU provision be applied to an ongoing employment relationship that had begun before the provision came into force? In *Land Nordrhein-Westfalen*, the CJEU answered that question by holding that 'the application of a new rule … from the date of its entry into force, to a contract of employment concluded prior to its entry into force, cannot be regarded as affecting a situation arising prior to that date (para 52).' As Advocate General Jacobs explained at para 59 of his Opinion:
>
> > 'Applying a legal provision to a fixed-term employment contract which has not finally ended by the time that provision enters into force does not involve the retroactive application of the law; it entails only the immediate application of that provision to the effects in the future of situations which have arisen under the law as it stood before amendment.'
>
> 25. The CJEU draws a distinction, therefore, between the retroactive application of legislation to past situations (which is prohibited unless expressly provided for) and its immediate application to continuing situations (which is generally permitted). The distinction was elucidated by Advocate General Jacobs in *Andersson v Svenska Staten* (Case C-321/97) [2000] 2 CMLR 191, para 57:
>
> > 'Retroactive effect consists in the application of the rule to situations which were permanently fixed before that rule came into force. Immediate effect, which, in principle, works likewise according to the principle tempus regit actum, consists in applying the rule to situations which are continuing.'"

31. Lord Kerr acknowledged that the application of these principles can present a challenge in the context of an entitlement to an occupational retirement pension:

> "26. ... Conventionally, the right to a pension accumulates over decades. During the time that the right is accruing, actuarial assumptions are made based on existing legal conditions, notwithstanding that the pension is payable in the future. Those assumptions are upset when, because of changes in social values, a new equal treatment provision is introduced. It is not immediately easy to identify the point at which entitlement to a pension becomes 'permanently fixed' - whether for example at the date of retirement or when the pension is paid."

32. Ultimately, however, the Supreme Court (Lords Carnwath and Hughes JJSC agreeing in the outcome) concluded that the Court of Appeal had erred in its application of these principles, holding that:

> "56. … The point of unequal treatment occurs at the time that the pension falls to be paid. If Mr Walker married a woman long after his retirement, she would be entitled to a spouse's pension, notwithstanding the fact that they were not married during the time that he was paying contributions to his pension fund. Whether benefits referable to those contributions are to be regarded as "deferred pay" is neither here nor there, so far as entitlement to pension is concerned. Mr Walker was entitled to have for his married partner a spouse's pension at the time he contracted a legal marriage. The period during which he acquired that entitlement had nothing whatever to do with its fulfilment."

33. Lord Kerr considered that the Court of Appeal had wrongly equated the time at which a pension accrues with the time at which discrimination in the provision of benefits was to be judged; he explained the flaw in that approach as follows:

> "[60] … The salary paid to Mr Walker throughout his working life was precisely the same as that which would have been paid to a heterosexual man. There was no reason for the company to anticipate that it would not become liable to pay a survivor's pension to his lawful spouse. The date when that pension will come due, provided Mr Walker and his partner remain married and his partner does not predecease Mr Walker, is the time at which denial of a pension would amount to discrimination on the ground of sexual orientation."

34. Further clarifying the position by reference to the relevant implementation date for the **Framework Directive**, and having regard to the analysis of the CJEU in **Maruko v Versorgungsanstalt der Deutschen Bühnen** (Case C-267/06) [2008] ECR I-1757; [2008] 2 CMLR 32 and **Römer v Freie und Hansestadt Hamburg** (Case C-147/08) [2011] ECR I-3591; [2013] 2 CMLR 11, Lord Kerr observed:

> "67 … [Mr Walker's] entitlement to a spouse's pension did not materialise until after the transposition of the Directive but … the nature of the right that Mr Walker then acquired … was [an] entitlement to a pension calculated on the basis of his years of service before the Directive was transposed."

35. As Lords Carnwath and Hughes put the point:

> "77. … On any view Mr Walker had earned a right to a pension for his spouse. That right, and the possibility of a change in his marital status, should have been taken into account in the financing of the scheme. The question who qualified as his spouse fell to be answered at a date when it was unlawful under the Directive to discriminate as between heterosexual and same-sex marriages.

> At that time, as Lord Kerr says (para 56), he was entitled to have for his married partner a spouse's pension; 'The period during which he acquired that entitlement had nothing whatever to do with its fulfilment.'"

36. Turning then to the question whether the exception at para 18 of schedule 9 **EqA** should be disapplied, Lord Kerr observed that "*for the general principle of non-discrimination to apply, the context must fall within EU law*" (see per Lord Mance at paragraphs 61-62 **R (Chester) v Secretary of State for Justice** [2013] UKSC 63; [2014] AC 271). It was Mr Walker's case that non-discrimination had been a general principle of EU law prior to 2003; the relevance of the implementation date laid down by the **Framework Directive** was that this had the effect of bringing domestic law within the scope of EU law in relation to protection against unequal treatment in pension benefits. In any event, he argued that, even if the implementation date under the **Framework Directive** marked the point when non-discrimination became a fundamental principle of EU law, that principle was now to be applied in his case. The Supreme Court did not consider it necessary to determine what had been the position prior to 2003, holding that Mr Walker's alternative argument disposed of the issue:

> "74 … non-discrimination on grounds of sexual orientation is now a principle of EU law. It follows that any contemporary denial to his husband of a spouse's pension, calculated on all the years of Mr Walker's service, would be incompatible with the Framework Directive. …"

On that basis, to the extent that para 18 schedule 9 **EqA** authorised such discrimination, it was to be disapplied; Lord Kerr expressing his conclusion in this respect as follows:

> "76. … I would allow Mr Walker's appeal and declare that, in so far as it authorises a restriction of payment of benefits based on periods of service before 5 December 2005, paragraph 18 of Schedule 9 to the 2010 Act is incompatible with the Framework Directive and must be disapplied."

The ET's decision and reasoning

37. Returning to the present case, the issue for determination before the ET was whether the claimants' claims must fail because of article 3(b) of the **2010 Order**.

38. Accepting that, prior to 1 December 2006 (the date of the domestic implementation of the **Framework Directive** as regards age in relation to pensions), the claimants had all left pensionable service, their pension benefits had come into payment, the assessment period had commenced, and the requirement to reduce the claimants' benefits had been imposed, the ET did not consider that these factors permanently fixed the situation before that date such that the claimants did not have a continuing cause of action. The ET found there was an on-going legal relationship between the claimants and the employer after 1 December 2006, because: (1) the employer continued to make pension payments to the claimants on an on-going basis and those payments were re-calculated and uplifted; (2) the situation was not fixed by the fact that the claimants had left pensionable service and their pension benefits had come into payment before 1 December 2006 (see **Maruko** and **Römer**) – as in **Römer**, the claim was for an uplift to such payments; (3) the situation was also not fixed by the commencement of the assessment period and the consequential requirement to reduce the level of benefits: section 138(2) of the **PA 2004** made clear that the claimants did not accrue an additional or standalone right on assessment (contrary to the trustee's submission, it was wrong to characterise the accrued right in issue in this case as the right to receive benefits set in accordance with the **PA 2004** during a PPF assessment period, rather, this was a restriction to the benefits that were payable in accordance with scheme rules).

39. Given that on-going relationship, the ET held that the principle of future effects applied and the point of unequal treatment occurred at the time the pension fell to be paid, not the date when it accrued:

> "72. … What therefore matters, is that, when paid, the pension is non-discriminatory in accordance with the law at the time of payment…."

40. The ET considered that the present case was analogous to **Walker v Innospec**; reasoning: (1) it was immaterial that **Walker v Innospec** concerned a different statutory exclusion and protected characteristic, both cases concerned compliance with the **Framework Directive**; (2) although there were references to the funding of the scheme in **Walker v Innospec**, that was not the *ratio* of the decision: the funding of the scheme would only have been relevant to the temporal limitation of the law if there would have been catastrophic economic consequences of its implementation, such that the **Barber** exception (see **Barber v Guardian Royal Exchange Assurance Group** (Case C-262/88) [1991] 1 QB 344) could be applied, but that was not the case; (3) in **Walker v Innospec**, there was a continuing relationship between Mr Walker's spouse and Innospec at the time when the **Framework Directive** was implemented, because the scheme rules permitted the spouse to receive a survivor's pension even if the marriage was entered into after retirement, and thus the position did not become permanently fixed upon Mr Walker's retirement – there was no reason for Innospec to anticipate that it would not become liable to pay a survivor's pension to Mr Walker's lawful spouse.

41. Against the reasoning thus explained, at paragraph 85 of its judgment, the ET concluded:

> "85. … Article 3 of the Equality Act (Age Exceptions for Pension Schemes) Order 2010, insofar as it authorises a restriction of pension payment related to rights accrued, or benefits payable, in respect of the claimants' periods of pensionable service prior to 1 December 2006, is incompatible with the Framework Directive and is disapplied."

The grounds of appeal and the position of the secretary of state

42. The secretary of state's appeal was permitted to proceed on the following four grounds:

(1) The ET erred in failing to take account of the **Withdrawal Act**. That was most obviously so in relation to the 15 ET claims presented on 9 August 2021 (proceedings which thus commenced after the implementation period completion day of 31 December 2020); but, following **Lipton v BA City Flyer Ltd** [2021] EWCA Civ 454; [2021] 1 WLR 2545, the EAT was constrained to find that the **Withdrawal Act** had immediate application and thus impacted upon all the claims. The **Framework Directive** had not been incorporated into domestic law under the **Withdrawal Act** and, accordingly, such rights as had been claimed by the claimants before the ET were no longer available under UK law.

(2) In any event, the ET had erred in allowing the claimants to invoke the **Framework Directive** against a private party given that EU directives have never had horizontal direct effect.

(3) Accordingly, the ET erred in relying on the **Framework Directive** to disapply national law: an individual relying on a directive can only rely on the tribunal's ability to interpret a domestic provision in line with EU law; where (as here) that was not possible, national law must prevail.

(4) Further, and in any event, the ET erred in finding that the **Framework Directive** applied to the situation in issue in these proceedings when it (and, indeed, EU law more generally) did not retrospectively apply to a situation – like this – that was permanently fixed prior to the date when the relevant parts of the **Framework Directive** were transposed into national law (1 December 2006). The claimants' situation was permanently fixed prior to 1 December 2006 given that they had left pensionable service, were already in receipt of their pension benefits, and the trustee

had by then reduced their benefits in accordance with the requirement at section 138(2) **PA 2004**.

