EMPLOYMENT TRIBUNALS

Claimant: Mr J Walker

Respondents:
1. Innospec Limited
2. Mr James Puckridge
3. Mr Roy Stewart
4. Mr M Rowe
5. Mr J Reynolds
6. Mr T Webb
7. Dr Cathy Hessner
8. Mr Duncan Lawson

HELD AT: Manchester **ON:** 16 October 2012
17 October 2012
25 October 2012
(in Chambers)

BEFORE: Employment Judge Russell
Ms C S Jammeh
Mr C S Williams

REPRESENTATION:

Claimant: Mr M Schaefer, Counsel
Respondents: Mr N Randall, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondents discriminated against the claimant in their operation of an occupational pension scheme in breach of the non discrimination rule included in the said scheme by virtue of section 61 of the Equality Act 2010.

2. A Remedy Hearing is listed on 20 December 2012 with an estimated length of hearing of one day.

REASONS

1. Paragraph 18(1) of Schedule 9 of the Equality Act 2010 provides that 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 who is not married 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 ("the contested provision").

The ostensible effect of the contested provision is that the general requirement under the 2010 Act to provide the same benefits to civil partners and married couples is disapplied in respect of pension rights accrued before 5 December 2005. The key issue in this case is whether, so construed, the contested provision contravenes directly effective European Union Law and/or the European Convention on Human Rights, and if so whether the Tribunal should interpret the provision in order to reach a compatible interpretation or disapply it.

2. At a Case Management Discussion held on 12 April 2012 it was directed that this Hearing would only deal with the issue of liability. The parties also provided the Tribunal with an agreed list of six issues. The agreed issues are:

1. Did the respondents breach the non-discrimination rule in the scheme by:

   (a) treating the claimant less favourably than a married person in the same situation because of his sexual orientation, and/or

   (b) applying a provision, criterion or practice which placed the claimant and other non-heterosexual people (whether real or hypothetical) at a particular disadvantage when compared to heterosexual people, and which is not justified?

2. Does the purported exemption in paragraph 18(1) of Schedule 9 of the Equality Act 2010 contravene the Framework Directive 2000/78/EC, and/or the general principles of EU Law prohibiting discrimination on grounds of sexual orientation in employment and occupation?

3. If the answer to question (2) is yes, can paragraph 18(1) be read compatibly with the Directive/principles of EU Law so as to preclude the respondents from relying on the exemption in the claimant's case?

4. If the answer to question (3) is no, should the Tribunal disapply paragraph 18(1) in the claimant's case?

5. Is the purported exemption in paragraph 18(1) compatible with the claimant's rights under articles 18 and 14, and article 1 of Protocol 1, of the European Convention on Human Rights?

6. Can paragraph 18(1) be interpreted compatibly with the claimant's Convention rights so as to preclude the respondents from relying on the exemption in the claimant's case?

3. Three witnesses gave evidence before us. These were the claimant and Dr Hessner and Mr Yandle on behalf of the respondents. Each of these witnesses had prepared a witness statement which was read by the Tribunal. None of the witnesses were cross examined by the other side and they were not asked any questions by the Tribunal.

4. Mr Schaefer on behalf of the claimant provided us with a written skeleton argument and he also made oral submissions. Mr Randall on behalf of the respondents provided us with written skeleton submissions and a further note of clarification. He also made oral submissions to the Tribunal.

5. The facts in this case are not in dispute and are as follows:

5.1 The claimant, who was born on 16 May 1951, commenced employment with the first respondent on 2 January 1980. He joined the first respondent's pension scheme on the commencement of his employment. In September 1993 he was posted to Singapore to set up a Regional Office. In the same year he met his partner, [redacted], and they have lived together ever since. The second – eighth respondents are the trustees for the being of the pension scheme.

5.2 The claimant continued to work in Singapore until his retirement in 2003. Since that date, the Scheme has paid him a pension which currently amounts to about £85,000 per annum.

5.3 After the claimant retired, he and [redacted] moved to London. They applied for a civil partnership on the same day as the Civil Partnership Act 2004 came into force, namely 5 December 2005. Their civil partnership was registered on 23 January 2006.

5.4 Rule 8.1 of the Scheme provides for the spouse's pension that "if a member dies on or after 1 December 1999 leaving a surviving spouse, that spouse will receive a pension for life...

