



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4109409/2021**

5

**Held in Glasgow on 24 April 2023**

**Employment Judge M Robison**

**Ms R Henry**

10

**Claimant  
Represented by:  
Mr M Allison -  
Solicitor**

**The Scottish Ministers**

15

**Respondent  
Represented by:  
Mr K McGuire -  
Solicitor**

20

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Employment Tribunal does not have jurisdiction to hear this claim, which is therefore dismissed.

**REASONS**

25

1. This preliminary hearing was listed following a previous preliminary hearing when the claimant's application to amend was granted and this hearing listed to consider the respondent's pleas of lack of jurisdiction and time bar.

30

2. The respondent in this case raised the question whether this Tribunal has jurisdiction to hear this claim, now pursued under section 67 of the Equality Act 2010. Even if this Tribunal does have jurisdiction to hear the claim, the respondent submits that it is time barred.

3. At the outset of the hearing, Mr Allison argued that only the issue of jurisdiction should be considered, because in regard to the question of time bar, that issue

was dependent on disputed facts and should be deferred until the hearing of evidence on the merits. Mr McGuire opposed that application in strong terms.

4. I rejected Mr Allison's application to defer the question of time bar until after a hearing on the merits. While I did not, at that point, rule out the possibility of deferring that question, I was not convinced, at that stage, that it would be necessary for me to defer the time bar question until I had heard further evidence (the Tribunal already having heard evidence on time bar, albeit when the claim was pursued under section 61). I therefore decided to hear full arguments from Mr Allison and Mr McGuire.
5. As it transpired, I was able to deal with both issues on the basis of the submissions heard. Although I have heard evidence from the claimant in this case, I make no findings in fact not least because I was able to deal with the issues which arose on the basis of legal submissions alone, but also because the evidence heard related to a claim pursued under section 61.

#### 15 **Relevant law**

6. Given the extensive nature of the relevant provisions of the Equality Act 2010, referenced in submissions, I have set these out in an annex for ease of cross referencing.

#### **Tribunal deliberations and decision**

#### 20 **Jurisdiction**

7. I considered first whether this Tribunal has jurisdiction to hear the claim. This claim is now pursued under section 67 of the Equality Act 2010, rather than section 61. The question for consideration in essence is whether this Tribunal has jurisdiction to hear a claim pursued by a dependant partner of a deceased member of a pension scheme.

#### *Summary argument for the respondent*

8. Mr McGuire argues that his point is a straightforward one, that the employment tribunal does not have jurisdiction under the Equality Act to determine the claim now brought by the claimant under section 67. The

relevant provision is in Part 5, chapter 3 headed “equality of terms”, where sections 64 to 70 apply and where enforcement is set out in section 127. He submits that, read together, these sections mean that:

- 5 a. It is clear that the reference to A in section 67 means that a claimant must be employed in work that is equal to B, by reference to section 64;
- b. the claim must therefore be brought by a person who is employed on equal work with a comparator;
- 10 c. There is no provision for a third party such as the claimant to bring a claim, and
- d. Nothing in section 127 gives the employment tribunal jurisdiction to determine the type of claim brought by the claimant.

*Summary argument for the claimant*

- 15 9. Mr Allison submits that s.67 does not limit or fetter who can rely on it because it does not address who can rely upon it at all. Section 67 he argues simply sets out the relevant circumstances in which s.67 is engaged, from the perspective of an occupational pension scheme, and there is nothing there which states that the claimant rather than Mr Allen (her deceased partner) cannot pursue a claim under section 67.
- 20 10. While he accepts that the claimant is not employed, he argues that given Mr Allen was a pension scheme member, the claimant is directly affected by the issue in question because she was a dependant. He submits that the challenge could only be made when a member is deceased because it is related to survivorship. If a claim could only be brought by a scheme member, there is no answer to the question whether the dependant survivor is entitled to the benefit. Otherwise, he argued, the claimant would have no remedy to address any discrimination.
- 25 11. He submits that the respondent confuses the concept of whose pension is subject to section 67 with who is entitled to enforce a breach of section 67. He says that it is plain from s.67(5) that the scope of s.67 is intended to include
- 30

the effect of discriminatory provisions within an occupational pension scheme of the member's dependant.

