

PENSIONS EQUALITY UPDATE 2004

Association of Pension
Lawyers in Ireland

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1. Domestic legislation

1.1 Part VII of the Pensions Act was amended twice this year to update pensions and occupational benefits equality laws. The principal changes were brought in on 5th April by the Social Welfare (Miscellaneous Provisions) Act 2004, which made sweeping changes to Part VII. The Equality Act 2004, which is effective from 19th July 2004, made a few more changes.

1.2 You might note that at the time of this talk the Pensions Board legislation update reflects the first set of changes, but not the second.

The new regime updates Part VII to reflect the terms of (a) Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment (this dealt with preventing discrimination on grounds of religion, or belief, disability, age or sexual orientation), and (b) Council Directive 2000/43/EC of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Also, included in revised Part VII are the grounds of marital and family status and the traveller ground.

1.3 The legislation follows the general approach of the Employment Equality Acts 1998 and 2004 and has become much longer and is extremely detailed. You'll recall pension rights are specifically excluded from the definition of remuneration under those Acts, so Part VII is the sole vehicle to bestow equality in this area (leaving aside the specifics of part-time and fixed-term workers whose pension rights are dealt with under the applicable primary legislation). The purpose of this talk is to guide you through the new regime. It's a regime that is based on old, familiar concepts (e.g. indirect discrimination surfaces, but new ideas are introduced.)

The purpose of this paper is to give an overview (and provide references) of the current workings of Part VII. It's very much a summary and does not cover all the issues.

2. Headline items

2.1 Now there are 9 equality grounds, whereas previously there were gender and an amalgam of family and marital status. They are gender, family

status, marital status, sexual orientation, age, religion, disability, race etc, and traveller status.

- 2.2 There are some new concepts such as the concept of the principle of equal pension treatment.
- 2.3 There are new enforcement procedures enabling those affected to bring claims to enforce their rights, rather than in the previous regime of leaving it up to the trustees to enforce their rights or the Board to prosecute breaches.
- 2.4 The time limit within which a claim must be brought is within 6 months from the end of the employment and a range of remedies apply.
- 2.5 The Board's role is changed radically. It continues to have jurisdiction to determine whether an occupational benefits scheme is a defined contribution scheme for the purposes of Part VII, and to prosecute offences. It no longer has a role to determine if a rule of a scheme offends the principle or to what extent it is rendered null and void.
- 2.6 Instead, these functions are reserved to the Director of the Equality Tribunal and, in some cases, the Circuit Court can have alternative jurisdiction.

3. **The Grounds**

- 3.1 **GENDER:** woman v man, or
woman v man with same family/marital status
EG Mary v Joe, or
Mrs. Mary v Mr. married Joe, or
Ms Mary v Mr Joe (both having kids)
- 3.2 **FAMILY STATUS:**
EG individual with children v individual without children. A parent is someone who is a parent or in loco parentis of a child under 18 or a person who is the resident primary carer of a person over 18 with a disability.
- 3.3 **MARITAL STATUS**
EG single v married
- 3.4 **SEXUAL ORIENTATION**

EG different sexual orientations (heterosexual, homosexual or bisexual)

3.5 **AGE** (only applies to a person above maximum age in respect of which there is a requirement that he attends school.)

EG 17 v 37

3.6 **RELIGION** (different religious beliefs or one has and the other has not)

3.7 **DISABILITY** (one person has a disability and the other has not or has a different disability)

3.8 **RACE, COLOUR NATIONALITY ETHNIC OR NATIONAL ORIGINS-** they differ in respect of any of these.

3.9 **TRAVELLER COMMUNITY** –one is a member of this and the other is not.

4. **The Principle of Equal Pension Treatment**

There are some new concepts. The first is the new concept of the principle of equal pension treatment.

Section 69 provides that there shall be no discrimination on any of the discriminatory grounds (including indirect discrimination unless the latter is objectively justified) in respect of a rule of a scheme.

Sounds familiar? As before, the scheme is not an occupational pension scheme but an occupational benefits scheme.

4.1 The definition of “occupational benefits scheme” in Section 65 needs careful reading, as it is the hook on which Part VII rests.

