

# Equal pension treatment in occupational pension schemes

## Guidance notes

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## Abbreviations

References to provisions of the Pensions Act, 1990, as amended (the Act), and its regulations to which the guidance notes relate, are given in abbreviated form on the left-hand side of the page. The following is the key to the abbreviations.

**'s'** means **'section'** and unless otherwise specified is used to refer to sections of the Act. Thus **'s27(1)'** means section 27, subsection (1) of the Act.

**'EEA'** means the Employment Equality Act 1998 (as amended).

**'EA'** means the Equality Act 2004.

**'SI'** means **'Statutory Instrument'** and refers to regulations made under the Act. Thus **'SI 279/02'** means the regulation numbered 279 made in 2002.

**'Sch'** means **'Schedule'** and is used to refer to Schedules to the Act. Thus **'2nd Sch'** means the Second Schedule of the Act.

**'r'** means **'regulation'** and is used to refer to sections in a statutory instrument. Thus **'r4(1) & r5 – SI 279/02'** means regulation 4, subsection 1 and regulation 5 of S.I. 279/02.

**'p'** means **'paragraph'** and is used to refer to paragraphs of Schedules. Thus **'p1(2) 2nd Sch'** means paragraph 1, subsection (2) of the Second Schedule of the Act.

## Introduction

s69

1. Part VII of the Act first became effective from 1 January 1993 and provided for the equal treatment of men and women in *occupational benefit schemes*. This requirement is referred to in Part VII of the Act and in these guidance notes as '*the principle of equal pension treatment*'.
2. Part VII originally gave effect to:
  - Article 141 (previously Article 119) of the Treaty of Rome which provides for equal pay for men and women. The European Court of Justice on 17 May 1990 ruled in Case G282/88 (Barber v Guardian Royal Exchange Assurance Group) that *benefits* under *occupational pension schemes* come within the scope of this article.
  - Council Directive 86/378/EC of 24 July 1986 specifically provides for the implementation of the principle of equal treatment in occupational social security schemes.
3. Since the introduction of Part VII, *the principle of equal pension treatment* has been extended as a result of decisions of the European Court of Justice, EC Council Directives and Irish social partnership agreements. The new Part VII implements Council Directives 2000/43/EC (the 'Race Directive') and 2000/78/EC (the 'Employment Directive') as they apply to occupational pensions. These Directives relate to discrimination on grounds of sexual orientation, religion, age, race and disability. Part VII also prohibits discrimination on grounds of marital, family or traveller status.
4. These developments have now been formally introduced into the Act by virtue of the Social Welfare (Miscellaneous Provisions) Act, 2004 and the Equality Act 2004. Amendments introduced by the Social Welfare (Miscellaneous Provisions) Act 2004 are effective from 5 April 2004 and the amendments introduced by the Equality Act, 2004 are effective from 19 July 2004. In certain circumstances these amendments can have retrospective effect (see paragraphs 96 to 98).
5. Part VII is the only part of the Act which applies to other arrangements in addition to *occupational pension schemes*. Part VII

applies to *occupational benefit schemes* which include arrangements for the self-employed such as retirement annuity contracts.

## Employment contracts

**s81C, s81D** 6. Part VII is the only part of the Act which covers in a limited way employment contract terms and terms of collective agreements.



## Part I – Principle of equal pension treatment

This part of the notes provides a general overview of the principle of equal pension treatment in occupational benefit schemes and explains the key terms used in the legislation.

**s66(2), s70** 7. The *principle of equal pension treatment* has now been extended so that there may not be *discrimination* between persons on any of the following grounds:

- (a) gender,;
- (b) civil status,
- (c) family status,
- (d) sexual orientation,
- (e) religious beliefs,
- (f) age,
- (g) disability,
- (h) race,
- (i) membership of the traveller community.

These grounds are referred to as '*discriminatory grounds*' in Part VII of the Act and in these guidance notes.