12. He also submits that there can be no dispute that, at the material time, the claimant was a dependant of the deceased. Mr McGuire on the other hand submits that even if it could be argued that there is an exception for a dependant of a member, there is no evidence that the claimant is a dependant of Mr Allen because she said little in evidence about their relationship.
13. Mr Allison relies also on Part 9 (enforcement) to support his argument. He submitted that the issue of who can enforce a breach of a sex equality rule is governed by part 9 of the Act, not section 67.
14. He does not accept the respondent's argument that under part 9 (enforcement) either chapter 3 or chapter 4 only applies.
15. The claimant's position is that she is entitled to proceed under either chapter 3 or chapter 4. He argues in particular that section 120(1) confers jurisdiction on the employment tribunal to determine a complaint relating to a contravention of Part 5 (work); Part 5 (work) includes chapter 3 on equality of terms; this includes section 67. This states in terms on the ordinary meaning that section 120 applies to contraventions under part 5, which includes section 67.
16. He also relies on the explanatory notes, which state that where there has been a breach of a term modified by a sex equality rule, proceedings may be brought against the person responsible for the breach under part 9 of the Act, with no specific reference to chapter 3 or 4.
17. He argued that if the intention was to exclude claims under section 67, it would say so in terms, as is done in section 120(7) and (8) where certain claims are excluded. Thus the decision not to exclude s.67 must be a deliberate one.
18. Further, with regard to section 127, there is nothing within that section which suggests only that section and not section 120 applies. This is limited only to the nature of the complaint rather than who can bring it.

*Tribunal deliberations*

19. Following consideration of these competing submissions, I came to the view that only members of pensions schemes and those who are entitled to become members can pursue claims under section 67. In particular, I  
5 concluded that this Tribunal does not have jurisdiction to hear a claim pursued by a dependant of a deceased member of a pension scheme, assuming that Ms Henry was indeed able to establish that. I came to that view for the following reasons.
20. It is now accepted that the relevant provision here is section 67 and not  
10 section 61. Section 61 relates to a non-discrimination rule implied into every occupational pension scheme. That provision relates to discrimination which is not discrimination because of sex, but because of other protected characteristics. This is clear from section 70, that is that when the claim relates to sex discrimination where a “sex equality rule” would otherwise be in  
15 play, claims under section 61 would be excluded.
21. While gender discrimination in occupational pension schemes was addressed prior to the introduction of the Equality Act by the Pensions Act (s212(1)), the Equality Act now addresses gender discrimination in occupational pension schemes, which implies a sex equality rule into an occupational pension  
20 scheme. This follows the same approach as that seen in relation to gender discrimination in pay and other terms, where an employment contract which does not include a sex equality clause is to be treated as including one.
22. The Equality Act thus maintains the distinction in the antecedent legislation deriving from the interplay between the Sex Discrimination Act 1976 and the  
25 Equal Pay Act 1970 in regard to sex discrimination and equal pay as between gender inequality in pay and other discriminatory acts in the employment sphere. A challenge to a term, either a contractual term or a provision of a pension scheme, is thus not challengeable as sex discrimination, but instead triggers the application of a sex equality clause, or in the case of  
30 discriminatory pension provision, a sex equality rule.

23. Thus gender discrimination in relation to a term of employment, including but not limited to one addressing pay or pensions, is only challengeable by reliance on a sex equality clause or rule. This requires a comparator, as is clear from section 66(2) and (3).
- 5 24. Section 67 is the relevant provision which requires that a sex equality rule should be implied into every occupational pension scheme. Section 67 states that the implied sex equality rule has the effect that “if a relevant rule is less favourable to A than it is to B, it is modified so as to be less favourable”.
- 10 25. It is quite clear from section 64, which states under the heading “relevant types of work”, that in sections 66-70, A means a person who is employed on work that is equal to a comparator of the opposite sex, which is referenced B. Thus both A and B, the claimant and the comparator, must be employed on equal work.
- 15 26. Accordingly a claimant must be employed and must identify a comparator who is also employed on like work. Here the claimant was not employed so there can be no comparator employed on equal work.
- 20 27. There is an exception where there is no actual comparator doing equal work (which would mean that a sex equality clause or rule would not operate) which is set out in section 71. This allows a claimant to bring a claim for sex discrimination under the normal sex discrimination provisions (which would allow for hypothetical comparisons), but only in a claim for direct discrimination. Only then could discrimination be challenged in the absence of a comparator. Here the offending term of the pension scheme is argued to be one that indirectly discriminates on grounds of sex so that exception does not apply (otherwise it is arguably marital status discrimination).
- 25 28. The focus of the relevant provisions vis-à-vis a pension scheme member (or potential member) is on the terms of the pension scheme. Section 67(3) references terms on which individuals are entitled to become members of the scheme and the way in which members of the scheme are treated, which are modified so as not to be less favourable. Similarly, where a term of an occupational pension scheme confers a discretion that is capable of affecting
- 30

the way in which persons become members of the scheme or the way in which members of the scheme are treated (s67(4))(in a way that would be less favourable to a woman compared to a man), the term is modified so as to prevent the exercise of discretion in that way.