Occupational benefits scheme means

- (a) in relation to self-employed persons, any occupational pensions scheme or arrangement which is comprised in one or more instruments or agreements and which provides, or is capable of providing, occupational benefits in relation to self-employed

persons in any description of self-employment within the State, but does not include: -

- (i) any individual contract made by or on behalf of a self-employed person, or
 - (ii) any scheme for a self-employed person which has only one member or,
 - (iii) any scheme in so far as benefits are financed by contributions paid by the members on a voluntary basis, or
- (b) in relation to employed persons, any occupational pension scheme or arrangement which is comprised of one or more instruments or agreements and which provides, or is capable of providing, occupational benefits in relation to employed persons in any description of employment within the State, but does not include: -
- (i) any insurance contract made by or on behalf of an employed person to which the employer is not a party, or
 - (ii) any scheme in so far as benefits are financed by contributions paid by the members on a voluntary basis;

The above contains some changes from the previous definition, the chief of which is to divide the definition up between self employed and employed persons.

4.2 It's also necessary to look at the definition of “**occupational benefits**”:

“benefits (other than remuneration to which sections 19 and 29 of the Employment Equality Act [2004] apply), in the form of **pensions**, payable in cash or in kind in respect of:-

- (a) termination of service,
- (b) retirement, old age or death,
- (c) interruptions of service by reason of sickness or invalidity,
- (d) accidents, injuries or diseases arising out of or in the course of a person's employment,
- (e) unemployment, or
- (f) expenses incurred in connection with children or other dependants;

and, in the case of a member who is an employee, includes any other benefit corresponding to a benefit provided by virtue of the Social Welfare Acts, the Maternity Protection Act 1994 or the Health Acts 1947 to 2001 which is payable to or in respect of the member as a consequence of his employment;” (emphasis added)

The above, bar the omission of two words, has the same definition as its predecessor definition. Those two words are “or otherwise”. They previously appeared after “pension” in bold above. Their exclusion radically alters this definition. As pension lawyers we are educated to understand that a pension is an income in retirement. Now the Pensions Act has been amended to re-educate us and tell us that no, it actually covers income continuance payments prior to retirement, maternity benefit and expenses incurred with children or other dependants.

It appears that this adjustment of the definition was made to give credence to the global concept of the principle of pension equal treatment. I checked the actual terms of the Social Welfare (Miscellaneous Provisions) Act in case there had been a glitch with the Pension’s Board legislation service, but no.

4.3 Reverting to the principle of equal pension treatment, as previously, it applies to members’ dependants as it applies in relation to members.

4.4 And it’s ok to have different occupational benefits in a scheme for different members provided there is no breach of the principle. (Section 70.)

5. Which things are to be ignored when establishing if the principle has been breached?

5.1 Well, the old familiar exclusions relating to pension schemes continue to apply: -

- different employer contributions, on gender grounds, if they are to remove or limit the amount or value of benefits provided under a defined contribution scheme, or to ensure that there is adequate funding under a defined benefit plan.
- difference on gender grounds in the amount or value of (i) benefits under a defined contribution plan to the extent it is justifiable on actuarial grounds, or (ii) some elements of benefits under a defined contribution plan arising from gender based actuarial factors in place when the funding of the benefits is being implemented e.g. different commutation factors, different rates of early retirement pensions and transfer values.
- it's ok to give special maternity treatment – e.g. continuing to accrue pensions when the leaver is on unpaid leave.
- it's ok to have different treatment in relation to additional benefits available.
- and flexible retirement ages may be provided if the applicable conditions are the same for both sexes. (Section 71)

- 5.2 As regards the age ground, so many savers apply that it's difficult to see what benefit this equality law provides in this area. But, this is all to the good, from a commercial perspective.

Provided no breach of the principle arises on the gender ground

it's ok to fix the age or qualifying service or both as a qualifying condition for:

- entry. e.g. being aged 25, plus having 5 years service is ok before access to a plan is permitted. (But in the meanwhile PRSA access must be provided.)
- entitlement to benefits. EG the executive level structure.
- entitlement to benefits for employees or groups or categories of employees. This is an important exception as there may be groups of employees in the workforce on differing structures.
- accrual of rights under a defined benefit scheme or in relation to the level of contributions to a defined contribution scheme for a single employee or as regards groups, provided this is appropriate and necessary by reference to a legitimate objective of the employer, including legitimate employment policy, labour market and vocational training objectives. For example, this would appear to legitimate an employer having a DB plan for an older employment population and a DC plan for a younger one. But it's up to the employer to get this structure right as the onus will be on the employer to prove that it is in compliance with the regime, should a case be taken against the employer.
- its also ok to "use criteria as to age in actuarial calculations". (Section 72(1))

As regards what is meant by fixing age, this can mean different ages at which an entitlement to benefit arises, or retirement ages. But again, no breach of the principle on gender grounds is permitted. (Section 72(4).)