**s69, s70, s78, s79** 8. Every *scheme* must comply with the *principle of equal pension treatment*. The *principle of equal pension treatment* is that there may not be *discrimination* between persons on any of the *discriminatory grounds*. The principle also applies to access to, as well as the exercise of any discretion under, a *scheme*. The principle applies to *members'* dependants as it applies in relation to *members* (although see paragraphs 51 and 52). Therefore, on the *gender ground*, widows and widowers must be provided with the same surviving spouse benefits.

- s68, s70**      **9.** Part VII also expressly prohibits '*indirect discrimination*', being *rules* which are seemingly neutral in their application, but in fact impact more heavily on one category of person than another.
- s65(3)**      **10.** Part VII also prohibits *victimisation* (such as dismissal or other adverse treatment) as a result of involvement in matters related to *discrimination* or alleged *discrimination*.
- s80, s74,  
s81**      **11.** The effect of a *rule* of an *occupational benefit scheme* failing to comply with *the principle of equal pension treatment* is to render that provision null and void and such a *scheme* will be obliged to provide the more favourable treatment to the person who did not previously benefit from that more favourable treatment ('levelling-up') until a formal change is made. When the change is made it is possible to equalise the future treatment of both persons (current or prospective members) at the less favourable level ('levelling down'). Further, it is an offence for a person to act (or to seek to have another person act) in breach of *the principle of equal pension treatment*.

## Part II - Discrimination, discriminatory grounds, permitted exceptions and victimisation

This part of the Notes explains the discriminatory grounds and the acts which constitute unlawful discrimination.

### Introduction

s68, s70  
s78, s79

**12.** The *principle of equal pension treatment* requires that there be no *discrimination* between persons based on any of the *discriminatory grounds* (see paragraphs 13 to 18). The *principle of equal pension treatment* also prohibits *indirect discrimination* (see paragraphs 20 to 22). The *principle of equal pension treatment* extends to access to and the exercise of any discretion under a *scheme*.

### Discrimination

s66(1)(a),  
s67

**13.** *Discrimination* occurs where a person ('X') is treated less favourably than another person ('X') is, has been or would be treated in a comparable situation and such less favourable treatment is due to a *discriminatory ground*. The *discriminatory ground* may exist in the present, the past or the future, or be imputed to X.

#### Example

If Sheila is excluded from her employer's pension scheme because she is female discrimination has occurred on the gender ground if a male employee in a comparable situation is, has been or would be admitted to the scheme.

s66(1)(b)

**14.** *Discrimination* also occurs where one person ('X') is associated with another person ('Z'), and by virtue of such association, X receives (or has received) less favourable treatment than a person in a comparable situation ('Y') but who is not associated with Z and it would constitute *discrimination* as described in paragraph 13 above if Z received less favourable treatment.



### Example

X is associated with Z who is a member of the traveller community and as a result of this association X accrues benefits under a defined benefit scheme on a 1/80<sup>th</sup> basis. Y however is not associated with Z and accrues benefits on a 1/60<sup>th</sup> basis. X is discriminated against where:

- (i) X is treated less favourably than Y because of X's association with Z; and
- (ii) provided that it would be *discrimination* if Z (as a member of the traveller community) were to receive the same less favourable treatment that X has received.

**s65**            **15.** Any instruction to discriminate will also constitute discrimination and is thereby prohibited.

**s70(3)**        **16.** Different *occupational benefits* may be provided to different *members* provided this does not constitute less favourable treatment on one of the *discriminatory grounds*.

**17.** Any allegation of less favourable treatment must be based on one of the *discriminatory grounds*, rather than for some other reason (e.g., job description) (*A Worker v. Mid-Western Health Board [1996] E.L.R. 1*).

**18.** It is not necessary for there to be an actual comparator; a hypothetical comparator is all that is required.

## Procuring discrimination

**s74**            **19.** It is an offence for a person to procure (or attempt to procure) another person to do anything which breaches *the principle of equal pension treatment*, or which constitutes *victimisation* under the terms of the Act.