5 29. As is generally accepted, the claimant was not a member of the scheme nor entitled to become a member, not least because she was not employed at any time by the respondent.

30. As I understand it, Mr Allison however relies on section 67(5) and (6) to support his argument. These provisions make specific reference to benefits  
10 for dependants of members. Contrary to Mr Allison's submission, I take the view that this provision reinforces the conclusion that it is members or prospective members of a scheme who are entitled to pursue a claim.

31. A term in a pension scheme is relevant if it is one relating to which persons  
15 *become members of the scheme or on which members are treated* (s67(3)). The references at 67(5) and 67(6) are to the types of terms which are to be included, and this encompasses terms which have effect for the benefit of *dependants of members* (section 67(5)), so that terms relating to a survivor's pension payable to dependants on the death of the pensioner will be relevant, and subject to the sex equality rule. Specifically in section 67(6) it is stated  
20 that the reference to the way in which members are treated includes a reference to the way in which *they* (ie the members) are treated in regard to the effect of the scheme for the benefit of dependants of members.

32. Thus contrary to Mr Allison's submissions, I take the view that these sections do specify the type of people who are entitled to pursue claims, namely  
25 members or prospective members of the scheme.

33. Further and in any event, as discussed above, a claim under section 67 requires the identification of a comparator. Section 67(7) and (8) make it clear in regard to a consideration of the terms of the pension scheme that where a term differs as between persons of the same sex according to their family,  
30 marital, or civil partnership status, any comparison must be with persons of the opposite sex who have the same status. This means that an unmarried

person who claims discrimination in respect of the terms of an occupational pension scheme (under section 67) must compare herself to an unmarried or non-civilly partnered man (marriage and civil partnership being equated for those purposes).

5 34. Thus, even if the claimant could pursue a claim under section 67 (and indeed even if Mr Allen had pursued a claim when he was alive) the comparator of the opposite sex would require to be similarly unmarried. However, as I understand it, male cohabittees/dependants would have been treated in exactly the same way as the claimant in terms of the application of the rules  
10 of the pension scheme.

35. With regard to the argument about the interplay with Part 9, Mr Allison on a close reading of section 120 and 127 suggested that the claimant has a choice about whether to pursue a claim under either, and specifically that claims under section 67 were not excluded under section 120.

15 36. So far as I noted, I was not referred in argument specifically to section 113(6) which is in Part 9 Enforcement. It is stated there that “chapters 2 and 3 do not apply to proceedings relating to an equality clause or rule except in so far as chapter 4 provides for that”. It seems to me that is the clear answer to the point. Mr Allison could see no provision in section 120 excluding claims under  
20 section 67 but it seems that he was looking in the wrong place, because section 113 states in terms that chapter 3, which includes section 120, does not apply to proceedings relating to an equality clause or rule.

37. The relevant enforcement provision is therefore found in chapter 4, section 127. That this is clear is evident from the fact that claimants in equal pay  
25 claims generally have not sought to rely on section 120. I agreed with Mr McGuire that if Mr Allison was right about there being a choice, then it would apply across the board. Indeed, I was aware of the decision of *Abdulla v Birmingham City Council* 2012 IRLR 116 CA, and it is apparent that such an argument was not considered in that case, where the claimants pursued  
30 claims in the High Court and it was recognised that were the claims to be referred to the employment tribunal they would be out of time.



38. This Tribunal does not therefore have jurisdiction to consider a claim by those in the circumstances of the claimant, that is as a dependant of a deceased member of a pension scheme. Absent jurisdiction, the claim has to be dismissed.

5 **Time bar**

39. I have determined that this Tribunal has no jurisdiction to hear this claim. Strictly speaking I do not therefore have any requirement to consider the time bar plea.

40. However, I went on to consider, given arguments were advanced, should it  
10 have been accepted that this Tribunal did have jurisdiction, whether any claim that might legitimately be pursued is in any event time barred.

41. As discussed above, I have also concluded that, even if the claimant did have the right to pursue a claim under the Equality Act, then enforcement of such a claim would proceed under Part 9, chapter 4, section 127.

15 42. This means that the claimant cannot in any event avail herself of arguments that the refusal to pay her a pension as a dependant of Mr Allen was a continuing act. Nor could she avail herself of alternative arguments, were that not to be accepted, that it was just and equitable to extend time, which are relevant in regard to claims under part 9, chapter 3, under sections 120 and  
20 123.

43. This is because, even if this Tribunal has jurisdiction, enforcement of the claim would be under section 127. In that regard, by reference to time limits, the relevant provision is section 129 and subsequent sections under chapter 4, set out in the annex for ease of cross referencing.

25 44. In short “equality of terms” type cases would normally require to be lodged within the period of six months beginning with the last day of the employment or appointment. This is now called a “standard case”. There are some exceptions to that, and one is where it is a “concealment case”.