- 5.3 As regards the marital or family status ground, it's ok for better benefits to be provided under the scheme on a member's death provided no breach of gender equality arises. Thus, positive discrimination in favour of married people is permitted as regards, for example, the provision of a death- in-service pension, or a greater lump sum, provided men and women are treated the equally. This reflects practice to date. (Section 72(2)).

This is in line with a recent UK case on the point.¹ At first sight it raises the question as to whether a breach of the sexual orientation ground might arise. The analysis is that the reason why the survivor could not marry the deceased arises from them being the same sex.

¹ The Queen v Secretary of State for Trade & Industry 2004 PLR 261 paragraphs 135 et seq.

- 5.4 However, section 72(3) expressly provides that no breach of the marital status or sexual orientation ground arises if more favourable occupational benefits are provided to a deceased member's widow or widower provided this does not breach the principle on gender grounds.
- 5.5 As regards disability, the approach is a fair and sensible one. Impliedly, positive discrimination in favour of the disabled is permitted. It's also possible to provide lesser benefits on the grounds that the person with the disability is unable to have the same output as a person without that disability. This augurs for a fair pro rating of benefits. And there is an important saver for those opting for early retirement on disability grounds: such rules are legal. (Section 73)
- 5.6 A point to watch is that just because there may be a saver on one ground does not mean that that will operate to legitimate the principle from falling foul of another ground. For example, if the plan fixes different ages for entry to a scheme for groups of employees and the rule does not offend the gender ground, were it to offend the sexual orientation ground one presumes that whilst the saver was applied to the age ground it could not legitimate the breach of the sexual orientation ground..

6. **Consequences of breaching the principle of equal pension treatment**

This is, again, familiar stuff, but updated to 2004, to some extent.

6.1 **Gender**

An opportunity was lost to tidy up some legacy issues on the gender equality front, which is disappointing. The approach seems to have been to replicate, word for word, the previous system and all its peculiarities as regards old Part VII. However, there seems to be some typographical glitches that make it all rather difficult to follow. And to be fair, the previous wording really only made sense if you knew what it was meant to say and why.

- 6.2 First, the easy bit: Where a rule tries to have effect on or after 5th April 2004, it is rendered null and void. (Section 80(1)(a))
- 6.3 For a "defective" rule purporting to operate on a date between 8th April 1976 and 5th April 2004,
- (i) if it relates to employees it's rendered void from its purported effective date, provided this is not earlier than 17th May 1990, but if the affected employees initiated proceedings or made an equivalent claim before 17th May 1990 alleging that the scheme did not comply with the principle of equal pension treatment or

was discriminatory as aforesaid, or the employees were denied access to the scheme levelling up to the time the rule was amended to comply arises.

(It appears that there is a paragraphing error in the legislation service so that the intention that levelling up to the time the rule was amended to comply was intended. Words to that effect are found at the end of section 80(1)(b) (ii) and those words ought to have been typed separately to apply to events mentioned at paragraph (i) and (ii).

It's less clear if these words are also meant to apply to "defective" rules operated post 6th April 2004. For this to happen the words at the end of section 80(1)(b) would need to be indented to appear to apply to paragraphs (a) and (b) and not just (b). It's difficult to ascertain this, even on a close reading of the original Act, but it is most likely that this is the position as enacted.)

- (ii) for self-employed persons the "defective" rule is rendered null and void from its effective date but no earlier than 1 January 1993.

A small point: it's most unlikely that anyone pre 17th May 1990 would have been alleging that the rule breached the principle of equal pension treatment as this is a new concept brought in on 5th April 2004.