43. The secretary of state further seeks to appeal on an additional ground (5), contending that the ET was wrong to conclude that article 3(b) of the **2010 Order** was incompatible with the **Framework Directive**. In considering this matter on the initial, paper sift, Judge Keith did not give permission for this final ground to proceed as it was inadequately particularised. The secretary of state has expressed dissatisfaction with the view thus expressed on the papers and, with the agreement of the parties, has been permitted to make submissions at this hearing, pursuant to rule 3(10) **EAT Rules 1993**.

The trustee's position

44. For the trustee, it was accepted that, other than the issues raised by (4), it had not sought to argue before the ET the points now identified by the secretary of state at grounds (1)-(3) and ground (5). At the hearing below, the trustee had questioned whether the claimants were entitled to argue that their rights became definitive after article 3 of the **2010 Order** had come into effect. It had been the claimants' primary case before the ET that they could rely on general principles of EU law to argue that article 3 should be disapplied. The trustee had accepted that the claimants were entitled to rely on the general principles of EU law and had taken no point under the **Withdrawal Act**. The claimants had also put their case, in the alternative, on the basis that the **Framework Directive** had direct effect. The trustee had never conceded that it was an emanation of the state but the focus of the hearing below had been on the issues raised by the claimants' primary case.

45. On the appeal, the trustee limited its submissions to grounds (2) and (4). To the extent the ET had found that the **Framework Directive** had direct effect against the trustee as an emanation of the state, that revealed an error of approach and the appeal should be upheld

on ground (2). As for whether the claimants could rely on general principles of EU law, the key question was when had the rights that they sought to assert in the proceedings become definitive? That question was not answered by the identification of a continuing act such as the on-going payment of benefits and the ET had erred in its approach in this regard; accordingly, in the alternative, the appeal should be upheld on ground (4).

The claimants' position

46. The claimants resisted the appeal. Whilst accepting that the secretary of state was entitled to pursue an appeal against the ET's decision, notwithstanding that she had not participated in the proceedings below, the claimants objected that she should not be permitted to pursue points that would not have been open to the trustee on appeal; the secretary of state should be in no better position than the trustee had it chosen to appeal. In particular, the secretary of state should not be permitted (1) to place reliance on the **Withdrawal Act** (ground (1)) when the trustee had expressly disavowed the suggestion that this impacted upon the claimants' arguments below; and (2) to argue that the ET had erred in allowing the claimants to invoke the **Framework Directive** against a private party (ground (2)) and to disapply article 3 of **the Order** on that basis (ground (3)).

47. In any event, the claimants contended that the ET had correctly held that article 3(b) of the **2010 Order** was inconsistent with the general principles of EU law such that it was to be disapplied; although the ET had referred to the **Framework Directive**, its reasoning plainly reflected that of the Supreme Court in **Walker v Innospec**, and the rights in issue had been retained under the **Withdrawal Act**. Alternatively, the ET was entitled to consider that the **Framework Directive** had vertical effect in this instance given the position of the trustee during the assessment period; applying the tests laid down in the case-law of the Court of Justice of the EU, during the assessment period the trustee was to

be treated as an emanation of the state such as to mean that the **Framework Directive** had direct effect.

The questions for the EAT

48. Given the parties' respective positions, the questions raised by this appeal can be summarised as follows:

(1) What was the basis for the ET's decision: was its reasoning dependent upon it having treated the **Framework Directive** as having direct effect as against the trustee, or did it approach this matter on the basis of general principles of EU law? ("*The basis for the ET's decision*")

(2) If the former is the case, did the ET err (a) by failing to make a finding as to whether the trustee was an emanation of the state and/or proceeding on the basis that it was to be treated as such, and (b) by relying on the **Framework Directive** to disapply national law? Relatedly, were these issues that could properly be raised on the appeal? ("*The emanation of the state/application of the Framework Directive questions")*

(3) In either event, whether proceeding on the basis of the **Framework Directive** or on general principles, did the ET err in finding there was a continuing basis for the claimants' complaints of discrimination post 2 December 2006? ("*The nature of the claimants' rights*")

(4) Even if the ET had been entitled to find that there was a continuing basis for the claimants' claims, and whether its decision was founded upon the **Framework Directive** or upon general principles of EU law, did the ET err by failing to take account of the effect of the **Withdrawal Act**? Relatedly, was this an issue that could properly be raised on appeal? ("*The impact of the Withdrawal Act*")

49. In addition, it is necessary to determine whether an arguable question of law is raised by the proposed fifth ground of appeal, such as would engage the jurisdiction of the EAT pursuant to section 21 **Employment Tribunals Act 1996**.

The Law

EU Law

The legislative framework

50. By article 6 **Treaty on European Union** ("TEU") it is stated:

> "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> …"

51. Relevantly, article 21 of the **Charter of Fundamental Rights of the European Union** ("EU Charter") provides:

> "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> …"

52. Article 51 of the **EU Charter** addresses its field of application, providing:

> "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

53. The scope of the **EU Charter** is further addressed at article 52, paragraph 5, as follows:

> "5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

54. The **Treaty on the Functioning of the European Union** ("TFEU") provides (relevantly):

> Article 10
>
> "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."
>
> Article 19
>
> "1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."
>
> Article 288
>
> "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
>
> Recommendations and opinions shall have no binding force."

55. **Council Directive 2000/78/EC** ("the Framework Directive") was adopted on the basis of article 13 **EC Treaty** (now, article 19 **TFEU**). In the preamble to the **Framework Directive** it is explained:

> "(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
>
> …
>
> (4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right ….
>
> …
>
> (11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
>
> (12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community.
>
> …"

56. It is within the context of the general principles of EU law that the **Framework Directive** thus gives expression to the principle of equal treatment in employment and occupation, providing (most relevantly for present purposes):

By article 1:

> "Purpose
>
> The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

By article 2:

> "Concept of discrimination

> 1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
>
> 2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1."

Article 6 then clarifies:

> "Justification of differences of treatment on grounds of age
>
> 1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
>
> 2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, …"

Dealing with implementation, article 18 provides that:

> "Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest".

There is, however, an exception in relation to age and disability discrimination, as follows:

> "In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003**,** that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination."

It is common ground in this case that, pursuant to the extended period thus allowed under the

Framework Directive, the relevant date for implementation was 2 December 2006.

How member states are to apply EU law

57. The provisions of EU treaties are capable of having direct horizontal effect as between the citizens of member states. Similarly, a general principle of EU law or an **EU Charter** right can be relied on "horizontally" in certain circumstances.

58. In **Benkharbouche and anor v Embassy of the Republic of Sudan and ors** [2015] EWCA Civ 33, it was common ground that the claimants had claims falling within the scope of EU law (including under the **EqA**); the question was whether they could rely on the relevant article under the **EU Charter** (article 47) as against their employer (not a member state of the EU or an emanation of such a state, see further at paragraphs 60-62 below). The Court of Appeal noted that in **Mangold v Helm** (Case C-144/04) [2005] ECR I-9981; [2006] 1 CMLR 43, the CJEU had held that the general principle of non-discrimination was to have horizontal direct effect, notwithstanding that the time limit for transposing the **Framework Directive** (which gave expression to that principle) had not expired. **Mangold** had pre-dated the **EU Charter** but, in **Kücükdeveci v Swedex GmbH & Co KG** (C-555/07) [2010] 2 CMLR 725; [2010] IRLR 346, the CJEU then went on to adopt the same approach to article 21, which it held now contained the principle of non-discrimination (as applied in **Mangold**) and to which effect was to be given. Asking whether that was the position for all rights under the **EU Charter**, the Court of Appeal in **Benkharbouche** noted that this issue had arisen in a further case before the CJEU:

> "79. … The CJEU to an extent addressed this question in Case C-176/12 *Association de Mediation Sociale (AMS*) [2014] ECR I-000 ("*AMS*"). … In this case, a trade union representative sought to rely on Article 27 of the EU Charter (workers' right to information and consultation) against a private employer. The relevant directive had again not been duly implemented by national law and it did not have direct effect. The CJEU held that Article 27 could not be invoked horizontally because it required specific expression in Union or national law, but expressly distinguished *Kücükdeveci*. The same objection does not apply to Article 47, which does not depend on its definition in national legislation to take effect.
>
> 80. The CJEU did not, however, go on to make it clear which rights and principles contained in the EU Charter might be capable of having horizontal

> direct effect, and which would not. In our judgement, however, Article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect. It follows from the approach in *Kücükdeveci* and *AMS* that EU Charter provisions which reflect general principles of EU law will do so."

59. As the Court of Appeal thus observed in **Benkharbouche**, whatever the position of **EU Charter** rights more generally, article 21 – which expresses the general EU law principle of non-discrimination – falls within the category of rights that are capable of having horizontal direct effect.

60. As for the **Framework Directive**, as article 288 **TFEU** makes clear, the binding nature of an EU directive exists in relation to each member state to which it is addressed; it is a direction to member states to bring about the necessary changes in national law to achieve the stated objectives. Of itself, an EU directive cannot impose obligations upon private individuals and cannot, therefore, be relied upon against individuals; see **Marshall v Southampton and South West Hampshire AHA** (152/84) [1986] ECR 726: [1986] 1 CMLR 688 at paragraph 48 and **Smith v Meade** Case C-122/17 [2019] 1 WLR 1823 at paragraphs 42-45.

61. Where, however, the provisions of a directive are clear, unconditional and sufficiently precise, these can be relied upon against organisations or bodies that are legal persons governed by public law that are part of the state in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, special powers beyond those which result from the normal rules applicable to relations between individuals (**Foster v British Gas plc** (Case C 188/89) [1990] ECR I-3313; [2018] QB 1179, paragraphs 18-22), allowing that the organisation or body in question might not display all those characteristics (**Farrell v Whitty (No 2)** (Case C-413/15) [2018] 1 CMLR 46; [2018] QB 1179, at paragraph 29). As the Court of Appeal observed in **National Union of Teachers**

and ors v Governing Body of St Mary's Church of England (aided) Junior School and ors [1997] 3 CMLR 630 CA, per Schiemann LJ:

> "15. … the concept of an emanation of the state for the purposes of the doctrine of vertical effect is a very broad one …
>
> 16. The European Court of Justice has not promulgated a formula which can be applied to all situations. It has preferred to adopt the approach of the Common Law and of the French Conseil d'Etat of moving from case to case to establish principles and refine them as it goes along."