45. Mr Allison argues that this is a concealment type case whereas Mr McGuire argues that it is a standard case.
46. Mr Allison argued that the reference to “worker” in the relevant provisions must be read as to include the claimant, that this must be the assumption because if the claim reaches this stage then the Tribunal will have accepted that it has jurisdiction to hear it. I do not however this along with other references in this section to employment and appointments reinforces the expectation that a claimant in an equality of terms type case would be an employee, office holder or former employee or office holder.
47. As I understand it, Mr Allison accepts that this claim has not been lodged within six months of the end of employment (since Mr Allen retired in or around 2001) notwithstanding that he argues that worker must be taken to include the claimant. There is however no provision, as there is under section 123, for any kind of just and equitable extension.
48. In regard to the time limit in a concealment type case, the limitation period is six months beginning with the day on which the worker discovered (or could with reasonable diligence have discovered) the qualifying fact.
49. A concealment case in a case relating to an equality rule is defined in section 130 as a case “where the employer or the trustees or managers of the occupational pension scheme in question deliberately concealed a qualifying fact from the member, and the member did not discover (or could not with reasonable diligence have discovered) the qualifying fact until the relevant day”.
50. A qualifying fact is “a fact which is relevant to the complaint and without the knowledge of which the worker or member could not reasonably have been expected to bring the proceedings”.

*Summary argument for the claimant*

51. Mr Allison argues that this is a “concealment” case because those administering the scheme have repeatedly and erroneously asserted that she was not entitled to a survivor’s award. However the effect of section 67 (that

is if the claimant is right on the merits) is to amend the scheme directly and the claimant therefore was entitled to a survivors award at the time those representation were made. While, he argued, there is a superficial attraction to assuming that the language of s.130(4) means that concealment must be  
5 in bad faith, the ordinary meaning of the language does not require that. So applying s.130(4), the representations made that the claimant did not qualify were made deliberately; those, on the hypothesis above, concealed the true position which is that the claimant was eligible; and that eligibility is a qualifying fact since without knowledge of her eligibility the claimant could not  
10 reasonably be expected to have brought proceedings (see s.130 (6)).

52. Mr Allison then argued that, if it is accepted that this is a concealment case, then the time bar is 6 months beginning with the day the claimant discovered (or could with reasonable diligence have discovered) the qualifying fact. He submitted that was the point at which she received clear and unequivocal  
15 advice to proceed with her claim (ie legal advice that, despite the concealment, the representations by the respondent were wrong). That can be taken as the point at which she applied for funding, being early 2021. Given she applied for early conciliation on 16 April 2021, this was within six months of the date on which she received that advice. The claimant therefore submits  
20 that the claim is within time.

*Summary argument for the respondent*

53. Mr McGuire disputes this analysis of a “qualifying fact”. He suggests that this is a counter intuitive argument because it rests on a fact which only emerges if the claimant is successful in her claim; and it is not a fact before that. The  
25 claimant asked for a survivor’s pension and was consistently advised that she did not qualify in terms of the rules of the scheme. There is no concealment here, he argued, and indeed the opposite is true and that is that the respondent has stated clearly that the claimant did not qualify. If a claimant did qualify and that only becomes a fact when it is found to be so by the  
30 Tribunal then this cannot be a qualifying fact. He submitted that this is not the type of situation envisaged by the provisions, which are aimed at employers not disclosing wage structures, and the case law examples relate to that.

54. Further, by reference to the definition in section 130(5), he submitted this cannot be a workable or logical interpretation of that provision which is to ensure that claims are brought timeously, since a claimant can only know the time limit once the employment tribunal decision is issued.

5 *Tribunal deliberations*

55. I did not accept Mr Allison's argument that this is a "concealment" case. I preferred the argument of Mr McGuire that this is a standard case, so that time bar would be the period of six months beginning with the last day of employment or appointment. Mr Allen's employment ended around 2001; the claim has not been brought within the prescribed period and is therefore out of time because there is no provision to extend time.

56. I agree that there has been no "concealment" at all here. Although Mr Allison suggests that there does not have to be bad faith, it must be the case that some fact has been concealed or hidden. The cases relating to concealment are those where an employer had deliberately concealed facts which prevented a claimant from knowing that she might have a valid equal pay claim. Indeed, the amendments to the antecedent legislation were introduced as a result of *Levez v TH Jennings* 1999 IRLR 36, which is a decision of the CJEU, where the court referenced delays in claims caused by an employer's deceit. It is this type of situation which the provisions intended to address, whereas here the respondent had been open and clear about the situation.