The spouse's pension will be calculated as follows:

If the member dies after the pension starts, the spouse's pension will be two thirds of the member's gross company pension increased in the period between the date the pension started or normal retirement date if earlier, and the member's death...

If the spouse was more than 10 years younger than the member, the spouse's pension will be reduced by 1.5% for each year of age difference greater than 10. But, it will not be reduced to less than the spouse's guaranteed minimum pension".

5.5 The respondents entered into a Deed of Alteration on 1 August 2006 and a provision was made in respect of civil partnerships indicating that the amendment to the rules of the Scheme was "to the extent necessary to comply with legislative requirements relating to benefits payable to surviving civil partners where a civil partnership has been entered into in accordance with the Civil Partnership Act 2004".

5.6 Shortly after entering into the civil partnership, the claimant asked the Scheme's administrator to confirm that [redacted] would benefit from the spouse's pension. By an email of 24 May 2006 the administrators informed the claimant that "the Company have confirmed that for pension purposes, individuals who enter into a civil partnership will be treated as married couples for service since December 5 2005".

5.7 As a result of this decision it means that, in the event of the claimant's death, his partner will only be entitled to 50% of the guaranteed minimum pension or around £500 per annum. However, if the claimant were married to a woman of the same age as [redacted] she would be entitled to a spouse's pension of approximately £41,000 per annum. It is common ground that the first respondent made a number of discretionary concessions in respect of the claimant's pension arrangements, which enabled him to retire early and to maximise his pension. However the respondents do not allege that it was suggested to the claimant that he should waive any future pension rights in exchange of such concessions or that he agreed to do so. Further, the respondents do not allege that such concessions were only given to the claimant or only to non heterosexual members of the Scheme.

5.8 It is common ground that the first respondent gave [redacted] certain benefits that it provided to the spouses of other senior employees, such as paying for his business class flights and providing him with health cover.

5.9 Dr Hessner gave evidence, which is not challenged, that by 2006 it was clear that the Fund was likely to be underfunded and that the first respondent would have to make additional contributions to address such underfunding. The level of payments required from the first respondent to address the funding deficit started at £1.5million per annum in 2007, increased to £5.8million per annum in 2010 and a further increase is scheduled in the sum of £6.9million per annum from January 2013.

6. The Council Directive 2000/78/EC (the "Directive") came into force on 2 December 2000. Article 1 provides that "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".

7. Article 2 of the Directive provides that:

1. "For the purpose 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 Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular...sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary..."

8. Article 3 of the Directive provides that "within the limits of the areas of competence conferred on the Community, this Directive shall apply to all person, as regards both the public and private sectors, including public bodies, in relation to;

...(c) employment and working conditions, including dismissals and pay..."

9. Pursuant to Article 18 of the Directive, member states had until 12 December 2003 to implement the Directive in national law.

10. In addition to the Articles, the Directive also has 37 Recitals. Recital 22 provides that "this Directive is without prejudice to national laws on marital status and the benefits dependent thereon".

11. The Directive, insofar as it concerns discrimination on the grounds of sexual orientation, was first implemented in Great Britain by the Employment Equality (Sexual Orientation) Regulations 2003 which came into force on 1 December 2003. Regulation 9A prohibited discrimination against members of occupational pension schemes by their trustees or managers except in relation to previously accrued benefits. Regulation 25 provided that it was not unlawful to prevent or restrict access to a benefit by reference to marital status. When the Civil Partnership Act 2004 came into force, Regulation 25 was amended so that it was not unlawful to prevent or restrict access to a benefit by reference to marital status where the right to the benefit accrued or the benefit was payable in respect of periods of service prior to the Civil Partnership Act 2004 coming into force.

12. The relevant provisions of the Equality Act 2010 are as follows, namely:

12.1 (a) section 13(1) defines direct discrimination.

(b) sexual orientation is a protected characteristic by virtue of section 4.

12.2 (a) section 19 defines indirect discrimination.

(b) sexual orientation is a relevant protected characteristic by virtue of sub-section 19(3).

12.3 Section 23 provides that:

(1) On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case...

(2) If the protected characteristic is sexual orientation, the fact that one person...is a civil partner while another is married is not a material difference between the circumstances relating to each case.