62. The direct reliance that may thus be placed upon a directive as against the state is necessary to prevent a member state of the EU from taking advantage of its own failure to comply with EU law; as the CJEU explained in **Farrell v Whitty**:

> "33. On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, not only against a Member State and all the organs of its administration, such as decentralised … but also against organisations or bodies which are subject to the authority or control of the State or which possess special powers beyond those which result from the normal rules applicable to relations between individuals ….
> 34. Such organisations or bodies can be distinguished from individuals and must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers.
> 35. Accordingly, a body or an organisation, even one governed by private law, to which a Member State has delegated the performance of a task in the public interest and which possesses for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals is one against which the provisions of a directive that have direct effect may be relied upon."

63. In addition, in proceedings between individuals, the member states' obligation to achieve the result envisaged by a directive, and their duty to take all appropriate measures to ensure the fulfilment of that objective, is binding on all the authorities of the state, including the courts (see **Von Colson v Land Nordrhein-Westfalen** (14/83) [1984] ECR 1891; [1986] 2 CMLR

430 at paragraph 26; **Marleasing SA v La Comercial Internacional de Alimentacion SA** (C-106/89) [1990] ECR I-4135; [1992] 1 CMLR 305 at paragraph 8).

64. In relation to the **Framework Directive**, in the case of **Mangold**, the CJEU noted that:

> "74. … Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Art.1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States."

In that case, the CJEU went on to hold that the principle of non-discrimination on grounds of age was to be regarded "*as a general principle of Community law …"* (paragraph 75), describing the obligation upon the national court in such circumstances as follows:

> "77. … it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law …"

65. In **Kücükdeveci**, noting that the **Framework Directive**:

> "50. … merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, [but] … the principle of non-discrimination on grounds of age is a general principle of EU law in that it constitutes a specific application of the general principle of equal treatment (see, to that effect, *Mangold* … at [74]–[76])"

the CJEU held that it was then for the national court:

> "51. … hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any

provision of national legislation contrary to that principle (see, to that effect, *Mangold* ... at [77]).”

66. In **Dansk Industri (DI) v Rasmussen** [2016] 3 CMLR 731, Advocate General Bot emphasised the primary requirement upon national courts to interpret domestic law in conformity with EU law, observing:

> “AG47 It is only when it proves impossible for the national courts to give effect to an interpretation of domestic law in conformity with Directive 2000/78 that the principle prohibiting discrimination on grounds of age becomes the rule of reference enabling the court to resolve disputes between individuals by neutralising the application of the domestic law that is inconsistent with EU law. This principle then acts as a palliative for the lack of horizontal direct effect of Directive 2000/78 and for the inability of national courts to interpret national law in conformity with that directive.”

67. In the UK, the role of the courts in this regard was considered by the Divisional Court in **R (National Council for Civil Liberties) v Secretary of State for the Home Department and anor** [2019] QB 481 Div Ct, in which it was explained (Singh LJ giving the judgment of the court):

> “64. As Lord Keith made clear in the *EOC* case [R v Secretary of State for Employment, Ex p Equal Opportunities Commission [1995] 1 AC 1], courts in this country have no power to ‘strike down’ an Act of Parliament. However, it is also clear that there may be a duty on courts in this country to ‘disapply’ incompatible domestic legislation, even primary legislation, to the extent of that inconsistency with directly effective EU law. As has subsequently been explained in the House of Lords, the relevant legislative provision ‘is not made void but it must be treated as being … 'without prejudice to the directly enforceable Community rights ...' ‘: see *Fleming (trading as Bodycraft) v HMRC* [2008] UKHL 2; [2008] 1 WLR 195, at para. 24 (Lord Walker of Gestingthorpe). As Lord Walker put it, at para. 62:
>
> > ‘… The disapplication of offending legislation is the duty of the national court, even if it involves action which would otherwise be alien to the strong judicial instinct not to intrude on the province of the legislature.’
>
> …
>
> 65. In one sense, this is a rule of interpretation. The incompatible legislation may still continue to have effect, for example, where it can properly be applied (compatibly with EU law) in respect of persons who are not entitled to the

> benefit of directly enforceable EU rights. ... An example of that can be found in the decision of the House of Lords in *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes) (No. 2)* [1999] 1 WLR 2035, at p.2041.
>
> 66. However, as Lord Walker explained, referring to the *ICI* case, in *Autologic plc v IRC* [2005] UKHL 54; [2006] 1 AC 118, at para. 128:
>
> > '… It is not a matter of construing the taxing statute, but of determining whether it is overridden by a rule from a higher legal order which gives the taxpayer companies a restitutionary claim.'"

68. In accordance with the ruling in **Mangold** and **Kücükdeveci**, it is not in dispute in the present proceedings that non-discrimination on grounds of age is a general principle of EU law, recognised as a right under the **EU Charter**, and that, in determining disputes relating to the legal protection which individuals derive from EU law, it is a principle to which the national courts of member states must give effect (as explained in **Benkharbouche**, the general EU law principle of non-discrimination (as expressed by article 21 **EU Charter**) falls within the category of rights that are capable of having direct horizontal effect). Had the ET reached its determination in this case in reliance on that general principle, the complaints at grounds (2) and (3) would fall away: by analogy with the approach adopted by the Supreme Court in **Walker v Innospec** (and subject to the points taken under the **Withdrawal Act**) it is accepted that the ET would have been entitled to seek to give effect to the general principle of non-discrimination that is part of EU law; it is, however, contended that the ET in fact did not determine this case on the basis of any such general principle of EU law but had erroneously placed reliance on the **Framework Directive** in upholding claims pursued against a private individual.

"No retroactivity" and "future effect"

69. Even if the ET had been correct in applying EU law (whether proceeding on the basis of the **Framework Directive** or on the general principle of non-discrimination), the secretary of state and the trustee argue that it erred in finding that there was a continuing basis for the claimants' complaints of discrimination after 2 December 2006 (the date by which the UK

was to implement the age provisions of the **Framework Directive**); see ground (4). The obligation upon a national court to give effect to an interpretation of domestic law in conformity with a relevant EU directive arises only once the period for the transposition of that directive has expired; see, in relation to the **Framework Directive**, **Adeneler v Ellinikos Organismos Galaktos (ELOG)** (C-212/04) [2006] ECR I-6057; [2006] 3 CMLR 30, at paragraphs 114-115. The issue raised by the appeal relates to how the national court is to apply the "no retroactivity" and "future effects" principles in circumstances in which the right to the benefits in issue will have accrued over many years, most of which will have pre-dated the protections against discrimination laid down by the **Framework Directive**. In this regard, it is helpful to refer to a number of decisions of the Court of Justice of the EU where the question of retrospective effect has been raised in relation to the application of the principle of equal treatment and pensions.

70. In **Maruko v Versorgungsanstalt der Deutschen Bühnen** (Case C-267/06) [2008] ECR I-1757; [2008] 2 CMLR 32, the court was asked whether entitlement to survivor's benefits under a pension scheme must be restricted in time, in particular, to periods subsequent to 17 May 1990 (that being the date of the judgment in **Barber v Guardian Royal Exchange Assurance Group Case C-262/88** [1991] 1 QB 344; in **Barber**, it was held that benefits under an occupational pension scheme amounted to "pay" for the purpose of a claim for equal pay – that was a ruling of such significance for pension schemes that the court restricted its effect to the date of the judgment). Mr Maruko's claim was one of sexual orientation discrimination. He was the registered life partner of a member of an occupational pension scheme, and his partner (the scheme member) had paid into the scheme throughout his working life, from 1959 until the end of September 1991. When his partner died in 2005, however, Mr Maruko was refused the pension that would have been paid automatically to a surviving married partner. Although the sexual orientation provisions of the **Framework**

Directive were to be implemented by the member states by 2 December 2003, it was argued that its provisions could not be given retroactive effect by means of a decision that it applied to periods prior to that date. On the basis that the **Framework Directive** applied in these circumstances, however, the court held that there was "*no need to restrict the effects of this judgment in time*." (see paragraph 78).

71. A claim of age discrimination was the subject of consideration in **Bartsch v Bosch und Siemens Hausgeräte (BSH) Alteredfürsorge GmbH** (Case C-427/06) [2008] ECR I-7245; [2009] 1 CMLR 5. In that case, the complainant had been refused a survivor's pension on the death of her husband (a member of the pension scheme in question) in 2004 because the rules of the scheme excluded the right to a pension of a spouse more than 15 years younger than the deceased former employee. The court held that EU law could not assist the complainant in this case as the death of Mr Bartsch had occurred before the time limit for the transposition of the relevant provisions of the **Framework Directive** into national law.

72. In **Römer v Freie und Hansestadt Hamburg** (Case C-147/08) [2011] ECR I-3591; [2013] 2 CMLR 11, the claim was again one of sexual orientation discrimination. The complainant's occupational pension entitlements were accrued during his employment from 1950 to his retirement on 31 May 1990. In October 2001, Mr Römer entered into a registered life partnership with his (same-sex) partner of some 40 years, and he applied to have his supplementary pension recalculated on the basis of the more favourable tax deductions applicable to married pensioners. On the basis that Mr Römer would be entitled to equal treatment if German life partnerships were comparable to marriage, the court held that he could pursue his claim, which related to an entitlement he was claiming from 1 November 2001, "*at the earliest after the expiry of the period for transposing the [Framework] Directive*" (see paragraph 64).

73. The case of **Ministry of Justice v O'Brien (No. 2)** [2019] ICR 505 concerned the calculation of pension entitlements due to part-time judicial office holders, where pension was earned for successive periods of pensionable service (increasing as each period of service was completed). Specifically, the court was asked whether periods of service completed prior to the deadline for transposing the relevant directive, taken into account when calculating the pension of a full-time worker, had to be taken into account when calculating the pension entitlement of a part-time worker. In answering this question, the court observed that:

> "27. … a new legal rule applies from the entry into force of the Act introducing it, and that, while it does not apply to legal situations that arose and became definitive prior to that entry into force, it does apply immediately to the future effects of a situation which arose under the old law, and to new legal situations. …"

Ruling that:

> "35. … it cannot be concluded from the fact that a right to a pension is definitively acquired at the end of a corresponding period of service that the legal situation of the worker must be considered definitive. It should be noted in this respect that it is only subsequently and by taking into account relevant periods of service that the worker can effectively avail himself of that right with a view to payment of his retirement pension.
>
> 36. Consequently, in a situation in which the accrual of pension entitlement extends over periods both prior to and after the deadline for transposition of [the Directive], it should be considered that the calculation of those rights is governed by the provisions of that Directive, including with regard to the periods of service prior to its entry into force.
>
> 37. Such a situation is, in that regard, to be distinguished from the situation … of the colleagues of the claimant who retired before the expiry of the period for transposition of [the Directive]."