Where the more favourable treatment arises, the trustees or employer must take such measures to give effect to it. (Section 80(2)) Failure to comply would be an offence under section 3 of the Act and possibly also under section 100 of the Employment Equality Act 2004. As in the latter case, the Board is conferred with jurisdiction, by virtue of section 81J (2) and 4th Schedule reference 30, to prosecute applicable breaches of that Act, it seems. The position on this is not free from doubt, however. But there are now many ways of ensuring that the affected person's rights can be enforced, although a big stick is always helpful.

As regards failure to admit to a scheme, if it's a contributory one, backdated admission is conditional on payment of back contributions. This is in line with applicable EU case law (e.g. Fisscher)² Interestingly, the quantum of back contributions is calculated as being the actual ones then arising. (Section 80(5)).

6.4 All other grounds other than gender or race

The offending rule is rendered void from its effective date, not being earlier than 2nd December 2003 (date by which Ireland had to comply with the relevant directive) and levelling up applies up until the rule is amended to comply, or access granted. (Section 81 (1))

² 1994 PLR 243

6.5 Racial grounds

As above, except that the earliest date a rule could be void is 19th July 2003 (which is the date by which Ireland had to comply with the relevant directive). (Section 81(2)).

As regards retrospective legislation, I presume that, in practice, levelling up on all grounds, other than gender, cannot be applied any earlier than the passing of the legislation bringing these provisions into force (5th April 2004) save as regards any organ of the State, given that compliance with a directive is at stake.

Like gender issues, third parties, such as the employer and the trustees, are required to give effect to more favourable treatment, and if the plan is contributory, back contributions are required. (Section 81(3)).

7. Savers for previous discriminatory treatment at a time when this was lawful

7.1 If the scheme discriminated at a time before the rule was nullified the benefits that accrued during that time are left unblemished as regards all grounds other than gender (i.e. the discriminatory treatment is protected). (Section 81(4)).

7.2 The position on gender remains obfuscated and the old legislation appears to have been re-enacted in all its apparent confusion.

7.3 Employees and the self-employed are treated differently.

Employees' "unequal" pre 17th May 1990 entitlements appear only to be "saved" as being permitted to be illegal up until 31st December 1998, other than in the case of retirement ages, when the illegality will cease from 31st Dec 2017. (Section 80(3)(a)) I have never been able to understand this provision. It seems to say that schemes had from 17th May 1990 to 31st December 1998 to rectify pre 17th May 1990 unequal treatment, save in the case of unequal retirement ages, when the time frame to level up is granted until the end of 2017. What is baffling is that there is no need to grant pre 17th May equality except in cases of unequal access.

Section 80(3)(b) then deals with the position of early leavers.

For them where the rule is rendered null and void, nothing in Part VII prevents rights or obligations, relating to pre 17th May 1990 membership, from remaining subject to the provisions of the scheme in force during that period of membership in respect of members who leave employment before or during the period referred to at paragraph (a) of section 80(3).

There are two such periods: 17th May 1990 to 31st December 1998 and 17th May 1990 to 31st December 2017.

This seems to say that if you leave you do not get the benefit of pre 17th May levelling up unless, perhaps, you leave before 31st December 2017. Any elucidation on the above is welcome, please!

7.4 For self-employed persons pre 1st January 1993 discriminatory membership is protected.

8. **Old familiar provisions:**

Special rules apply to those on maternity leave. (Section 81A) More or less word for word the same as the old provisions. The same goes for special terms applicable to family leave. (Section 81B). The principle of equal pension treatment is implied into collective agreements on gender and other grounds (Section 81C), and in contracts of employment (Section 81D).

9. **Enforcement**

One of the main changes in Part VII is that there is now a procedure whereby a person who has suffered discrimination on one of the 9 grounds can enforce their rights.

Before we look at how that happens, it's appropriate to see what amounts to discrimination. It's pretty clear that even though the Social Welfare (Miscellaneous Provisions) Act 2004 predated the Equality Act 2004 cognisance was taken of the likely outcome of amendments to the earlier Employment Equality Act 1998.

In particular, section 66 deals with when discrimination is taken to occur.

9.1 It is when:

- (a) one person is treated less favourably than another **is, has been or would be treated in a comparable situation** on any of the 9 discriminatory grounds which **exists, existed but no longer exists, may exist in the future, or, is imputed to the person concerned,**
- (b) a person who is associated with another natural person -

- (i) is treated, by virtue of that association less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and
- (ii) similar treatment of the other person on any of the discriminatory grounds would, by virtue of paragraph (a) constitute discrimination.