12.4 Section 61 provides that:

(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;

(5) A breach of a non-discrimination rule is a contravention of this Part (5) for the purposes of Part 9 (Enforcement).

12.5 Schedule 9 of the Act is entitled "Work: Exceptions". It is given effect, for the purposes of Part 5, by section 83(11).

12.6 The contested provision is paragraph 18(1) of Schedule 9 and it is set out above in paragraph 1 of our Reasons.

12.7 The Tribunal has jurisdiction to determine a complaint relating to a contravention of Part 5 of the Act by virtue of section 120(1)(a) of the Act.

13. The first issue for the Tribunal to determine is whether the respondents have breached the non-discrimination rule implied into the Pension Plan by treating the claimant less favourably than a married person in the same situation because of his sexual orientation. Mr Schaefer submits that it is clear that the respondent's treatment of the claimant does amount to direct discrimination from binding domestic and European case law and from the provisions of the Equality Act 2010 itself. In relation to the English case law, the claimant relies upon the Court of Appeal judgment in **Bull and Bull v Hall [2012] HRLR 11**. In this case, the appellants, who

ran a hotel, had refused to provide a double bedded room to the respondents, who were in a civil partnership. The Court of Appeal held that the reasoning of the House of Lords in **James v Eastleigh Borough Council [1990] 2 AC 751** was "fatal to the appellant's case. A homosexual couple cannot comply with the restriction because each partner is of the same sex and therefore cannot marry. In **James** the male plaintiff could never have a pension aged 61. The restriction therefore discriminates against the respondents because of their sexual orientation just as the criterion at the swimming baths discriminated against Mr James because of his sex. For this reason alone, it is directly discriminatory. Put another way, the criterion at the heart of the restriction, that the couple should be married, is necessarily linked to the characteristic of a heterosexual orientation. There has, in my view, been direct discrimination...less favourable treatment on the grounds of sexual orientation". Mr Schaefer further submits that the same result follows from the judgments of the European Court of Justice in the cases of **Tadao Maruko v Versorgungsanstalt der deutschen Buhnen [2008] All ER (EC) 977** and **Jurgen Romer v Freie und Hansestadt Hamburg** (decided on 10 May 2011). In these cases, the European Court of Justice held that where under national legislation same sex couples are in a "comparable situation" to married couples, it is direct discrimination to treat the former less favourably than the latter on the grounds of sexual orientation within the meaning of the Directive. Thirdly, the claimant relies upon section 23 of the Equality Act 2010 which provides that for the purposes of section 13 of the Act, that if the protected characteristic is sexual orientation, the fact that one couple is a civil partnership while another is married is not a material difference between the circumstances relating to each case.

14. Mr Randall on behalf of the respondents submitted that on the facts of this case, the respondents have not directly discriminated against the claimant but rather they have indirectly discriminated against him but that such indirect discrimination can be justified. The respondents also seek to rely upon the judgment of the European Court of Justice in **Romer**. In the **Romer** case the European Court stated that "according to Article 2(2)(a) of Directive 2000/78, direct discrimination is taken to occur where one person is treated less favourably than another person who is in a comparable situation, on any other grounds referred to in Article 1 of the Directive". The respondents contend that in the present case, the situations being weighed up are not comparable because of the existence of the contested provision. We do not accept this submission. We are satisfied that the question of whether or not there has been direct discrimination is unaffected by the existence of the contested provision. Rather, it is necessary for the Tribunal to decide whether there has been direct discrimination and it is then for the Tribunal to consider whether what would otherwise have been direct discrimination is prevented from being so by reason of the operation of the contested provision. Thus we are satisfied that the contested provision is not relevant to the issue of whether there has been direct discrimination but it is only relevant to whether such direct discrimination is illegal or not.

15. Having considered the submissions of both parties, we are satisfied, having regard to the relevant domestic and European case law, and to the statutory provisions, that the respondents have directly discriminated against the claimant on the grounds of sexual orientation.