74. It is to be noted that the cases of **Maruko** and **Römer** were not referenced by the court in **O'Brien**.

75. Finally, the case of **EB v Versicherungsanstalt Öffentlich Bediensteter BVA** (Case C-258/17) [2019] 2 CMLR 15, concerned a former police officer who, in 1974, had been convicted of an attempted offence of same-sex indecency on two minors. This had led to

disciplinary proceedings resulting in EB's pension being reduced by 25 per cent, a decision that took effect when he was compulsorily retired in 1976. In 2002, the criminal offence for which EB had been convicted was repealed as amounting to unjustified discrimination on the grounds of sexual orientation. Subsequently, in 2008, EB unsuccessfully applied to have the disciplinary decision annulled; thereafter, he brought a claim for the re-calculation of his pension and for back-dated higher pension benefits. On the question whether EB could rely on the **Framework Directive** in this regard, the court held:

> "65. As regards … the sanction consisting in the 25 per cent reduction of EB's pension entitlement on the basis of his compulsory retirement from 1 April 1976, it should be noted that, although the effects produced by that sanction before the expiry of the time limit for transposing Directive 2000/78 cannot … be called into question on the basis of that directive, that reduced pension continues however to be regularly paid to EB. Therefore, the application of Directive 2000/78 after the expiry of the time limit for transposing it requires, in accordance with the case law cited [relevant to the principle of non-retroactivity] …, that a review of the reduction of EB's pension entitlement as from that date be carried out, in order to put an end to the discrimination on the grounds of sexual orientation. The calculation to be carried out in the context of that review must be made on the basis of the amount of the pension to which EB would have been entitled on account of his compulsory retirement from 1 April 1976."

76. In reaching its decision in **EB**, I observe that the court had regard to both **Maruko** and **Römer** but did not refer to **O'Brien**.

77. For completeness, I also note that this issue was considered by the High Court in **Carter and anor v Chief Constable of Essex Police** [2020] EWHC 77, in which a claim of indirect age discrimination was pursued in respect of the denial of a right to a widow's pension in respect of the wife of a retired police officer. In that case, the claimants were complaining of the refusal to extend the benefit of a survivor's pension to Mr Carter's second wife because they had only married after his retirement; the rule in issue limited this benefit to the spouse of a scheme member where the marriage had occurred before the member retired. Mr Carter's first wife would have come within the rules, but she had died shortly after his retirement.

Dismissing the claim, Pepperall J concluded that the rule in question had "*extinguished the right to a widow's pension many years before*"; this was an attempt "*to give retrospective effect to the Framework Directive and 2006 regulations in order to challenge a situation that was permanently fixed long before such provisions came into force*" (see paragraphs 44-48).

Domestic Law

Domestic protection against age discrimination

78. As I have already recorded, the relevant date for implementation of the age discrimination provisions of the **Framework Directive** was 2 December 2006. Initially, the prohibition on age discrimination in relation to occupational pensions was introduced into domestic law by way of regulation 11 of the **Employment Equality (Age) Regulations 2006/1031** (the "2006 Regulations"), made under section 2(2) of the **European Communities Act 1972**.

79. The **2006 Regulations** were subsequently replaced by the **EqA**, which came into force on 1 October 2010. In the **Explanatory Notes** to the **EqA**, it is noted as follows:

> "Transposition of EU Directives
>
> 21. The Act does not itself implement EU Directives for the first time. It replaces earlier legislation which has implemented EU Directives … [including the 2006 Regulations]."

80. The protected characteristic of age is defined at section 5 **EqA**. Section 13 sets out the prohibition on direct discrimination, providing that direct discrimination because of age can be justified under section13(2), if the treatment in issue is shown to be a proportionate means of achieving a legitimate aim.

81. Section 61 **EqA** (see as set out at paragraph 21 above) provides that occupational pension schemes must be taken to include a non-discrimination rule. By sub-section 61(8), however, it will not be a breach of the non-discrimination rule for an employer, or for the trustee or

manager of a scheme to maintain or use rules, practices, actions or decisions relating to age as specified by ministerial order; in the present case, reliance is being placed on paragraph 3(b) of the **2010 Order** (set out at paragraph 22 above), which allows for a temporal limitation on the protection afforded by section 61 in respect of pension scheme rules, practices, actions or decisions relating to rights accrued, or benefits payable, in respect of periods of pensionable service prior to 1 December 2006.

The Withdrawal Act

82. Following the Brexit referendum, terms governing the UK's departure were agreed with the EU on 17 October 2019, in the form of the Withdrawal Agreement; this came into legal effect on 1 February 2020. The Withdrawal Agreement was implemented into domestic law by a series of measures, including the **Withdrawal Act**, which provided for the withdrawal of the UK from the EU on "*exit day*", defined originally as 29 March 2019 but subsequently amended to 31 January 2020. There was a further implementation period ("IP"), preserving the effect of EU law until 31 December 2020 ("IP completion day"); after that, EU law will only have effect if it falls into the category of retained EU law. As the **Explanatory Notes** to the **Withdrawal Act** confirm:

> "2. The Act ends the supremacy of European Union (EU) law, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations."

83. By section 1 **Withdrawal Act**, the **European Communities Act 1972** ("ECA") was repealed, but provision was made for EU-derived domestic legislation to continue to have effect (section 2) and for directly applicable EU law (principally EU regulations) to continue in force as part of domestic law, unless and until repealed, revoked or amended (section 3).

84. In the present proceedings it is not suggested that either section 2 or 3 would be applicable, but the claimants say this is a case that is properly to be considered as falling within section 4

of the **Withdrawal Act**, which concerns EU rights that were rendered enforceable in domestic law by virtue of section 2(1) **ECA**, which formerly provided:

> "2. General implementation of Treaties
>
> (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies."

85. By section 4 **Withdrawal Act**, it is provided:

> "4. Saving for rights etc. under section 2(1) of the ECA
> (1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day – (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and (b) are enforced, allowed and followed accordingly, continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
> (2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions or procedures so far as they - … (b) arise under an EU directive … and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case).
> (3) This section is subject to section 5 and Schedule 1 …"

86. Section 5 of the **Withdrawal Act** then provides:

> "5 Exceptions to savings and incorporation
>
> (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day.
>
> (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day.
>
> (3) …
>
> (4) The Charter of Fundamental Rights [of the European Union] is not part of domestic law on or after IP completion day.

> (5) Subsection (4) does not affect the retention in domestic law on or after [IP completion day] in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).
>
> (6) Schedule 1 (which makes further provision about exceptions to savings and incorporation) has effect.
>
> …"

87. Section 6 of the **Withdrawal Act** is concerned with how retained EU law is to be interpreted; at subsection (3) it provides:

> "(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it – (a) in accordance with any retained case law and any retained general principles of EU law, and (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences."

88. By section 6(7), it is further explained:

> "In this Act-
>
> "*retained case law*" means— (a) retained domestic case law, and (b) retained EU case law;
>
> "*retained domestic case law*" means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP completion day and so far as they— (a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
>
> "*retained EU case law*" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they— (a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
>
> "*retained EU law*" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 … (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);

> "*retained general principles of EU law*" means the general principles of EU law, as they have effect in EU law immediately before exit day and so far as they— (a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles are modified by or under this Act or by other domestic law from time to time)."

89. Turning to Schedule 1 of the **Withdrawal Act**, at paragraph 2 it is stated:

> "No general principle of EU law is part of domestic law on or after IP completion day if it was not recognised as a general principle of EU law by the European Court in a case decided before IP completion day (whether or not as an essential part of the decision in the case)."

90. By paragraph 3 it is provided:

> "(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.
>
> (2) No court or tribunal or other public authority may, on or after IP completion day – (a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law."

91. Paragraph 5 then deals with matters of interpretation, stating:

> "(1) References in section 5 and this Schedule to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in *Francovich* are to be read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after exit day in accordance with this Act.
>
> (2) Accordingly (among other things) the references to the principle of the supremacy of EU law in section 5(2) and (3) do not include anything which would bring into domestic law any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day."

92. Schedule 8 of the **Withdrawal Act** makes consequential, transitional, transitory and saving provision, and, by paragraph 39, provides (relevantly):

> "(3) Section 5(4) and paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before IP completion day.
>
> …

> (5) Paragraph (3) of Schedule 1 does not apply in relation to any proceedings begun within the period of three years beginning with IP completion day so far as – (a) the proceedings involve a challenge to anything which occurred before IP completion day, and (b) the challenge is not for the disapplication or quashing of- (i) an Act of Parliament or a rule of law which is not an enactment, or (ii) any enactment, or anything else, not falling within sub-paragraph (i) which, as a result of anything falling within that sub-paragraph, could not have been different or which gives effect to, or enforces, anything falling within that sub-paragraph."