57. In any event, I agree with Mr McGuire that the claimant ascertaining that she was eligible to make a claim under the Equality Act cannot be described as a qualifying fact (whether at the point she gets unequivocal legal advice or at the point a tribunal or court finds in her favour on the merits). Although Mr Allison suggested that the date the circumstances became known would be the date on which the claimant got legal advice, I preferred the analysis of Mr McGuire, that in cases such as this the claimant could only know that she had been misled about eligibility when a court or tribunal found in her favour, which could not possibly be the basis on which time limits would run.

58. In any event, I do not accept that this is a concealment case at all, so that it would fall to be considered as a standard case, if section 129 were to be in play. Mr Allison accepts that in such a case the claim would be out of time, with no provision to extend time.

5 59. Thus even if this Tribunal has jurisdiction to hear this claim, then I find that the claim would be time barred.

### **Effective remedy**

60. Mr Allison argues however that if the Tribunal concludes that it does not have jurisdiction to hear a claim, or if it does, any claim is deemed to be time barred,  
10 such a conclusion would deprive the claimant of a remedy. This he argues must be a breach of EU law and/or human rights law.

### *Summary submission for claimant*

61. Mr Allison's arguments were primarily premised on this Tribunal having jurisdiction, but the claim not being pursued in time.

15 62. Mr Allison relies on the Equal Treatment Directive which requires adequate enforcement procedures to ensure the principle of equal treatment. His position is that this is retained EU law having been directly implemented into domestic law prior to exit day; accordingly he argues that the Equality Act must be interpreted in accordance with the Directive.

20 63. Since this interpretation of the Equality Act deprives the claimant of a remedy, then s129 should be disapplied to ensure compliance with the Directive (relying on *Lloyds Banking Group Pension Trustees Ltd v Lloyds Bank PLC* 2019 Pens.L.R. 5 where the court disapplied s.134 of the 2010 Act because it offended the principle of equivalence found in EU law).

25 64. Alternatively, he argues, the claimant is entitled to an effective remedy in terms of Article 6 ECHR in regard to the determination of her civil liberties and obligations. Section 3 of the Human Rights Act requires this Tribunal to read and give effect to legislation in a Convention compliant manner. Relying on *Ghaidan v Godon-Mendoza* [2004] UKHL 30, he argued that this Tribunal

requires to read s129(3) to include the words “or in the case of a complaint which relates to circumstances arising after the last day of employment such time period from those circumstances arising at the Tribunal shall conclude to be just and equitable in the whole circumstances”. Thus he argues, this Tribunal should conclude that this claim has been brought within a time period which is just and equitable in the whole circumstances.

5  
65. In general, Mr Allison submitted that the claimant otherwise would have no remedy to challenge a discriminatory pension scheme. Mr Allison submitted in particular that the claimant did not have the right to pursue a claim for  
10 judicial review. If I understood his argument, this is because of the provisions of the rules of the Court of Session, specifically rule 58.3 that “A petition may not be lodged in respect of an application if that application could be made by appeal or review under or by virtue of any enactment”.

*Summary argument for respondent*

15 66. Mr McGuire does not however accept, whether for want of jurisdiction or time bar, that the claimant is devoid of a remedy.

67. Mr McGuire argues that it is not the case that the claimant has no remedy because there is an alternative remedy in the civil courts including judicial review, so there is no question that the claimant has been deprived of a  
20 remedy.

68. This is because it is well established that the breach of the sex equality clause gives rise to a contractual claim, which can be brought in the civil courts and the courts have jurisdiction in relation to pensions and equality of treatment.

69. He submits there was nothing stopping Mr Allen bringing a claim in the civil  
25 courts because he was a member of the pension scheme.

70. Further there is no doubt that the claimant herself has a remedy in the civil courts. All such claims that he is aware of have been pursued as judicial reviews. He referenced claims relating to similar subject matter which have been pursued as judicial review in England, Northern Ireland and Scotland.