## Indirect discrimination

- s68(1)      **20.** *Indirect discrimination* occurs where a seemingly neutral *rule* of a *scheme* puts persons at a disadvantage based on one of the *discriminatory grounds*, compared with other persons. Such other persons, who are not so disadvantaged, may be *members* of, or potential future entrants to, the *scheme* in question.
- s68(2)      **21.** Any *rule* which constitutes *indirect discrimination* is prohibited, unless it is objectively justified by a legitimate aim. These objective factors must bear no relation to the discriminatory ground which has been alleged to be infringed; they must relate to, for example, a genuine economic need of the business and the means used for attaining that aim must be appropriate and necessary.
- r3 SI 337/01      **22.** The person who asserts that any such *rule* is objectively justified must prove that justification.

## Discriminatory grounds

The following paragraphs set out in detail the nine *discriminatory grounds*.

### Gender ground

- s66(2)(a),  
s67(1)(a)      **23.** *Discrimination* on the *gender ground* occurs where a woman is treated less favourably than a man or vice versa. It also occurs where survivors' benefits are provided on a differing basis for male and female dependants.
- s71      **24.** The following differing treatments of employees on the *gender ground* do not infringe *the principle of equal pension treatment*:
- greater employer contributions made under a *defined contribution scheme* in respect of employees of one gender, where they are made in order to remove or limit pre-existing differences between the genders in the amount or value of benefits provided or to ensure the adequacy of funds to cover the cost of benefits under a *defined benefit scheme*;
  - greater employer contributions made under a *defined benefit scheme* in respect of employees of one gender, where they are

made in order to ensure the adequacy of funds to cover the cost of benefits under a *defined benefit scheme*;

- gender based differences in the amount or value of:
  - benefits under a *defined contribution scheme*, where such differences are justifiable on actuarial grounds, or
  - certain elements of benefits provided under a *defined benefit scheme*, to the extent that the difference results from using actuarial factors which differ according to sex at the time when the funding of such *scheme* is implemented, such as:
    - (a) the conversion into a capital sum of part of a periodic pension,
    - (b) transfer of *occupational benefits*,
    - (c) a reversionary pension payable to a dependant in return for the surrender of part of a pension, or
    - (d) a reduced pension on early retirement.
- differing treatment of self-employed persons regarding optional benefits available under a *scheme*;
- differing treatment as regards additional benefits (being benefits which *members* choose) and which secure additional benefits to those ordinarily provided under the *scheme*; or
- differing rights to claim a flexible pension age, provided other conditions are the same for men and women.

### Civil status ground

- s66(2)(b),  
s67(1)(b)      **25.** *Discrimination* occurs between persons based on the *civil status ground* where the less favourable treatment is based on the fact that one person is single, married, in a civil partnership, separated, divorced or widowed.
- s75(1),  
s72(2)&(3)      **26.** The following differing treatments are permitted without infringing *the principle of equal pension treatment*:

- differing treatment required under, or acts done in compliance with the Maternity Protection Act, 1994 (as amended) or the Adoptive Leave Act, 1995; and
- if a member with *civil status* dies the spouse and children of such member may receive more favourable benefits than the benefits payable to the dependants of an unmarried member provided there is no breach of the *principle of equal pension treatment on the gender ground*.

### Example 1

Positive discrimination in favour of married people is permitted so long as the same benefit is provided in respect of male and female members of the scheme, e.g., it is permissible to pay a spouse's death in service pension but to provide no equivalent benefit for unmarried or same sex partners.

### Example 2

If a member with *civil status* dies and his/her spouse subsequently dies a scheme may provide a children's pension without providing similar benefits for the children of an unmarried member.

### Example 3

If a member with *civil status* dies and his/her spouse subsequently dies a scheme may provide for increased children's pensions without providing for corresponding increases to pensions payable to the children of an unmarried member.