Note the timing of the discrimination and that it can be imputed. What is also interesting is that the concept of an Article 141 comparator is not included in the legislation. Given that this stems from the gender equal pay for equal/like work approach, which is the cornerstone of gender equal pay laws, this is an interesting omission. I wonder if it is fair to employers to exclude this test in favour of the “comparable situation” test referred to above. Of course, Part VII has never contained an equal pay approach to pensions equality, due perhaps to the fact that this was enacted to comply with directive 86/378 EEC, which did not encompass such a test. But, since the Employment Equality Acts exclude pension rights from their ambit it seems that somewhere there may be a lacunae that Ireland has not conferred enough domestic machinery to enable a claim for pensions equality based on an Article 141 approach. However, there is a significant amount of machinery to support any pensions discriminations claim so that a claimant is hardly likely to be prejudiced, especially as not having to prove a like work test is to their advantage. Also, in Ireland’s defence is the principle of subsidiarity, whereby member states are left the freedom to enact local laws in their own unique way to comply with GHQ (i.e. the EU), which can intervene if there is a material issue at stake. And, in the final analysis, it’s always open to plead Article 141 as it’s a directly effective article.

However, there seems to be no requirement to establish any connection, other than the comparable situation test, between the claimant and the person who is receiving the non-discriminatory pension. For example, under the Employment Equality Act 1998, the approach taken as regards equal treatment on conditions of employment is that the employer must “offer [the] employee the same terms of employment as the employer offers to another person ... where the circumstances in which both are employed are not materially different”. It seems very odd, both from the claimant’s and respondent’s viewpoint that Part VII does not establish the need for that sort of connection.

It appears that the Tribunal will be the person who determines what constitutes a comparable situation for the purposes of proving a claim. Presumably, it will bring its interpretation to bear on previous employment claims. This may leave those representing the parties unsure before the case proceeds as to whether there is a valid claim.

In one sense it’s helpful to have a broad test as it may avoid getting bogged down in overly prescriptive detailed legislation. On the other hand, it may put the

parties and their advisors in an uncertain situation. Perhaps the solution will lie in the parties being represented by employment lawyers familiar with the practice of how the expression is interpreted in claims under the Employment Equality Act 2004, where a similar test applies.

- 9.2 The legislation takes an X and Y approach to the comparator test, where each have different status on the relevant ground. (Section 67).
- 9.3 As regards indirect discrimination, an easier test than that in previous Part VII is included in section 68. It is where an apparently neutral rule puts persons at a particular disadvantage in respect of any of the discriminatory grounds compared to others who are members or prospective members. Where this happens it's a case of indirect discrimination unless objectively justified by a legitimate aim, the means of achieving which are appropriate and necessary. Statistical data is admissible to determine if indirect discrimination has occurred. It's unclear if the claimant has to assert that a particular number or percentage of the whole group are being disadvantaged by the apparently neutral rule. Again, this point could be clarified for the benefit of potential claimants and respondents.
- 9.4 The burden of proof is such that, if facts are established by or on behalf of the complainant from which it may be reasonably inferred that there has been a breach of the principle, it's up to the respondent to disprove it. (Section 76).
- 9.5 All claims now lie to the Director of the Equality Tribunal. In practice, I think, equality officers are likely to actually hear a case and the functions of the Tribunal are likely to be delegated to them under Section 75 of the Employment Equality Act. Gender based claims can lie to the Circuit Court. (This to ensure compliance with the Marshall case.)
- 9.6 Claims for redress in respect of the breach of the principle must be made within 6 months of "termination of the relevant employment". Note that this is a potentially problematic time limit for the self-employed. A time extension of up to a further 6 months is possible. (Appeals are possible to this process.) If a delay in bringing a claim arose because of the respondent's misrepresentation, time starts once the complainant finds out about the misrepresentation. (Section 81E(7)).
- 9.7 The Director has power to order any one of 5 remedies: an order requiring compliance with the levelling up principle, an order that the principle is implemented from the date the rule is amended to comply with a previous order, a general power to make whatever order is appropriate in the sense of requiring people to take a certain course of action, an order for compensation of the effects of acts of victimisation that occurred up to 6 years before the date of referral and an order for re-instatement, or re-

engagement with or without compensation. (Section 81H as amended by the Equality Act 2004.)