71. He did not accept Mr Allison’s argument that the claimant was prevented by the Court of Session procedural rules from pursuing a claim for judicial review. He referenced section 113(3) which states that the enforcement provisions do not prevent a claim for judicial review, or specifically in Scotland, an application to the supervisory jurisdiction of the Court of Session. He also referenced section 127(9) which states that “nothing in this section affects such jurisdiction as the High Court, the county court, the Court of Session or the sheriff has in relation to an equality clause or rule”.
72. Mr McGuire made the point that the fact that a claimant might chose the wrong forum, does not allow that claimant to continue her claim in that forum. He pointed out that the fact that a claimant might be time barred from pursuing a claim in a particular forum, does not entitle a claimant to continue their claim in that forum even if there is no other alternative.
73. Further and in any event he argues that the Directive cannot be read in such a way that would mean that the claimant’s claim should be required to proceed. The decision in the case of *Lloyds Banking Group* was based on very different facts and circumstances and the principle of equivalence. There are many claimants whose claims cannot proceed because they are lodged out of time and there is no principle in European law that such claims should be required to proceed. There is no lacuna in European law. In any event Mr McGuire argued that directives are not retained EU law, by reference to section 6(7) of the 2018 Withdrawal Act.
74. Similarly with regard to Mr Allison’s claims in regard to the HRA, he argued that Article 6 relates to procedures and does not give litigants a particular remedy or access to a particular tribunal. In any event the claimant had access to a court or tribunal and she chose not to pursue her claim in another court. She cannot fall back on Article 6 to protect the choice which she has made.
75. Mr McGuire argues that Article 6 is not engaged and, even if it is, it is not possible to read words into the Equality Act without going against the grain or essence of the legislation. He submits that Mr Allison’s argument which seeks

to introduce a just and equitable extension where it has been decided there is no just and equitable extension would need to be of general application. However, even if restricted to those circumstances, it completely re-writes section 129 which is well beyond “going against the grain”. It is not possible, he submits, for this Tribunal to read this provision down so that it is compliant.

### **Tribunal deliberations**

76. I accepted Mr McGuire’s arguments that the claimant or individuals in her circumstances, specifically where she was a dependant or cohabitee, is not deprived of a remedy in regard to survivors’ benefits.
77. It seems to me that Mr Allen himself could have sought to challenge the scheme, and it may well be that he would have been entitled to pursue such a claim in this Tribunal, but if not he was certainly not precluded from pursuing a claim in the civil courts. I do not accept Mr Allison’s argument that the claim did not arise until after Mr Allen’s death and therefore it cannot be said that there was no way of challenging a discriminatory term relating to survivors benefits prior to his death (which addresses the time limit point).
78. I noted in particular that a claim was pursued by a pensioner member relying on section 61 and it seems to me that by analogy Mr Allen himself could have made such a claim (*Walker v Innospec* 2017 IRLR 928, SC).
79. Although a claimant like Mr Walker relying on section 61 would be able to rely on the time bar provisions of section 123, and would be in a different position from a claimant claiming sex discrimination who will require to rely on section 129, that distinction will apply across the board to all claims relating to sex discrimination in pay and not just to pensions cases. Further that distinction has been considered by the CJEU (in *Levez* discussed above) and the subsequent exceptions to the standard time bar introduced for equal pay type cases.
80. Whether that analogy is right or not is beside the point because as an individual claiming survivors’ benefits, the claimant could have pursued a claim in the civil courts, and in particular she could have challenged the



operation of the scheme by way of judicial review. I was referred for example to the decision of the High Court in Northern Ireland in the application by Joanne Eccles reported at [2021] NIQB 111. As Mr McGuire pointed out, it seems that the claimant was aware of this, given that she referenced in her witness statement discussions with her solicitors in 2013 and 2014 her awareness of other similar cases. In her witness statement she stated “Due to the uncertainty in the outcome, and the substantial cost of making an application to the Court of Session for judicial review, I did not instruct this”.

5

10

81. I agreed with Mr McGuire’s comments about the consequences for litigants choosing the wrong forum or lodging claims out of time; specifically that this does not equate with the absence of an effective remedy.

15

82. I do not need to consider Mr Allison’s arguments under European law or under the ECHR because I do not accept that, in regard to my conclusion that this Tribunal does not have jurisdiction to hear this claim, the claimant was unable, at the appropriate juncture, to pursue a claim in the civil courts. Nor do I accept that the application of time bar rules otherwise operate to deprive her of a remedy.

83. I therefore do not accept that the claimant is thereby deprived of an effective remedy.

20

## **Conclusion**

84. This Tribunal does not have jurisdiction to hear the claim under section 67/section 127 of the Equality Act 2010, which therefore falls to be dismissed.

25

**Employment Judge: M Robison**  
**Date of Judgment: 19 May 2023**  
**Entered in register: 19 May 2023**  
**and copied to parties**

30

**ANNEX – RELEVANT LAW****Under the headings Part 5 Work; Chapter 3, equality of terms:****Section 64 Relevant types of work**

- 5 (1) Sections 66 to 70 apply where—
- (a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;
  - (b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.
- 10 (2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.