93. The case of **Lipton and anor v BA City Flyer Ltd** [2021] EWCA Civ 454; [2021] 1 WLR 2545, concerned a claim for compensation for a cancelled flight, brought under the **Parliament and Council Regulation (EC) No 261/2004**. Upholding the claimants' appeal, the Court of Appeal (in the judgment of Green LJ, with whom the other members of the court agreed) gave guidance as to the proper approach to construing an EU regulation following the UK's withdrawal (in that case, the regulation in issue was operative prior to IP completion day and, by virtue of section 3 **Withdrawal Act**, continued to apply). Addressing other aspects of the EU *acquis communautaire*, however, Green LJ further observed:

> "*Relevance of general principles of EU law*
>
> 63. Under section 5(4) [of the Withdrawal Act] the Charter of Fundamental Rights [of the European Union] is not part of domestic law … on or after IP completion day. However, under section 5(5) this does not affect the retention in domestic law on or after IP completion day of 'any fundamental rights or principles which exist irrespective of the Charter'. Further, under section 5(5) any 'references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles.
>
> 64. Paragraph 2 of Schedule 1, entitled 'General principles of EU law', makes general principles part of domestic law provided they were recognised in relevant case law prior to IP completion day …"

94. In **Adferiad Recovery Ltd v Aneurin Bevan University Health Board** [2021] EWHC 3049 (TCC), His Honour Judge Keyser QC (sitting as a Judge of the High Court) was concerned with a claim (issued after IP completion day) that was (relevantly) founded on what were said to be general principles of EU law relevant in the field of public procurement. Specifically,

the claimant contended that the defendant was subject to the general principles and enforceable obligations of retained EU law by virtue of section 4 of the **Withdrawal Act**, relying on "*the general principles of equal treatment, transparency, non-discrimination, non-arbitrariness, proportionality, good administration, procedural fairness, and the protection of legitimate expectations*" and a requirement to conduct the procurement "*in a manner which was free from manifest error*". Rejecting the claim, HHJ Keyser QC concluded that "*retained general principles of EU law*" amounted to interpretative rules for that domestic law that was "*retained EU law*" but were not, of themselves, "*retained EU law*"; reasoning as follows:

> "116. A convenient starting point for consideration of these arguments is the definitions in section 6 of the 2018 Act. To paraphrase: "retained EU law" is anything that continues to be part of domestic law by virtue of (for present purposes) section 4 of the 2018 Act. Thus it is *domestic* law. By virtue of section 6(3) of the 2018 Act, any question as to the meaning or effect of EU retained law is to be decided in accordance with any 'retained case law' (whether of the CJEU or the domestic courts) and any 'retained general principles of EU law' (general principles of EU law existing as at 31 December 2020) so far as they relate to retained EU law that is preserved in domestic law by (here) section 4 of the 2018 Act and is not otherwise excluded. Accordingly, 'retained EU case law' and 'retained general principles of EU law' constitute interpretative rules for domestic law that is 'retained EU law' but are not per se 'retained EU law', though the definitions do not preclude them being so. (I should not have thought that section 6(3), by giving retained general principles of EU law an interpretative authority, makes them part of domestic law; the contrary seems indicated by their strictly interpretative function in specific cases. Given that limited function, the answer to this rather Dworkinesque question may not much matter.)"

95. To the extent that Green LJ in **Lipton** had suggested that schedule 1 paragraph 2 of the **Withdrawal Act** made provision for the general principles of EU law to be part of domestic law (see paragraph 64 of his Judgment), HHJ Keyser QC disagreed (noting that those remarks were not part of the *ratio decidendi* of the case), opining:

> "117. … The point of para 2 of Schedule 1, I should think is simply to make clear that the contents of domestic law in the future are a domestic matter; the recognition by the CJEU of new principles of EU law is in no way constitutive of domestic law."

96. In any event, HHJ Keyser rejected the claimant's argument that paragraph 3 of schedule 1 was to be read subject to paragraph 2:

> "118. … There is nothing in Schedule 1 that suggests such a reading, which is contrary to the plain meaning of para 3. … [and] is also contrary to Schedule 1, para 5, which makes clear that references in the Schedule (including para 3) 'to any general principle of EU law … are to read as references to that principle … so far as it would otherwise continue to be, or form part of, domestic law' after 2020 by virtue of the 2018 Act. In my judgment, therefore, para 3 is straightforward: general principles of EU law do not ground a cause of action in domestic private or public law."

97. HHJ Keyser concluded:

> "120. The upshot is that the status of general principles of EU law is that they are a form of interpretative rule as regards any question concerning the validity, meaning or effect of any retained EU law …
>
> 121. Therefore the claimant's claim …, … based squarely on general principles of EU law that are said to have been recognised in domestic law, is untenable."

98. In **Jersey Choice Limited v Her Majesty's Treasury** [2021] EWCA Civ 1941, the Court of Appeal was concerned with a **Francovich** damages claim, founded upon what was said to have been the failure of the UK to properly implement an EU directive (see **Andrea Francovich v Italian Republic** Joined Case C-6/90 and C-09/90 [1991] ECR I-5359). In that case, if the claim were to succeed, it could only do so on the basis that there had been a breach of general principles of EU law. Although the proceedings had commenced prior to IP completion day, the Court of Appeal was considering the position after that point and was thus required to have regard to the potential impact of the **Withdrawal Act**. Doing so, Green LJ (with whom the other two members of the court agreed) noted that there were three important exceptions to the rights that were otherwise preserved and saved under the **Withdrawal Act**, as follows:

> "21. … (a) the EU Charter of Fundamental Rights was not part of UK domestic law on or after IP completion day (section 5(4)); (b) there was no right of action in domestic law on or after IP completion day based upon a

> failure to comply with any of the general principles of EU law (section 5(6) and Schedule 1 paragraph 3); (c) there was no right in domestic law on or after IP completion day to *Francovich* damages (section 5(6) and Schedule 1 paragraph 4)."

99. That said, Green LJ further observed, that:

> "22. Under … Schedule 8 paragraph 39(1),(3), these exceptions apply to anything occurring before IP completion day in addition to anything occurring after that date. But the three exceptions do *not* apply to proceedings commenced, but not finally decided, before a court or tribunal in the UK before IP completion day.
>
> 23. In addition the removal of a right of action relating to general principles of EU law does not apply to any proceedings commenced within the period of 3 years beginning with IP completion day insofar as the proceedings involved a challenge to acts occurring before IP completion day and the challenge was *not* for the disapplication or quashing of an Act of Parliament or a rule of law which was not an enactment or certain other specified laws (see … Schedule 8 paragraph 39(5)). ….
>
> 24. Rights which were saved under this somewhat convoluted regime form part of the body of retained EU case law and retained general principles of EU law in accordance with which domestic courts must decide any questions as to the validity meaning or effect of retained EU law so far as relevant and so far as that law is unmodified on or after IP completion day (sections 6(3) and 6(7))."

100. Having regard to the entirety of the structure thus laid down by the **Withdrawal Act**, and given that the claim had been commenced before IP completion day, the Court of Appeal held that the UK's withdrawal from the EU did not impact upon the claimant's "*right to pursue its damages claim, its reliance upon its rights under the EU Charter and/or its reliance upon rights under general principles of EU law*".

Raising new points on appeal

101. The EAT has a discretion to allow new points of law to be argued on appeal. The discretion is regulated by authority, summarised at paragraph 50 of **Secretary of State for Health and ors v Rance and ors** [2007] IRLR 665 EAT, and will be exercised only in exceptional circumstances, especially where the point would require fresh issues of fact to be investigated

(**Jones v Governing Body of Burdett Coutts School** [1999] ICR 38 CA, at p 43G-44E). Even where the new point relates to jurisdiction, it is a matter of discretion as to whether it can be raised (**Barber v Thames Television plc** [1991] IRLR 236 EAT, paragraph 38).

102. Having reviewed the relevant authorities, the EAT in **Rance** identified the possible circumstances in which the discretion might be exercised, including those cases in which the EAT is in possession of all the material necessary to dispose of the matter fairly, without recourse to further hearing (**Rance** paragraph 50(6)(b)), the point raises a discrete issue of law, requiring no further factual enquiry (**Rance** paragraph 50(6)(f)), or it raises a matter of particular public importance, requiring neither further factual enquiry nor evaluation by the ET (**Rance** paragraph 50(6)(g)).

Discussion and Conclusions

The basis for the ET's decision

103. In considering the questions raised by this appeal, my starting point must be the ET decision under challenge, and to ask what was the basis for that decision? Does the ET's reasoning depend upon it having assumed that the **Framework Directive** had direct effect as against the trustee or, properly understood, does that reasoning reveal that the ET approached this matter on the basis of general principles of EU law of equal treatment and non-discrimination (the two terms are used interchangeably in the jurisprudence of the EU and in the relevant UK case law)?

104. In setting out its conclusion, at paragraph 85 of its judgment, the ET stated only that the **2010 Order** was incompatible with the **Framework Directive**. On its face, therefore, the ET's disapplication of the **2010 Order** might appear to have been dependent upon it having permitted the claimants to rely on the **Framework Directive** as being directly effective against the trustee. As Mr Short and Ms Venkata point out, however, the wording of

paragraph 85 is almost identical to that adopted by Lord Kerr in setting out the conclusion at paragraph 76 **Walker v Innospec**: *"[the provision in question] is incompatible with the Framework Directive and [is/must be] disapplied.*" It is not suggested that the Supreme Court's decision in **Walker v Innospec** was dependent upon an assumption that the **Framework Directive** was to be given direct effect as against the private sector employer in that case; rather, as the secretary of state has put the point in argument:

> "The relevance of the Framework Directive in Walker was that Mr Walker argued that the date when the period for the Framework Directive's transposition expired, was the date when the Framework Directive had the effect of bringing UK law within the scope of EU law, and the general principle of law in question was said to be effect." (footnote 13 of the secretary of state's skeleton argument for the appeal)

105. That the decision in **Walker v Innospec** was founded upon the principle of equal treatment, recognised and enforceable as a general principle of EU law, is clear when regard is had to the earlier reasoning and to Lord Kerr's engagement with the way Mr Walker had put his case (see paragraph 74, set out at paragraph 36 above). It is, of course, trite that a judgment is to be read fairly and as a whole. Moreover, where the judgment is that of a first instance tribunal, an appellate court must exercise particular caution against adopting an unduly pernickety critique, as Mummery LJ said in **Brent LBC v Fuller** [2011] ICR 806, at p 816:

> "Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."

See also the guidance provided by Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 at paragraphs 57-58). As Singh LJ put the point at paragraph 42 **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694: "*An ET is not sitting an examination*."