16. In that we are satisfied that the respondents have directly discriminated against the claimant, it is not strictly necessary for us to consider the claimant's

alternative complaint of indirect discrimination. However, we consider that it is appropriate for us to so for the sake of completeness. It is common ground in this case that the relevant rules of the scheme amount to a provision, criterion or practice applied to the claimant by the respondents. Further it is agreed that the respondents applied, or would have applied, these rules to persons with whom he does not share the protected characteristic of sexual orientation, namely married heterosexuals. Yet further it is agreed that the rules put or would put other gay men and lesbians in civil partnerships at a particular disadvantages when compared with married heterosexuals and the rules put the claimant at that disadvantage. However, the respondents have sought to show that the relevant rules, which amount to a PCP, are a proportionate means of achieving a legitimate aim. This issue is dealt with by the respondents in paragraph 12 of their Grounds of Resistance. First, the respondents seek to rely upon the fact that the Scheme is a final salary scheme which is based upon relationships of mutual funding between its members who do not accrue an entitlement to identical benefits. Secondly, they seek to rely upon the fact that the funding of such schemes is a complex arrangement which is undertaken over many years and that the financial obligation of meeting any new or improved benefits falls upon subsequent generations of members. In such circumstances the respondents allege that it is generally recognised that the retrospective effect of discrimination law with respect to pension benefit should be restricted. Thirdly, the respondents seek to rely upon the fact that retirement arrangements will have been agreed with certain individual members of the scheme that would not have been offered if it had been known at the time that certain provisions of the scheme would be outlawed at a later date. The witness statement of the respondents' witnesses add little of substance to the assertions made in paragraph 12 of the Grounds of Resistance save to state that the scheme is in deficit. Further Mr Yandle states that the cost of providing the equivalent of a widow's pension to the claimant's partner would be £47,500 per annum and the cost of providing it would be at least £400,000. He adds that there is no way of knowing what the potential additional liabilities resulting from changing the rules may be having regard to other members of the Fund who are in the same position as the claimant. With regard to the evidence of Mr Yandle, the cost of providing a pension to the claimant's partner will depend upon whether the claimant predeceases his partner and if so, by how many years. Clearly, if the claimant's partner dies before the claimant or shortly after him, then the cost to the respondent as a result of changing the rules will be nil or a fairly small amount. It is only if the claimant's partner survives him for many years that a liability in the region of £400,000 would arise. Further, although this would place some financial burden upon the Fund, it would be no greater burden than if the claimant were to dissolve his civil partnership and enter into a marriage with a woman of the same age as his present partner. Further we consider that it is unsatisfactory for the respondents to suggest that there is no way of knowing what the potential additional liabilities may be and to seek to rely upon this alleged lack of knowledge as a basis for seeking to show that the PCP is a proportionate measure for achieving a legitimate aim. There is no evidence before us as to how many members of the pension scheme are gay or lesbian, how many have entered into civil partnerships and as to when they joined the scheme. We are satisfied that in the absence of such evidence it would be inappropriate for us to speculate as to the potential liabilities which would arise as a result of changing the rules of the scheme. Having regard to the fact that the respondents have failed to produce any cogent evidence upon the issue of justification, and have simply sought to rely upon generalised assertions, we

are satisfied that the respondents have failed to show that the PCP applied was a proportionate means of achieving a legitimate aim.

17. In the circumstances we are satisfied that not only have the respondents directly discriminated against the claimant but they have also indirectly discriminated against him. By discriminating against the claimant in the operation of the scheme, the respondents are in breach of the non-discrimination rule, which is included in the scheme by virtue of section 61 of the Equality Act 2010, unless the respondents are able to rely upon the contested provision.

18. The second of the agreed issues to be determined is does the purported exception in paragraph 18(1) of Schedule 9 of the Equality Act 2010 contravene the Directive and/or the general principles of EU Law prohibiting discrimination on grounds of sexual orientation in employment and occupation? Mr Schaefer submitted on behalf of the claimant that the contested provision would, if given the meaning contended for by the respondents, contravene EU law and in particular the general principle of non-discrimination on the grounds of sexual orientation as given expression in the Directive. It is further submitted on behalf of the claimant that it is clear that the contested provision does contravene the Directive having regard to the judgment of the European Court of Justice in the **Maruko** case. In this case the claimant was the surviving registered life partner of a person who was a member of a pension scheme. After his partner's death, the claimant, on the basis of the relevant regulations, was denied a widow's pension that would have been provided to a surviving spouse. The European Court of Justice held that the survivor's pension fell within the scope of the Directive because it amounted to "pay" despite being paid to the survivor rather than to the member. The Court further held that if surviving spouses and life partners were in a comparable situation so far as concerned the survivor's benefit, then the legislation at issue constituted direct discrimination on the grounds of sexual orientation and such discrimination was precluded by Articles 1 and 2 of the Directive. The claimant further relies upon the decision of the European Court of Justice in the **Romer** case. In this case the claimant retired in 1990 and entered into a same sex partnership in 2001. Since that date his former employer, the City of Hamburg, refused to pay him the supplementary pension to which he would have been entitled to had he been married. Following its earlier decision in **Maruko**, the Court of Justice held that, assuming life partners and married people were in comparable situations, this constituted direct discrimination on the grounds of sexual orientation contrary to the Directive and that the claimant was entitled to the supplemental pension.