**Section 67 Sex equality rule**

- 15 (1) If an occupational pension scheme does not include a sex equality rule, it is to be treated as including one.
- (2) A sex equality rule is a provision that has the following effect—
- (a) if a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable;
  - (b) if a term confers a relevant discretion capable of being exercised in a way that would be less favourable to A than to B, the term is modified so as to prevent the exercise of the discretion in that way.
- 20 (3) A term is relevant if it is—
- (a) a term on which persons become members of the scheme, or
  - (b) a term on which members of the scheme are treated.
- 25 (4) A discretion is relevant if its exercise in relation to the scheme is capable of affecting—
- (a) the way in which persons become members of the scheme, or
  - (b) the way in which members of the scheme are treated.
- 30 (5) The reference in subsection (3)(b) to a term on which members of a scheme are treated includes a reference to the term as it has effect for the benefit of dependants of members.
- (6) The reference in subsection (4)(b) to the way in which members of a scheme are treated includes a reference to the way in which they are treated as the scheme has effect for the benefit of dependants of members.

- (7) If the effect of a relevant matter on a person (A) differs according to the effect it has on a person of the same sex as A, according to whether A is married, in a civil partnership, or for some other reason due to A's family status, a comparison for the purposes of this section of the effect of that matter on persons of the opposite sex must be with a person of the opposite sex to A who is in the same position as A and in particular—
- 5
- (a) where A is married to, or the civil partner of, someone of the opposite sex, A is to be compared to a person of the opposite sex to A ("B") where B is married to or (as the case may be) the civil partner of someone of the opposite sex to B;
- 10
- (b) where A is married to, or the civil partner of, someone of the same sex, A is to be compared to B where B is married to or (as the case may be) the civil partner of someone of the same sex as B.
- (8) A relevant matter is—
- 15
- (a) a relevant term;
- (b) a term conferring a relevant discretion;
- (c) the exercise of a relevant discretion in relation to an occupational pension scheme.
- (9) This section, so far as relating to the terms on which persons become members of an occupational pension scheme, does not have effect in relation to pensionable service before 8 April 1976.
- 20
- (10) This section, so far as relating to the terms on which members of an occupational pension scheme are treated, does not have effect in relation to pensionable service before 17 May 1990.
- 25

### **Section 70 Exclusion of sex discrimination provisions**

- (1) The relevant sex discrimination provision has no effect in relation to a term of A's that—
- (a) is modified by, or included by virtue of, a sex equality clause or rule, or
- 30 (b) would be so modified or included but for section 69 or Part 2 of Schedule 7.
- (2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision—
- (a) the inclusion in A's terms of a term that is less favourable as referred to in section 66(2)(a);
- 35 (b) the failure to include in A's terms a corresponding term as referred to in section 66(2)(b).

- (3) The relevant sex discrimination provision is, in relation to work of a description given in the first column of the table, the provision referred to in the second column so far as relating to sex.

5 **Section 71 Sex discrimination in relation to contractual pay**

- (1) This section applies in relation to a term of a person's work—
- (a) that relates to pay, but
  - (b) in relation to which a sex equality clause or rule has no effect.
- (2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14.
- 10

**Under the heading, Part 9 Enforcement; Chapter 3 Employment Tribunals**

**Section 113 Proceedings**

- 15 (1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.
- (2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.
- (3) Subsection (1) does not prevent—
- 20 (a) a claim for judicial review;
  - (b) proceedings under the Immigration Acts;
  - (c) proceedings under the Special Immigration Appeals Commission Act 1997;
  - 25 (d) in Scotland, an application to the supervisory jurisdiction of the Court of Session.
- (4) This section is subject to any express provision of this Act conferring jurisdiction on a court or tribunal.
- (5) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- 30 (6) Chapters 2 and 3 do not apply to proceedings relating to an equality clause or rule except in so far as Chapter 4 provides for that.
- (7) This section does not apply to—
- (a) proceedings for an offence under this Act;

- (b) proceedings relating to a penalty under Part 12 (disabled persons: transport).

### Section 120 Jurisdiction

- 5 (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—
  - (a) a contravention of Part 5 (work);
  - (b) a contravention of section 108, 111 or 112 that relates to Part 5.
- 10 (2) An employment tribunal has jurisdiction to determine an application by a responsible person (as defined by section 61) for a declaration as to the rights of that person and a worker in relation to a dispute about the effect of a non-discrimination rule.
- 15 (3) An employment tribunal also has jurisdiction to determine an application by the trustees or managers of an occupational pension scheme for a declaration as to their rights and those of a member in relation to a dispute about the effect of a non-discrimination rule.
- (4) An employment tribunal also has jurisdiction to determine a question that—
  - (a) relates to a non-discrimination rule, and
  - (b) is referred to the tribunal by virtue of section 122.
- 20 (5) In proceedings before an employment tribunal on a complaint relating to a breach of a non-discrimination rule, the employer—
  - (a) is to be treated as a party, and
  - (b) is accordingly entitled to appear and be heard.
- 25 (6) Nothing in this section affects such jurisdiction as the High Court, the county court, the Court of Session or the sheriff has in relation to a non-discrimination rule.
- (7) Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.
- 30 (8) In subsection (1), the references to Part 5 do not include a reference to section 60(1).