106. In the present case, the ET was clear that it was the claimants' case that article 3 of the **2010 Order** was to be disapplied "*in accordance, or by analogy, with the reasoning of the Supreme*

*Court in [**Walker v Innospec**]*" (ET paragraph 10). The focus of the ET's reasoning was on the application of the no retroactivity principle and the future effects principle; that reflected the focus of the parties' submissions below. In its analysis of the competing arguments before it, however, the ET was clear that it considered the claimants' circumstances to be analogous to those of Mr Walker, and that Lord Kerr's reasoning in that case was to be applied in the present proceedings. Although it might have been preferable if the ET had more clearly identified that it was reaching its decision on the application of the equal treatment principle as a general principle of EU law, the claimants had clearly differentiated between (1) a claim founded upon the general principle of non-discrimination, as embodied by article 21 of the **EU Charter** (their primary case), and (2) reliance on the **Framework Directive** as directly effective against the trustee as an emanation of the state during the assessment period (their alternative case), and it is tolerably clear that the ET had accepted the claimants' primary case, as set out at (1). Indeed, had the ET intended to uphold the claims on the basis of the claimants' alternative case, it might have been expected to have then engaged with the question whether or not the trustee during the assessment period was to be viewed as an emanation of the state – a dispute that had been identified in the pleadings – but there is no indication that it considered this relevant to its reasoning.

107. In the circumstances, reading the ET's judgment fairly and as a whole, I consider that the decision in this case, like that of the Supreme Court in **Walker v Innospec**, was founded upon the principle of equal treatment, recognised and enforceable as a general principle of EU law. On this basis, I accordingly reject grounds (2) and (3) of this appeal.

108. Should it be considered that I am wrong in my analysis of the ET's reasoning, however, I have gone on to consider the questions that would then arise if the decision was to be treated as founded upon the **Framework Directive**.

The emanation of the state and/or the application of the Framework Directive questions

109. If the ET's decision is to be understood as founded upon the **Framework Directive**, two points of challenge are raised by the appeal: (1) did the ET err in allowing the claimants to invoke the **Framework Directive** against a private party, when EU directives could not have horizontal effect? and (2) did the ET err in relying on the **Framework Directive** to disapply national law, when it could only be used as an interpretative aid in this context?

110. Addressing the first point, the claimants raise a preliminary objection that this was not a point taken by the trustee before the ET and they argue that it would therefore not have been open to the trustee to raise this issue on appeal; the secretary of state, it is said, should not be in a better position than the trustee in this regard.

111. I do not consider this to be a valid objection. First, in its pleaded case, the trustee had expressly denied the contention that it was to be treated as an emanation of the state (see paragraph 27 of the trustee's grounds of resistance). Given that it was the claimants' contention that a private pension scheme was to be treated as an emanation of the state in these circumstances, it was for the claimants to make good that assertion; the fact that the trustee had not addressed this point further in its arguments before the ET did not mean it was conceded. Secondly, even if I was wrong in my understanding as to the position below, this is a point that I am satisfied can properly be raised on appeal as falling within the kind of circumstances described in **Rance** at paragraph 50(6)(b), (f) and (g) (see paragraphs 101-102 above). Whilst the ET made no relevant findings of fact on this issue, it is not suggested that there was any material before it that is not now before the EAT; indeed, it is common ground that no further factual enquiry is required. Although Mr Short contended that the issues raised were properly to be matters of evaluation by the ET, the parties' submissions on this question (the claimants addressing the point without prejudice to their contention that it was not open to the secretary

of state to raise it on appeal) have focused on the legal arguments and on the statutory framework of powers and responsibilities under the **PA 2004**; nothing has been identified that would suggest that the ET would be in any different position to the EAT to determine this matter. Finally, although questions relating to EU law may be rather less common (given the UK's withdrawal from the EU), I can see that this is a point of potentially wider public importance, given that it would be likely to impact upon other trustees of pension schemes in a similar period of assessment under the **PA 2004**.

112. Turning then to the substance of the points raised on the appeal, there is no dispute between the parties as to the relevant legal framework; this is set out at paragraphs 60-67 above, and can be summarised as follows:

(1) An EU directive is binding, as to the result to be achieved, upon each of the member states to which it is addressed (**TFEU** article 288).

(2) An EU directive cannot impose obligations upon private individuals and does not, therefore, have horizontal direct effect as between private citizens (**Marshall v Southampton**; **Smith v Meade**).

(3) A member state cannot take advantage of its own failure to comply with EU law and, therefore, a provision within an EU directive that is sufficiently clear, unconditional and precise can be relied upon as against organisations or bodies that are legal persons governed by public law that are part of the state in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, special powers beyond those which result from the normal rules applicable to relations between individuals (**Foster v British Gas**), allowing that the organisation or body in question might not display all those characteristics (**Farrell v Whitty**).

(4) Additionally, in proceedings between private individuals, the national court (as an authority of the state) is under an obligation to give effect to directly effective EU law, such that it should seek to interpret domestic law in conformity with a relevant directive (**Von Colson**; **Marleasing**); if it proves impossible for the national court to interpret domestic law in conformity with the directive, then it would be required to disapply the domestic law in issue (**Mangold**; **Kücükdeveci**).

113. For the claimants it is emphasised that a broad approach is to be taken to the determination of whether a body is to be treated as an emanation of the state (see the judgment of Schiemann LJ in the **NUT** case; set out at paragraph 61 above). In **Farrell v Whitty** the CJEU had found that the Motor Insurance Bureau Ireland ("MIBI"), although governed by private law, was an emanation of the state as it was performing a task that contributed to the protection of victims of motor accidents and thus helped Ireland meet its obligations under **Directive 84/5/EEC** on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles. In that case, Advocate General Sharpston had opined that, if the member state had both entrusted the body concerned with performing a public service, which the state might otherwise need directly to perform, and had equipped that body with some form of additional powers to enable it to fulfil its mission effectively, the body in question was to be regarded as an emanation of the state; the legal form of the body in issue was irrelevant (see paragraph 120 of the Advocate General's opinion).

114. As for the trustee, the claimants contend that, since the scheme entered the assessment period, the trustee had been performing a task in the public interest rather than acting as a trustee governed by private law; it was effectively acting as a proxy for the PPF by administering its compensation scheme, which had been introduced to satisfy the UK's obligations under the **Insolvency Directive**. The scheme was essentially under the control of the state given that the PPF board not only fixed the rates of payments that could be made to pensioners (section

138 **PA 2004**) but was also able to give directions to the trustee (including in respect of legal proceedings; see section 134 **PA 2004**), to prescribe the approach to valuations (sections 143-144) and could ultimately assume responsibility for the scheme (sections 160-161). To the extent that it was necessary to show special powers, the effect of the **PA 2004** was that the trustee was freed from the obligation to act consistently with its trust law obligations under the rules of the scheme (section 138), was able to seek loans from the PPF (section 139) and could apply for reconsideration of PPF determinations in certain circumstances (section 151). More generally, failing to treat the trustee as an emanation of the state risked allowing the PPF to benefit from any failure to comply with the **Framework Directive** (as would be the case if it ultimately assumed responsibility for the scheme).

115. I note that, in **Hampshire v PPF** the ECJ confirmed that the PPF was to be regarded as an emanation of the state for the purposes of establishing whether the **Insolvency Directive** had direct effect (see paragraphs 12-14 above); the reasoning of the court treating the PPF as in a broadly analogous position for these purposes as the MIBI in **Farrell v Whitty**. In my judgement, the trustee is in a very different position. Although the trustee during the assessment period is required to pay reduced benefits in certain circumstances, it is not thereby administering the PPF compensation scheme so as to satisfy the requirements of the **Insolvency Directive** on behalf of the PPF board or the UK state. Rather, the trustee continues to act *qua* trustee: meeting its legal obligation to pay the pensions to which the scheme members are entitled, albeit that it is constrained by legislation to pay reduced sums in certain instances, and continuing to act in the interests of the individuals to whom it owes fiduciary duties – it is not given any special powers such as would absolve the trustee from those responsibilities. In saying this, I do not mean that the legal *form* of the body in question is determinative (it is not), but I do consider it relevant that, *as a matter of substance*, the

obligation on the trustee continues to be a fiduciary one, owed to the members of the scheme, not to the PPF (or the UK state).

116. Although the ECJ in **Hampshire v PPF** was not directly concerned with the position of the trustee, I do not consider it entirely irrelevant that it saw the scheme (for which the trustee had responsibility) as a third party; it was not seen as part of the PPF compensation scheme (see paragraph 69 **Hampshire v PPF**, set out at paragraph 13 above). This, it seems to me, is consistent with the fact that the state has not entrusted the trustee with the performance of a public service that it would otherwise perform itself. The trustee remains concerned with ensuring that the assets of the scheme are preserved so that they are sufficient to meet the protected liabilities of the scheme; the PPF board, for its part, retains responsibility for prescribing the correct approach to valuations and for determining whether it is to assume responsibility for the scheme. Although the PPF board imposes additional regulation on the trustee in how it continues to carry out its private law functions, the trustee remains concerned with the administration of a scheme that is properly to be considered as a third party, separate from the PPF. Equally, the state has not equipped the trustee with some form of additional powers: the trustee is required to act within the legal restrictions imposed by the **PA 2004**, it is not afforded any power or freedom to act other than as trustee. As for the other "powers" to which the claimants refer, I cannot see that the ability to apply to the PPF for a loan, or for a reconsideration of a determination, would amount to "special powers".

117. Allowing that the concept of "emanation of the state" is to be broadly interpreted (per Schiemann LJ in the **NUT** case), I am not persuaded that it extends to cover the position of the trustee in this case. There may be many contexts in which a private entity is constrained to act in a particular way by regulation (in submissions, Ms Ling pointed to the powers that may, for example, be exercised by the Pensions Regulator under section 13 **PA 2004**); that does not mean that it is to be treated as an emanation of the member state. In my judgement,

the particular restrictions imposed on the trustee by the **PA 2004** do not place the trustee under the control of the state and it had neither been required to perform a task in the public interest nor given special powers to do so. If the ET's decision was dependent upon it having allowed the claimants to directly invoke the **Framework Directive** against the trustee, I would consider that it had thereby erred in law.

118. I can take the second point of challenge in relation to the **Framework Directive** more shortly. If, as I have concluded, the trustee was to be treated as a private individual, and not as an emanation of the state, then the ET erred in purporting to disapply article 3 of the **2010 Order** on the ground that it was incompatible with the **Framework Directive**: to the extent that a national court is under an obligation to disapply inconsistent domestic legislation, that can only arise in respect of directly effective EU law (and see the reference to **R (NCCL) v SSHD**, at paragraph 67 above).