## Family status ground

- s.6(2)(c),  
s67(1)(c)
- 27.** *Discrimination* occurs between two persons on the *family status ground* where the less favourable treatment is based on the fact that one has *family status* and the other does not.
- s65
- 28.** *Family status* is defined as being a parent (or being a person in loco parentis) to a person under the age of 18 or being a parent or resident primary carer to a person over 18 with a disability such that he/she needs continuing, regular or frequent support.

s75(1),  
s72(2) & (3)      **29.** The following differing treatments are permitted without infringing *the principle of equal pension treatment*:

- differing treatment required under, or acts done in compliance with the Maternity Protection Act, 1994 (as amended) or the Adoptive Leave Act, 1995; and
- if a member with *family status* dies his/her partner and children may receive more favourable benefits than the benefits payable on the death of a member without *family status* provided there is no breach of the *principle of equal pension treatment* on the *gender ground*.

**Example 1**

It is permissible to provide a dependant's pension to the partner of a deceased member with *family status* without providing similar benefits to the partner of a deceased member without *family status*.

**Example 2**

If a member with *family status* dies and his/her spouse subsequently dies a scheme may provide a children's pension without providing similar benefits for the children of a member without *family status*.

**Example 3**

A scheme may not provide for a higher accrual/contribution rate for parents than for non-parents.

**Sexual orientation ground**

s66(2)(d),  
s67(1)(d)      **30.** *Discrimination* on the *sexual orientation ground* occurs where one person is accorded less favourable treatment than another person due to differing *sexual orientation*, which includes heterosexuality, homosexuality and bisexuality. This ground is separate and distinct from the gender/sex ground.

s72(3)      **31.** It would be *discrimination* to provide death benefits to unmarried heterosexual partners, but not to provide equivalent death benefits for



unmarried same sex partners. However, because of the *civil status* exemption it would not be *discrimination* on the *sexual orientation ground* to provide death benefits for *spouses* but not to provide equivalent death benefits for same sex partners, provided this does not breach *the principle of equal pension treatment on the gender ground*.

## Religion ground

s66(2)(e),  
s67(1)(e)      **32.** *Discrimination* on the *religion ground* occurs where less favourable treatment is based on the fact that persons have different *religious beliefs* or that one person has a *religious belief*, and the other person does not. *Religious belief* is stated to include a religious background or outlook.

## Age ground

s66(2)(f),  
s66(3),  
s67(1)(f)      **33.** *Discrimination* on the *age ground* occurs where less favourable treatment is based on the fact that persons are of different ages. However, this ground only applies to persons over the maximum age for which there is an obligation to attend school. At present the obligation to attend school applies (under the Education (Welfare) Act, 2000) to all minors aged less than 16 years or who have not completed 3 years of post-primary education, whichever occurs the later).

s72(1)      **34.** It is not a breach of *the principle of equal pension treatment* on the *age ground* for account to be taken of age in the following circumstances:

- to fix a particular age or qualifying service (or a mixture of both) as a condition for admission to a *scheme*, entitlement to benefits under the *scheme*, or to use age related criteria for actuarial calculations.
- s72(1)(e)      • for *schemes* to fix age or qualifying service, or a combination of both as a condition to the accrual of rights under a *defined benefit scheme*, or to use age as a criterion for calculating the level of contributions to a *defined contribution scheme*, provided, that the imposition of such conditions is appropriate and necessary to the pursuit of a legitimate objective of the employer. Legitimate employment policy, labour market and vocational training objectives are cited in the Act as examples of legitimate objectives which may be pursued by imposing such preconditions. (see paragraphs 120 to 121 below).

- s77           **35.** The provisions of the Act relating to *discrimination* on the *age ground* do not apply to Defence Forces employments.
- s75(2)&(3)  
&(4)           **36.** Acts done in compliance with the following statutory provisions will not breach *the principle of equal pension treatment* on the *age ground*:
- (a) section 5 of the Air Navigation and Transport Act, 1946,
  - (b) section 12 of the Merchant Shipping Act, 1947,
  - (c) section 29 of the Transport (Miscellaneous Provisions) Act, 1971,
  - (d) section 3 of the Merchant Shipping (Certification of Seamen) Act, 1979,
  - (e) section 5 of the Irish Aviation Authority Act, 1993,
  - (f) the Protection of Young Persons (Employment) Act, 1996,
  - (g) the National Minimum Wage Act, 2000,
  - (h) section 3 of the Redundancy Payments Act, 1971, as amended by section 5 of the Redundancy Payments Act, 1979,
  - (i) paragraph 1 of Schedule 3 to the Redundancy Payments Act, 1967.

