

JUDGMENT OF THE COURT
12 July 1990

In Case C-188 /89,

REFERENCE to the Court under [Article 267 TFEU] by the House of Lords for a preliminary ruling in the proceedings pending before that court between

A. Foster, G. A. H. M. Fulford-Brown, J. Morgan, M. Roby, E. M. Salloway and P. Sullivan

and

British Gas plc,

on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976 L 39, p. 40),

THE COURT

composed of: Sir Gordon Slynn, President of Chamber, acting as President, C. N. Kakouris, F. A. Schockweiler and M. Zuleeg (Presidents of Chambers), G. F. Mancini, R. Joliet, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodriguez Iglesias, F. Grevisse and M. Diez de Velasco, Judges,

Advocate General: W. Van Gerven
Registrar: H. A. Ruhl, Principal Administrator,

after considering the observations submitted on behalf of

Mrs Foster and Others by James Goudie, QC, and John Cavanagh, barrister,
instructed by Bruce Piper, solicitor,

British Gas plc by Michael J. Beloff, QC, and Elizabeth Slade, barrister, instructed by
C. E. H. Twiss, HQ Director of Legal Services, British Gas plc,

the United Kingdom by Susan J. Hay, of the Treasury Solicitor's Department, assisted
by John Laws and David Pannick, barristers, acting as Agents,

the Commission of the European [Union] by Karen Banks, a member of its Legal
Department, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Foster and Others, British Gas plc, the
United Kingdom and the Commission at the hearing on 15 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 May
1990,

gives the following

Judgment

- 1 By an order of 4 May 1989, which was received at the Court on 29 May 1989, the House of Lords referred to the Court for a preliminary ruling under [Article 267 TFEU] a question on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976 L 39, p. 40).
- 2 That question was raised in proceedings between A. Foster, G. A. H. M. Fulford-Brown, J. Morgan, M. Roby, E. M. Salloway and P. Sullivan (hereinafter referred to as 'the appellants in the main proceedings'), women who were formerly employed by the British Gas Corporation (hereinafter referred to as the 'BGC'), and British Gas plc (hereinafter referred to as the 'respondent in the main proceedings'), the successor to the rights and liabilities of the BGC, in respect of their compulsory retirement from the BGC.
- 3 By virtue of the Gas Act 1972, which governed the BGC at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly of the supply of gas.
- 4 The members of the BGC were appointed by the competent Secretary of State. He also had the power to give the BGC directions of a general character in relation to matters affecting the national interest and instructions concerning its management.

- 5 The BGC was obliged to submit to the Secretary of State periodic reports on the exercise of its functions, its management and its programmes. Those reports were then laid before both Houses of Parliament. Under the Gas Act 1972 the BGC also had the right, with the consent of the Secretary of State, to submit proposed legislation to Parliament.
- 6 The BGC was required to run a balanced budget over two successive financial years. The Secretary of State could order it to pay certain funds over to him or to allocate funds to specified purposes.
- 7 The BGC was privatized under the Gas Act 1986. Privatization resulted in the establishment of British Gas plc, the respondent in the main proceedings, to which the rights and liabilities of the BGC were transferred with effect from 24 August 1986.
- 8 The appellants in the main proceedings were required to retire by the BGC on various dates between 27 December 1985 and 22 July 1986, on attaining the age of 60. These retirements reflected a general policy pursued by the BGC, that of requiring its employees to retire upon reaching the age at which they were entitled to a State pension pursuant to British legislation, that is to say 60 years of age for women and 65 for men.
- 9 The appellants in the main proceedings, who wished to continue to work, brought proceedings for damages before the British courts asserting that their retirement by the BGC was contrary to Article 5(1) of Directive 76/207. According to that provision, 'application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex'.
- 10 According to the order of the House of Lords, the parties to the main proceedings are agreed that on the basis of the judgment of the Court in Case

152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723 the dismissals were contrary to Article 5(1) of Directive 76/207. They are also agreed that those dismissals were not unlawful under the British legislation in force at the material time and that according to previous judgments of the House of Lords that legislation cannot be interpreted in a manner consistent with Directive 76/207. The parties are in dispute over the issue whether Article 5(1) of the directive may be relied on against the BGC.

- 11 It was in those circumstances that the House of Lords stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Was the BGC (at the material time) a body of such a type that the appellants are entitled in English courts and tribunals to rely directly upon Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions so as to be entitled to a claim for damages on the ground that the retirement policy of the BGC was contrary to the directive?'

- 12 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant [Union] legislation, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The jurisdiction of the Court

- 13 Before considering the question referred by the House of Lords, it must first be observed as a preliminary point that the United Kingdom has submitted that it is not a matter for the Court of Justice but for the national courts to determine, in the context of the national legal system, whether the provisions of a directive may be relied upon against a body such as the BGC.

- 14 The question what effects measures adopted by [Union] institutions have and in particular whether those measures may be relied on against certain categories of persons necessarily involves interpretation of the articles of the Treaty concerning measures adopted by the institutions and the [Union] measure in issue.
- 15 It follows that the Court of Justice has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on. It is for the national courts, on the other hand, to decide whether a party to proceedings before them falls within one of the categories so defined.

Reliance on the provisions of the directive against a body such as the BGC

- 16 As the Court has consistently held (see the judgment in Case 8/81 *Becker v Hauptzollamt Munster-Innenstadt* [1982] ECR 53, paragraphs 23 to 25), where the [Union] authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of [Union] law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.
- 17 The Court further held in its judgment in Case 152/84 *Marshall*, paragraph 49, that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking

advantage of its own failure to comply with [Union] law.

- 18 On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.
- 19 The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments in Case 8/81 *Becker*, cited above, and in Case C-221/88 *ECSC v Acciaierie e Ferriere Busseni (in liquidation)* [1990] ECR I-495), local or regional authorities (judgment in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR I-1839), constitutionally independent authorities responsible for the maintenance of public order and safety (judgment in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-1651), and public authorities providing public health services (judgment in Case 152/84 *Marshall*, cited above).
- 20 It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.
- 21 With regard to Article 5(1) of Directive 76/207 it should be observed that in the judgment in Case 152/84 *Marshall*, cited above, paragraph 52, the Court held that that provision was unconditional and sufficiently precise to be relied on by an individual and to be applied by the national courts.
- 22 The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207 of 9 February 1976 may be relied

upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

Costs

- 23 The costs incurred by the United Kingdom and by the Commission of the European [Union], which submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the House of Lords, by order of 4 May 1989, hereby rules:

Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

Slynn

Kakouris

Schockweiler

Zuleeg

Mancini

Joliet

O'Higgins

Moitinho de Almeida Rodriguez Iglesias

Grevisse

Diez de Velasco

Delivered in open court in Luxembourg on 12 July 1990.

J.-G. Giraud

Gordon Slynn

Registrar

President of Chamber acting as President

Robert Schütze European Union Law Lisbonised Cases