### Section 123 Time limits

- 35 (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.
- 5 (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
- (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
- (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
- 10 (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.
- 15 (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
- (a) when P does an act inconsistent with doing it, or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.
- (a) finds that a contravention is established by virtue of section 19, but
- 20 (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.
- (5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).
- (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.
- 25 (7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation..., the tribunal may—
- (a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;
- 30 (b) if no such order was made, make one.

**Under the heading Part 9, Enforcement; Chapter 4 Equality of Terms****Section 127 Jurisdiction**

- (1) An employment tribunal has, subject to subsection (6), jurisdiction to determine a complaint relating to a breach of an equality clause or rule.
- 5 (2) The jurisdiction conferred by subsection (1) includes jurisdiction to determine a complaint arising out of a breach of an equality clause or rule; and a reference in this Chapter to a complaint relating to such a breach is to be read accordingly.
- (3) An employment tribunal also has jurisdiction to determine an application by a responsible person for a declaration as to the rights of that person and a worker in relation to a dispute about the effect of an equality clause or rule.
- 10 (4) An employment tribunal also has jurisdiction to determine an application by the trustees or managers of an occupational pension scheme for a declaration as to their rights and those of a member in relation to a dispute about the effect of an equality rule.
- 15 (5) An employment tribunal also has jurisdiction to determine a question that—
- (a) relates to an equality clause or rule, and
  - (b) is referred to the tribunal by virtue of section 128(2).
- (6) .....
- 20 (7) Subsections (2) to (6) of section 121 apply for the purposes of subsection (6) of this section as they apply for the purposes of subsection (1) of that section.
- (8) In proceedings before an employment tribunal on a complaint relating to a breach of an equality rule, the employer—
- (a) is to be treated as a party, and
  - 25 (b) is accordingly entitled to appear and be heard.
- (9) Nothing in this section affects such jurisdiction as the High Court, the county court, the Court of Session or the sheriff has in relation to an equality clause or rule.

30 **Section 129 Time limits**

- (1) This section applies to—
- (a) a complaint relating to a breach of an equality clause or rule;
  - (b) an application for a declaration referred to in section 127(3) or (4).
- (2) Proceedings on the complaint or application may not be brought in an employment tribunal after the end of the qualifying period.
- 35

- (3) If the complaint or application relates to terms of work other than terms of service in the armed forces, the qualifying period is, in a case mentioned in the first column of the table, the period mentioned in the second column, subject to section 140B.

Case	Qualifying period
A standard case	The period of 6 months beginning with the last day of the employment or appointment.
A stable work case (but not if it is also a concealment or incapacity case (or both))	The period of 6 months beginning with the day on which the stable working relationship ended.
A concealment case (but not if it is also an incapacity case)	The period of 6 months beginning with the day on which the worker discovered (or could with reasonable diligence have discovered) the qualifying fact.
An incapacity case (but not if it is also a concealment case)	The period of 6 months beginning with the day on which the worker ceased to have the incapacity.
A case which is a concealment case and an incapacity case.	The period of 6 months beginning with the later of the days on which the period would begin if the case were merely a concealment or incapacity case.

5

- (4) ....

**Section 130 Section 129: supplementary**

- (1) This section applies for the purposes of section 129.

- (2) A standard case is a case which is not—

10

- (a) a stable work case,
- (b) a concealment case,
- (c) an incapacity case, or
- (d) a concealment case and an incapacity case.

15

- (3) A stable work case is a case where the proceedings relate to a period during which there was a stable working relationship between the worker and the responsible person (including any time after the terms of work had expired).
- (4) A concealment case in proceedings relating to an equality clause is a case where—



- (a) the responsible person deliberately concealed a qualifying fact from the worker, and
  - (b) the worker did not discover (or could not with reasonable diligence have discovered) the qualifying fact until after the relevant day.
- 5 (5) A concealment case in proceedings relating to an equality rule is a case where—
  - (a) the employer or the trustees or managers of the occupational pension scheme in question deliberately concealed a qualifying fact from the member, and
  - 10 (b) the member did not discover (or could not with reasonable diligence have discovered) the qualifying fact until after the relevant day.
- (6) A qualifying fact for the purposes of subsection (4) or (5) is a fact—
  - (a) which is relevant to the complaint, and
  - 15 (b) without knowledge of which the worker or member could not reasonably have been expected to bring the proceedings.
- (7) An incapacity case.....
- (10) The relevant day for the purposes of this section is—
  - (a) the last day of the employment or appointment, or
  - 20 (b) the day on which the stable working relationship between the worker and the responsible person ended.