The upper amount of compensation is 104 times weekly remuneration (including occupational benefits) if the complainant was in a job (or dismissed at the time of referring the claim) or, otherwise, Euro 12,700.

If the claim is a gender related one the Director may order Courts Act interest.

- 9.8 Special provisions apply to those employed in the Defence Forces where certain procedures apply.
10. The 4th Schedule is complex to follow. Section 81J applies a form of tricky shorthand to incorporate by reference the follow on enforcement provisions of the Employment Equality Acts that are there to enable compliance with the pronouncements of the Director and also deal with appeals and procedural matters.

10.1 My gripe is that it's difficult to follow and this does not assist the enforcement of rights which is the aim of the exercise. That said I expect that those very helpful people at the Equality Tribunal will be able to offer guidance on the extent to which those provisions apply and the extent to which they do not. Let me explain.

10.2 Section 81J (2) states “ Sections 74, 76, 77A, 78 to 81, 83 to 85 and 86 to 104 of the Act of [2004] shall, **where appropriate**, apply in relation to this Part as they apply in relation to that Act but with the following modifications.” (emphasis added)

Subsection 3 then goes on to explain that in the key in the Fourth Schedule the words in column 3 are to be deleted in favour of the words in column 4. But, in practice, when you read the full text there are areas where its unclear if the relevant provision applies at all. I mentioned the matter of offences at the start of this talk, at paragraph 2.6, as an example.

It would help practioners if a full job were done, next time out, please! That said, there are few cases of pensions or, indeed, occupational benefits discrimination that surface.

In my experience the old chestnuts are the terms of old phi policies (and new ones relating to exclusions for AIDS related illnesses), and discretionary access to all schemes whether they are occupational benefits plans or pension schemes. As regards the latter this issue arises usually in transactions. Rarely do I see express areas of discrimination and I have

never seen one on racial, age, ethnic, sexual orientation, or traveller grounds.

So it seems to me that this legislation is helpful to make sure that these breaches of law do not occur rather than remedying existing practices.

11. Pensions Board

The Pensions Board has a limited role: to determine whether an occupational benefits scheme is a defined contribution for the purposes of Part VII (Section 81G), and to refer any claim to the Director if it thinks it's appropriate to do so or where it thinks there is a general practice of victimisation or discrimination being practiced (Section 85 Employment Act 2004 as incorporated by section 81J of Part VII- see 4th Schedule reference number 12), or to assist the Director in matters relating to an occupational pension scheme and prepare a report in such cases. (Section 81J).

There is also a general principle that redress can only arise under one set of rights or proceedings and this is reflected throughout. For example, the Fourth Schedule was amended by the Equality Act 2004 to ensure that a claim could not be made under Part VII and also under either the Protection of Employees (Part-Time Work) Act 2001 or the Protection of Employees (Fixed-Term Work) Act 2003.

Part VII also deals with victimisation and the previous position is generally maintained. The Fourth Schedule's provisions cover situations where at the time of prosecution of an employer for victimisation, personal redress for the affected individual may be ordered. It also deals with appeals and all procedural matters relating to same. As far as I can make out, although I did not look anything up specifically on the point, and I am relying on memory, there is no procedure whereby the claimant can have costs of bringing the action awarded against the respondent. Perhaps this is where the compensation comes in of up to 104 times weekly remuneration if in employment at time of claim etc.

Going forward, future new grounds will probably derive from challenges on sexual orientation and marital status grounds. This is the experience in the UK e.g. *KB v National Health Service Pensions Agency & Anor*³, where the European Court left it up to national courts in the UK to decide whether a transsexual can rely on Article 141 to gain recognition of her right to nominate her partner as a beneficiary of her pension. KB was a female member of the NHS pension scheme in the UK whose partner was a female-to-male transsexual. Previously the European Court of Human Rights had held that the fact that someone could not marry someone of their own sex prior to gender reassignment, which arises because they are deemed to belong to the same sex, is a breach of the right to marry under Article 12 of the European Convention on Human Rights.

³ 2004 PLR 191

Thanks for listening and I welcome all observations.

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