R v Secretary of State for Employment, ex parte Seymour Smith, Case C-167/97 [1999] 2 AC 554

1) Reference Details

Jurisdiction: European Court of Justice, referred from the UK’s House of Lords  
Date of Decision: 9 February 1999  
Link to full case:  

2) Facts

The respondents to the appeal were dismissed from their employment and claimed unfair dismissal and compensation under s. 54(1) of the Employment Protection (Consolidation) Act 1978 ("the 1978 Act"). Their claim was refused by the Industrial Tribunal on the basis that they had not worked continually for the minimum duration of two years which was necessary under s. 64(1)(a) of the 1978 Act in order to claim compensation.

The respondents claimed that the Unfair Dismissal (Variation of Qualifying Period) Order 1985 which had increased the qualifying number of years from one to two was indirectly discriminatory against women and thus contrary to Council Directive 76/207/EEC (Equal Treatment Directive).

3) Law

National Legislation

• Employment Protection (Consolidation) Act 1978 (as amended by the Unfair Dismissal (Variation of Qualifying Period) Order 1985)

European Community Law

• Article 119 EC Treaty

4) Legal questions referred to the ECJ

The House of Lords sought a preliminary ruling from the European Court on:

1. The construction of Article 119 EC Treaty; namely whether compensation for unfair dismissal constituted "pay" within the meaning of that provision?

2. Whether the respondent’s claim would be determined under the Directive or under Article 119 of the EC Treaty?

3. Whether the 1985 Order was compatible with Community law?

4. Whether, if not compatible, any indirect discrimination caused by the Order could be objectively justified by factors unrelated to sex?
5) Decision

ECJ

The ECJ held that compensation for unfair dismissal does fall within the meaning of "pay" for the purposes of Article 119 of the EC Treaty and the respondent’s claims should be determined under that provision. It determined that the 1985 Order is not, however, compatible with Community Law where a considerably fewer amount of women than men can satisfy the two year requirement for compensation. There would however be a satisfactory objective justification for such differential impact if the 1985 Order could be shown to achieve a legitimate aim of the Government’s social policy which was unrelated to and not based on sex, and if it could be shown that the Government reasonably considered the means chosen to achieve that aim.

House of Lords

On referral back to the House of Lords their Lordships held that the 1985 Order was indirectly discriminatory as it resulted in a "persistent and constant disparity over a long period" between men and women who were entitled to claim compensation for Unfair Dismissal. It was further held however that the 1985 Order was a reasonable response to a legitimate aim of social policy unrelated to discrimination based on sex and was therefore objectively justified.