19. Mr Randall on behalf of the respondents sought to distinguish the **Maruko** and **Romer** decisions. Firstly, he contended that in the **Maruko** and **Romer** cases the employers were an emanation of the State rather than private individuals. However, we are satisfied that this distinction does not go to the question of whether there has been a breach of the Directive as opposed to the consequences, if any, which should flow from any such breach. Secondly, Mr Randall sought to distinguish the **Maruko** case on the basis that there had been a failure to pay any benefit at all in the schemes under consideration whereas the contested provision and the respondents' scheme only applies a partial restriction in benefit. We do not find that this is a valid reason for distinguishing the **Maruko** case from the present case. Mr Randall on behalf of the respondents has also sought to rely upon the decision in **Barber v Guardian Royal Exchange Assurance Group [1990] 2 All ER 660** which

held the direct effect, in respect of pension schemes, of Article 119 could not be relied upon in order to claim entitlement to a pension arising before the date of the judgment. However, the **Barber** decision was considered by the European Court of Justice in both the **Maruko** and **Romer** cases. In **Maruko** the Court decided that there was no need to restrict the effect of the judgment. Further, in the **Romer** case, the Court of Justice decided that the **Barber** judgment could have no bearing on the pension entitlement at stake "notwithstanding the fact that the cvontributions underpinning the entitlement had been paid before the date of that judgment". We are satisfied having regard to the judgments of the Court of Justice in the **Maruko** and **Romer** cases that the Directive precludes discrimination in respect of any pension rights accrued before 5 December 2005.

20. For the avoidance of doubt, we are satisfied that the European Court of Justice's decisions not to limit the retrospective effect of Articles 1 and 2, in **Maruko** and **Romer** apply to all subsequent cases. In such circumstances we do not consider that it is appropriate for us to make a reference to the European Court of Justice. We further note that in his submissions Mr Randall sought to rely upon Recital 22 of the Directive. Having regard to paragraphs 58 and 59 of the **Maruko** judgment, we are satisfied that Recital 22 does not assist the respondents in this case.

21. The third issue for the Tribunal to determine is can paragraph 18(1) be read compatibly with the Directive/principles of EU Law so as to preclude the respondents from relying on the exemption in the claimant's case. The principle of harmonious interpretation was first applied to horizontal situations in the **Marleasing** case **[1992] 1 CMLR 305**. The **Marleasing** principle was explained by the European Court of Justice in the case of **Seda Kucukdeveci v Swedex [2010] All ER (ET) 867**, as follows: "where proceedings between individuals are concerned, the Court has consistently held that a Directive cannot of itself impose obligations on an individual and cannot therefore be relied on as against such an individual... However, the Member State's obligation arising from a Directive to achieve the result envisaged by that Directive and their duty to take all appropriate measure, whether general or particular, to ensure the fulfilment of that obligation, are binding on all the authorities of the Member State including, for matters within their jurisdiction, the Court...It follows that, in applying national law, the national Court called on to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in question, in order to achieve the result pursued by the Directive and thereby comply with the third paragraph of Article 288...The requirement for national law to be interpreted in conformity with EU Law is inherent in the system of the Treaty, since it permits the national Court, within the limits of its jurisdiction, to ensure the full effectiveness of EU Law when it determines the dispute before it..."

22. The **Marleasing** principle was considered by the Court of Appeal in **HMRC v IDT Card Services Ireland Limited**. The Court of Appeal concluded that arriving at a compatible interpretation:

1. May involve a substantial departure from the language used.

2. Does not depend upon whether it is possible to solve the problem by a simple linguistic device or on the statutory language being ambiguous.