119. I have been considering these points in the alternative; my primary conclusion is, of course, that the ET's decision was founded not upon the **Framework Directive** but upon the principle of equal treatment as a general principle of EU law. Turning next to the issue whether the ET erred in finding there was a continuing basis for the claimants' complaints of discrimination after 2 December 2006, I note that this is a question that would arise on either reading of the ET's reasoning.

The nature of the claimants' rights

120. The question raised by the fourth ground of appeal requires an analysis of the nature of the claimants' rights in the context of the no retroactivity and future effects principles. The secretary of state and the trustee contend that the ET erred in concluding that the principle of non-discrimination on grounds of age (whether derived from general principles of EU law or the **Framework Directive**) could apply to these claims when the matters about which the

claimants were complaining were permanently fixed prior to 2 December 2006 (the date on which the **Framework Directive** fell to be implemented in relation to age discrimination and, therefore, the date on which the general principle of non-discrimination on grounds of age was effective). Reliance is placed on the following facts: (i) that the claimants' pension rights had accrued prior to 1 December 2006; (ii) the claimants had left pensionable service no later than 31 January 2005 and their pension benefits came into payment on or before this date; (iii) the alleged act of unequal treatment – the reduction of the claimants' benefits – had taken place on 10 July 2006. The issue was when did the rights that were sought to be asserted in the proceedings become definitive? The secretary of state and the trustee say that the answer to that question in the present proceedings ought to have been that, consistent with the analysis in **O'Brien** and **Carter**, the situation of the claimants had become definitive prior to 1 December 2006.

121. As Lord Kerr observed in **Walker v Innospec**, the policy behind the no retroactivity principle is the need to ensure legal certainty and to protect the legitimate expectations of those who have relied on the law as it previously stood; in accordance with this principle, a new law is not to be understood as unpicking that which has already occurred – that which has become "*definitive*" (**O'Brien**) or "*permanently fixed*" (**Walker v Innospec**). It is this principle that explains the conclusions reached in **Bartsch** (the refusal of the survivor's pension had taken place in 2004 and Mrs Bartsch's position had been fixed at that time; she could not rely on the **Framework Directive** to revisit that refusal) and in **Carter** (the denial of the second Mrs Carter's right to a widow's pension had taken place many years before the **Framework Directive** came into effect). Where, however, there is an on-going relationship (such as an on-going employment relationship), the application of the new law in that situation will not offend the non-retroactivity principle because it is simply giving immediate effect to the new provision in "*the future of situations which have arisen under the law as it stood before*

amendment" (see the citation at paragraph 24 **Walker v Innospec**; set out at paragraph 30 above). The distinction is between the retroactive application of a new law to past situations (generally prohibited under the non-retroactivity principle) and its immediate application (consistent with the future effects principle) to continuing situations (generally permitted); see per Lord Kerr at paragraph 25 **Walker v Innospec**; paragraph 30 above).

122. Understanding the distinction in this way explains the conclusions reached in **Römer** and **EB**. These cases are not (as Ms Ling suggested in oral submissions) "*outliers*" but are orthodox applications of the future effects principle. In **Römer**, although the decision to refuse Mr Römer's application for enhanced benefits had taken place in 2001, he remained a member of the pension scheme and was therefore entitled to claim those benefits from the implementation date of the **Framework Directive**. Similarly, in **EB**, the claim for a recalculation of EB's pension benefits, to remove the sexual orientation discrimination prohibited by the **Framework Directive**, could take place with effect from 3 December 2003 (the relevant date for transposition) notwithstanding that the decision in issue had been put into effect in 1976.

123. The situation of the claimants in the current proceedings is analogous to that of Mr Römer and EB; there was (and is) an on-going relationship within which the trustee has to make decisions (consistent with its fiduciary obligations) as to the payment of benefits under the scheme. In contrast to Mrs Bartsch and Mrs Carter, the claimants are not asking that some earlier, pre-1 December 2006, relationship (or potential relationship) be resurrected; rather, they invoke the future effects principle to ask that they are not discriminated against on grounds of age from the date when the **Framework Directive** took effect (thus giving the claimants the right to rely directly on the general EU law principle of equal treatment).

124. In reaching this conclusion, I accept that the First Chamber of the ECJ in **O'Brien** drew a distinction in that case between the position of the claimant and that of his colleagues who

had retired before the implementation date of the relevant directive. The suggestion made by the secretary of state and the trustee is that this demonstrates that the legal rights of those who have retired before the introduction of the relevant EU law must be considered definitive. That, however, would be entirely inconsistent with the court's earlier analysis in **Römer** and with the conclusion reached by the Grand Chamber of the ECJ, only some two-three months after the judgment in **O'Brien**, in **EB**. On my reading of the judgment in **O'Brien**, the point the court was in fact making was in response to the submissions of the UK government; it was not making a definitive ruling upon the potential rights of those who had retired before the implementation date of the relevant directive but was merely observing that Mr O'Brien's case was different to the situation postulated by the UK government.

125. For completeness, I also acknowledge that, in applying domestic law relating to the time limits for bringing proceedings, the Supreme Court in **Miller and ors v Ministry of Justice** [2019] UKSC 60; [2020] 2 All ER 621 allowed that the claim might be made "*during his period of service … and, at the point of retirement …*" (see per Lord Carnwath at paragraph 34). I do not, however, consider that this impacts upon my analysis. As Lord Carnwath observed at paragraph 30 of his judgment (with which the other members of the court agreed), the issue in that case was purely one of domestic law; the Supreme Court in **Miller** was not concerned with questions of non-retroactivity relating to the introduction of EU rights.

126. As the ET permissibly held in the current proceedings (see ET paragraph 70): (1) after 1 December 2006, the trustee continued to make pension payments to the claimants on an on-going basis and these payments were recalculated and uplifted; (2) consistent with **Römer** and **EB**, the situation was not fixed by the fact that the claimants had left pensionable service and their pension benefits had come into payment before 1 December 2006 - as in **Römer**, the claimants were asserting an on-going right to an uplift to those payments; (3) the commencement of the assessment period, and the consequential requirement to reduce the

level of benefits, did not permanently fix the situation either: the claimants continued to assert their rights under the scheme. On this final point, the ET rejected the submission that the accrued right in this case was the right to receive benefits set in accordance with **PA 2004** during the assessment period. That, it seems to me, is plainly correct: the relevant relationship is that between the claimants and the scheme and the ET's finding appropriately gives weight to the position of the trustee *qua* trustee, independent of the PPF.

127. For all the reasons I have explained, I therefore reject the fourth ground of appeal.

128. At this stage, I turn to the first ground of appeal and the question whether the claimants' claims are precluded by reason of the **Withdrawal Act**.

The impact of the Withdrawal Act

129. Before addressing the potential impact of the **Withdrawal Act**, I need first to consider the claimants' objection to this point being taken for the first time on appeal. In this respect, it is undoubtedly the case that this was a point that was not taken by the trustee below; indeed, it was conceded that the claimants' arguments, founded on **Walker v Innospec**, "*remain available to the Claimants under the provisions of the European Union (Withdrawal) Act 2018"*. Although that was a clear concession (albeit that the trustee's reliance on section 2 of the **Withdrawal Act** means that the basis for the concession is less than clear), I consider that exceptional circumstances exist in this instance such that the secretary of state should be permitted to take the point on appeal. This is a matter of some public importance (albeit that this consideration may be time-limited) and it requires neither further factual enquiry nor evaluation by the ET (and see **Rance** paragraph 50(6)(b)(f) and (g)).

130. Having allowed that the point can be taken, I have considered the potential application of the **Withdrawal Act** on the basis that the ET's decision was (as I have concluded) based upon its

application of the principle of equal treatment/non-discrimination as a general principle of EU law.

131. As I have set out above (see paragraphs 57-59 above), prior to the UK's withdrawal from membership of the EU, the general EU law principle of non-discrimination, as expressed at article 21 **EU Charter** (see **Kücükdeveci**), gave rise to a right that was capable of having horizontal direct effect in the UK (see **Benkharbouche**). That was the basis for the Supreme Court's decision in **Walker v Innospec** (see per Lord Kerr at paragraph 74; paragraph 36 above) and it remained the position immediately prior to IP completion day (31 December 2020).

132. Subsequent to IP completion day, however, "*retained EU law*" is defined as that which "*continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4*" of the **Withdrawal Act** (see section 6(7)). The claimants do not suggest that they can rely on a provision that continues to be, or forms part of, domestic law by virtue of sections 2 or 3 of the **Withdrawal Act**; they contend, however, that they can continue to rely on the general principle of non-discrimination pursuant to section 4.

133. In **Lipton v BA City Flyer**, Green LJ suggested (*obiter*) that general principles of EU law were made part of domestic law by virtue of paragraph 2 of schedule 1 of the **Withdrawal Act**. As HHJ Keyser observed in the **Adferiad** case, however, that paragraph merely provides that a general principle of EU law will not be part of domestic law on or after IP completion day unless it was recognised as such by the European Court prior to that date. Green LJ's observation in **Lipton v BA City Flyer** was, however, made in the context of his consideration of section 5(4) of the **Withdrawal Act** and I do not read this passage (set out at paragraph 93 above) as setting out any view as to how "*retained EU law*" was to be understood.

134. In **Adferiad** (see paragraphs 94-97 above) HHJ Keyser observed that "*retained EU law*" will be anything that continues to be part of domestic law by virtue of (relevantly) section 4 of the **Withdrawal Act**. He considered, however, that the "*retained general principles of EU law*" amounted to merely "*a form of interpretative rule*", potentially relevant to any question concerning the validity, meaning or effect of any retained EU law; he did not consider that such general principles could themselves amount to "*retained EU law*". The reasoning in **Adferiad** focuses on the interpretative provisions at section 6 of the **Withdrawal Act** and on the further provisions regarding exceptions to savings and incorporation at schedule 1; there is no further analysis of what might be included within section 4.

135. Returning to section 4 of the **Withdrawal Act**, it becomes apparent that it is necessary to have close regard to section 2(1) of the **ECA**: the "*rights, powers, liabilities, obligations, remedies and procedures*" retained in domestic law under section 4 are defined in terms of the rights that were recognised and available under section 2(1) of the **ECA**. In turn, section 2(1) **ECA** made clear that all "*rights, powers, liabilities, obligations, remedies and procedures … created or arising by or under the Treaties …, as in accordance with the Treaties are without further enactment to be given legal effect or used in the UK*" were to be recognised and available in UK domestic law. The assumption made in **Adferiad** would appear to be that this could not include general principles of EU law. That approach would, however, fail to engage with the way in which the general principles of EU law have been treated as rights under the **EU Charter**, recognised as having the same legal effect as EU treaties, and with the way those principles have clearly been treated as giving rise to directly enforceable rights in UK domestic law. Relatedly, it would potentially raise a question as to the purpose of section 5(4) of the **Withdrawal Act**.

