Compensation for unfair dismissal and entitlement to redundancy pay have required two years of continuous employment by a full-time employee working 16 hours or more a week before a claim may be made. Continuity of employment is made up of qualifying weeks. Until the decision of the House of Lords in R. v. Secretary of State for Employment ex parte Equal Opportunities Commission (1994) I.R.L.R. 176 (the “EOC case”) part-time employees who worked between 8 and 16 hours per qualifying week could count those weeks but only if they had worked for 5 years or more and part-timers who worked for fewer than 8 hours per week never qualified for unfair dismissal compensation or redundancy pay. The House of Lords held that the hours per week qualifying thresholds for part-time employees who claim a redundancy payment were incompatible with Article 119 of the EEC Treaty and Council Directive 75/117 EEC (the “Equal Pay Directive”) and that those thresholds in respect of a claim for unfair dismissal compensation were incompatible with Council Directive 76/207 EEC (the “Equal Treatment Directive”). Subsequently the UK government introduced the Employment Protection (Part-Time) Employees Regulations SI 1995/531 which abolished all the hours per week qualifying thresholds for part-time workers and so periods of qualifying service for all employees were equalised at two years.

In R. v. Secretary of State for Employment ex parte Seymour-Smith and Perez (1994) I.R.L.R. 448, (1995) I.R.L.R. 464, two employees claimed that the two-year minimum service qualification for unfair dismissal — as enacted in the Employment Protection Consolidation Act 1978 at 26 weeks and raised successively by statutory instrument to one year in 1979 and to two years in 1985 — was in itself discriminatory because fewer women than men could qualify under it and that it was incompatible with Council Directive 76/207 (the “Equal Treatment Directive”, hereafter the “ET Directive”). The two employees had both been dismissed in May 1991 after each had worked for fifteen months for different employers but they were unable to complain to an industrial tribunal because they could not satisfy the two-year service qualification introduced by the Unfair Dismissal (Variation of
Qualifying Period) Order 1985 (the “1985 Order”). They then brought judicial review proceedings for an order of certiorari to quash the 1985 Order. The Divisional Court rejected the application on the grounds that even if the applicants could succeed on the merits a declaration that the 1985 Order was incompatible with Community Law would be the only appropriate relief and that they had failed to show that the two-year service qualification indirectly discriminated against women. However, if adverse impact had been shown the Secretary of State could not be held to have discharged the onus of establishing objective justification of the service qualification. Before the Court of Appeal the appellants were given leave to amend their application to include a contention that the right to compensation for unfair dismissal constitutes “pay” for the purposes of Article 119 and that by making and maintaining the 1985 Order the UK was in breach of its obligations under Article 119. There were five issues for consideration by the Court of Appeal: the legal standing of the appellants to bring judicial review proceedings in relation to the ET Directive; the claim under Article 119; whether discrimination had been proved; justification; and the form of relief.

The first issue was whether the appellants had sufficient standing in relation to the ET Directive to bring judicial review proceedings based on the Government’s alleged breach of it. For the Secretary of State it was argued that a Directive, as a general rule, was not enforceable by individuals. There were exceptions, particularly where an individual is employed by the State or a body providing a public service under the control of the State. None of the exceptions (paragraph 28) applied here and the appellants were trying to enforce the Directive against private employers, the effect of which would be to undermine the distinction between EEC instruments which have direct effect and those which do not.

Despite those arguments the Court of Appeal was persuaded that persons in private employment such as the appellants had sufficient standing to bring judicial review proceedings in reliance on the ET Directive. After referring to RSC Order 53, rule 3(7), S31(3) of the Supreme Court Act 1981, Article 119, Articles 1 and 5 of the ET Directive and the decision of the European Court of Justice (the “ECJ”) in Francovich v. Italian Republic 6/90 (1992) I.R.L.R. 84, the Court of Appeal placed great emphasis on the decision of the House of Lords in the EOC case and particularly on the judgment of Lord Keith. At paragraph 14 he referred to a number of cases in which the EOC had