3. Is not precluded because it may result in the imposition of a civil liability where such a liability would not otherwise have been imposed under domestic law; and

4. Does not require the Court to identify precise words to be spliced into the language.

In setting out the conclusions of the Court of Appeal, we have adopted the wording used by Mr Schaefer in paragraph 71 of his skeleton argument. Having read the relevant paragraphs of the Court of Appeal's decision we are satisfied that the words used by Mr Schaefer accurately set out the Court of Appeal's conclusions. Mr Randall in his submissions relied upon the speech of Lord Rodger in the case of **Ghaidan v Godin-Mendoza [2004] 2 AC 557**. Lord Rodger stated that, "if the Court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention Rights, and, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute".

In the IDT case the Court of Appeal considered a situation in which the statutory language clearly intended a result that was incompatible with the Directive in question. Lady Justice Arden stated that, "Lord Nicholls (in Ghaidan) ...does not deal expressly with the possibility of Parliament making express provision in contravention of convention rights. Mr Lasok refers to such a possibility in the context of legislation designed to implement Community legislation in his argument before us...Parliament might use language which made it clear that it did not intend VAT to be imposed in a situation in which it was chargeable under the Sixth Directive. The situation which he postulates is not one in which Parliament has specifically stated that it is legislating in a manner which departs from the Sixth Directive.... In the situation postulated, as it seems to me, the Court's interpretative duty, whether arising under Community Law or arising under section 3 (of the Human Rights Act 1998) is not excluded. In determining whether the solution is one of interpretation or impermissible law making, the relevant test remains whether the interpretation that would be required to make the statute in question Convention compliant or in this case, EU law compliant, would involve a departure from a fundamental feature of the legislation. As I see it, the latter cannot be the case where the effect of the interpretation would be to bring the statute into conformity with the objectives of the Sixth Directive in the absence of clear statutory language to the effect that Parliament intended that there should not be such conformity"

23. In the present case, there is no clear statutory language to the effect that Parliament intended the contested provision not to conform with the Directive. In such circumstances, we are satisfied that to interpret the contested provision so as to make the statute in question Directive compliant would not involve a departure from a fundamental feature of the legislation. Further, we are satisfied that to interpret the contested provision so as to make it compatible with the Directive would not go against the grain of the legislation because the fundamental feature of the

Equality Act 2010 is the prohibition of discrimination. Further, we are satisfied, having regard to the judgment of the Court of Appeal in the IDT case, that it is possible to interpret the contested provision as applying only to the extent compatible with the Directive. We are further satisfied that it is not necessary for us to identify the precise words which have to be spliced into the language used by Parliament so that the contested provision is applicable only to the extent compatible with the Directive. However, if it was necessary for us to splice in additional words into the paragraph, we accept Mr Schaefer's alternative submission that it would be appropriate for us to splice in the words "or in a civil partnership" between the words "who is not married" and "from having access to a benefit, facility or service". We also accept Mr Schaefer's submission that whether the contested provision is interpreted as applying only to the extent compatible with the Directive, or whether the words "or in a civil partnership" are spliced into the paragraph neither interpretation would deprive the contested provision of effect. We are satisfied that the contested provision would still operate to excuse other potentially discriminatory conduct in circumstances not necessarily prohibited by the Directive. For example, it would prevent a gay or lesbian who is not in a civil partnership from having access to benefits accrued before 5 December 2005 which are provided to married people. Further we do not accept Mr Randall's submission that by interpreting the contested provision in the alternative ways set out above would not bring the contested provision in line with what the claimant contends to be the correct interpretation of the Directive.

24. We are satisfied that the contested provision can and should be interpreted so as to be compatible with the Directive and in such circumstances we are satisfied that the respondents, by treating the claimant less favourably under the scheme than they would treat a married person in a comparable situation, are in breach of the non-discrimination rule included in the scheme by virtue of section 61(1) of the Equality Act 2010. In that we have found that the claimant succeeds in his claim we are satisfied that there is no need for us to determine the remaining issues, namely issues 4-6 of the agreed Issues.

25. A Remedy Hearing is listed for 20 December 2012 at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA with an estimated length of hearing of one day.

Employment Judge Russell

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 November 2012

FOR THE SECRETARY OF THE TRIBUNALS

[AF]