136. In the present proceedings, I am concerned with the general principle of non-discrimination/equal treatment. In **Mangold** that principle was held to be capable of having

direct effect; it was subsequently given expression by article 21 of the **EU Charter**. As article 6(1) **TEU** provides, the **EU Charter** is to have "*the same legal value as the Treaties*" (article 6(1) **TEU** having been introduced by the **Treaty of Lisbon**, which was included within the list of treaties at section 1(2) **ECA** by virtue of section 2 **European Union (Amendment) Act 2008**) and it has been treated as similarly directly enforceable by the UK courts (**Benkharbouche**; **Walker v Innospec**), albeit that could only be the case where the circumstances fell within the scope of EU law (see article 6 **TEU**, articles 51 and 52 **EU Charter**, and the references in **Walker v Innospec** cited at paragraph 36 above). In the present case, the claims are concerned with an exemption to a protection (the equality rule under section 61 **EqA**) that was relied upon as the UK's means of implementing the **Framework Directive** post 1 December 2006 (that much is made clear in the **Explanatory Notes** to the **EqA** (see paragraph 79 above)); as such they plainly fall within the scope of EU law. Given the recognition of the right expressed at article 21 of the **EU Charter** prior to IP completion day, I consider this falls to be treated as part of domestic law by virtue of section 4 **Withdrawal Act**. Indeed, if such a right under the **EU Charter** could not thus be treated as "retained EU Law", it would be difficult to see the necessity for the exclusion of such rights at section 5(4).

137. That, however, raises the next problem for the claimants, as section 5(4) **Withdrawal Act** makes plain that the **EU Charter** is not to be treated as part of domestic law on or after IP completion day. On the claimants' case, this is not fatal as the general principles on which they rely do not depend on the **EU Charter** but existed (per **Mangold**) prior to, and irrespective of, the **EU Charter**; thus, the claimants say this is a case falling under section 5(5) (and see the text of the relevant provisions of section 5 at paragraph 86 above). Whether or not that is correct, however, the point is ultimately academic given the provisions of paragraph 3(2) of Schedule 1 of the **Withdrawal Act** (set out at paragraph 90 above), which

makes clear that, on or after IP completion day, no court or tribunal may disapply or quash any enactment or other rule of law because it is incompatible with any of the general principles of EU law. The position thus appears to be as follows:

(1) if the right of non-discrimination/equal treatment is to be treated as retained EU law by virtue of section 4 **Withdrawal Act**, that cannot be on the basis of the **EU Charter** (section 5(4));

(2) in any event, to the extent that the right of non-discrimination/equal treatment existed irrespective of the **EU Charter**, founded upon the general principles of EU law, *and* is still to be treated as retained EU law, it can no longer provide a basis for the disapplication or quashing of any enactment or other rule of law that has been found to be incompatible with such a general principle (schedule 1 paragraph 3(2)).

138. As the Court of Appeal observed in **Jersey Choice** (see paragraph 98 above), however, that position needs to then be considered in the light of paragraph 39 of schedule 8 of the **Withdrawal Act** (see paragraph 91 above), which:

(1) by sub-paragraph (3), disapplies section 5(4) and paragraph 3 of schedule 1 in relation to proceedings that were commenced, albeit were not finally decided, prior to IP completion day; and

(2) by sub-paragraph (5), disapplies paragraph (3) of schedule 1 in relation to proceedings commenced within three years of IP completion day, where those proceedings (a) challenge something occurring before that date, and (b) do not seek the disapplication of (i) an Act of Parliament or a rule of law that is not an enactment or (ii) an enactment or anything else, not falling within (i) which, as a result of anything that does fall within (i), "*could not have been different or which gives effect to, or enforces, anything falling within that sub-paragraph*."

139. In the cases of Mr Hampshire and Mr Farrell, proceedings were commenced before IP completion day, on 1 November 2019. As such, applying the "*somewhat convoluted regime*" (per Green LJ in **Jersey Choice**) established by the **Withdrawal Act** and given my reasoning above, I am satisfied that their claims (1) are brought under EU retained law, as provided by section 4(1); (2) can rely on the general principle of non-discrimination provided at article 21 **EU Charter** (section 5(4) **Withdrawal Act** being disapplied by paragraph 39(3) schedule 8); and (3) can result in the disapplication of article 3(b) of the **2010 Order** in their cases (schedule 1 paragraph 3 of the **Withdrawal Act** again being disapplied by paragraph 39(3) schedule 8).

140. The position is, however, different for the other claimants. Their claims were only commenced after IP completion day, on 9 August 2021. Accordingly, section 5(4) applies to those claims and, even if they were nevertheless entitled to rely on general principles of EU law by virtue of section 5(5), although the proceedings were commenced within three years of IP completion day, they face what I consider to be an insurmountable obstacle to their claims under paragraph 39(5) of schedule 8. Even if the claims are not understood to be a challenge to the **EqA** (albeit the effect of the claimants' challenge might be seen to relate to section 61(8) **EqA**), I agree with Ms Darwin that the challenge to the **2010 Order** must fall within sub-paragraph (ii) paragraph 39(5) schedule 8: it is something that, as a result of section 61(8) "*could not have been different*", alternatively, "*which gives effect to, or enforces*" section 61(8) **EqA**.

141. Accordingly, I dismiss ground (1) of the appeal in relation to the claimants Mr Hampshire and Mr Farrell, but allow that ground of challenge in respect of the remaining claimants.

Rule 3(10) hearing – ground (5)

142. By ground (5) of the proposed appeal, the secretary of state contended that "*the ET was wrong to conclude that article 3(b) of the **2010 Order** is incompatible with the **Framework Directive***". Given that no further particulars were provided of this objection, it is unsurprising that Judge Keith declined to give permission for this final ground to proceed to a full hearing. With the agreement of all parties, it was directed that the oral hearing requested by the secretary of state in relation to ground (5) should take place at the end of the full hearing of the appeal. Although the claimants sought to make representations on this ground, I make clear that I have not had regard to those submissions but have solely considered the matters raised by Ms Darwin, on behalf of the secretary of state.

143. In thus addressing this point, Ms Darwin submitted that the ET had assumed that, if the claimants' situation was within EU law (which it had wrongly considered to be the case), it was bound to disapply article 3 of the **2010 Order**. That, it is said, was incorrect, because:

(1) member states were required, within the bounds of the freedom left to them by article 288 **TFEU**, to choose the most appropriate forms and methods to ensure the effectiveness of directives, in the light of their objective;

(2) the **Framework Directive** did not lay down any specific provisions about how the prohibition on age discrimination should be implemented, and nor did it prohibit member states from excluding rights accrued or benefits payable in respect of periods of pensionable service prior to 2 December 2006;

(3) rather, article 6(1) of the **Framework Directive** expressly provided that member states could "*provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably*

justified by a legitimate aim" – a provision that was unique to age discrimination and distinguishes this from any other protected characteristic;

(4) further, article 6(2) expressly envisaged that member states might want to legislate to make exceptions to the prohibition on age discrimination for retirement benefits;

(5) yet further, article 18 of the **Framework Directive**, provided that the provisions of the Directive on age discrimination did not need to be implemented until 2 December 2006.

144. It is thus the secretary of state's submission that there was nothing in EU law which prevented the UK, as a member state, from having in place provisions within domestic legislation which (i) applied the prohibition on age discrimination from the date when the relevant section of the **Framework Directive** should have been implemented by member states (2 December 2006); and (ii) made clear that the prohibition on age discrimination did not apply to rights accrued, or benefits payable, in respect of periods of pensionable service prior to 1 December 2006. It is further observed that, prior to the UK leaving the EU there was no suggestion by the European Commission, or anyone else, that the UK had not properly implemented the **Framework Directive** by making article 3 of the **2010 Order**. Accordingly, it is contended that the exceptions in the domestic legislation are entirely compatible with the **Framework Directive** and, for this reason, it was not open to the ET to disapply them.

145. I accept that there is a material distinction between the protected characteristic at issue in the present proceedings and that with which the Supreme Court was concerned in **Walker v Innospec**: it is potentially possible to justify, on objective grounds, direct discrimination in the case of age. That said, I am not persuaded that this is a ground of appeal that it is open to the secretary of state to take at this stage. The question of objective justification is always fact-sensitive and there would presumably be a need for further evidence to be adduced to make good any justification relied on by the secretary of state in this case. More than that,

however, the assessment of proportionality that would need to be undertaken is clearly one for the ET; if this was a point that was to be taken in this case, it should have been taken below. In this regard, I note that the trustee raised the question whether the secretary of state should be joined to the proceedings "*to defend the validity of an Act of the UK Parliament*" (see paragraphs 34-35 of the trustee's grounds of resistance below). That would have been the appropriate course had this been an issue that the secretary of state had wished to take in these claims.

146. The proposed fifth ground of appeal does not fall within any of the categories of case identified in **Rance** that might warrant exceptionally allowing it to be taken for the first time at this stage. It is not a pure point of law and is likely to require further factual enquiry and evaluation by the ET. I therefore refuse the application made in respect of the fifth ground of appeal.

Disposal

147. For the reasons provided:

(1) I allow the appeal in part. I dismiss all grounds of appeal in respect of the claimants Mr Hampshire and Mr Farrell; in respect of all other claimants, I dismiss grounds of appeal (2)-(4) but allow the appeal on ground (1). The effect of my decision is that the ET proceedings will continue in the cases of Mr Hampshire and Mr Farrell but that the age discrimination claims brought by the remaining claimants must be dismissed.

(2) In respect of ground of appeal (5), I refuse the application made under rule 3(10) **EAT Rules 1993** and direct that no further action shall be taken on this ground of appeal.

148. Should the parties wish to make any applications to be considered on the handing down of this judgment, or any representations as to the terms of the order on the disposal of the appeal,

these should be provided to the EAT in writing (limited to two sides of A4 paper in each case), at least two days before the hand down date.