### **Disability ground**

- s66(2)(g),  
s67(1)(g)       **37.** *Discrimination* on the *disability ground* occurs where:
- (a) one person has a *disability*, and the other person does not, or
  - (b) where both persons have different disabilities
- and one person receives less favourable treatment than the other.
- s73(1)       **38.** *Rules of schemes* may provide for differences in treatment of disabled *members* who cannot do the same amount of work as a *member* without that *disability* provided such action does not breach *the principle of equal pension treatment* on the *gender ground*. A person without that *disability* is not entitled to this more favourable treatment.

- s77           **39.** The provisions of the Act relating to *discrimination* on the *disability ground* do not apply to Defence Forces employments.
- s75(2)       **40.** Acts done in compliance with the following statutory provisions will not breach *the principle of equal pension treatment* on grounds of *disability*:
- (a) section 5 of the Air Navigation and Transport Act, 1946,
  - (b) section 12 of the Merchant Shipping Act, 1947,
  - (c) section 29 of the Transport (Miscellaneous Provisions) Act, 1971,
  - (d) section 3 of the Merchant Shipping (Certification of Seamen) Act, 1979,
  - (e) section 5 of the Irish Aviation Authority Act, 1993.
- s73(3)       **41.** *Schemes* may have *rules* providing more favourable *occupational benefits* to be paid to a member with a *disability* where the member avails of early retirement on grounds of that *disability*. A person without that *disability* is not entitled to this more favourable treatment.
- s73(2)

### Ground of race

- s66(2)(h),  
s67(1)(h)    **42.** *Discrimination on grounds of race* occurs where less favourable treatment is based on the fact that one person is of a different race, colour, nationality or ethnic or national origin, or a combination of any of those factors and another person is not.

### Traveller community ground

- s66(2)(i),  
s67(1)(i)    **43.** *Discrimination on the traveller community ground* occurs where less favourable treatment is based on the fact that one person is a member of the travelling community, and another person is not.

### Victimisation

- s65(3)       **44.** *Victimisation* occurs where an employee is dismissed or otherwise treated adversely by the employer where the employee:

- (i) notifies the Director General of the Workplace Relations Commission or the Pensions Authority (the Authority) of an alleged breach of Part VII,
- (ii) complains of a breach of *the principle of equal pension treatment* to his/her employer,
- (iii) institutes proceedings (including appeals) for failure to comply with *the principle of equal pension treatment*,
- (iv) has represented or supported another employee in proceedings under Part VII,
- (v) compares his/her work to that of another employee for the purposes of Part VII,
- (v) has been a witness in proceedings brought under Part VII, or
- (vi) gives notice of an intention to take any of the above-mentioned steps.

## Part III - Practical application of the principle of equal pension treatment

This part of the notes sets out some of the practical considerations in applying the principle of equal pension treatment.

### General

**45** In this section guidance is given on how *the principle of equal pension treatment* affects the main *rules* that govern the provision of pensions under *occupational pension schemes* only.

Each **TOPIC** is considered by reference to each **discriminatory ground**.

### All schemes

#### Eligibility for scheme membership/benefits

##### General principles

s70, s78 **46.** The *principle of equal pension treatment* prohibits employers from treating persons differently on *discriminatory grounds* in deciding:

- the manner in which employees are afforded access to an employer's *scheme*,
- who may become a member of a *scheme*,
- whether membership is compulsory or optional, and
- eligibility criteria such as age of entry, length of service to qualify for benefits etc.

**47.** Different *occupational benefits* are permissible for different categories of *member* provided that the different treatment does not constitute a breach of the *principle of equal pension treatment*.

**48.** There are exceptions to these basic principles for *discrimination* on the *age, civil status, family status* and *sexual orientation grounds*.

## Exceptions for the age ground

49. The *principle of equal pension treatment on the age ground* has little practical impact on *occupational pension schemes* because of the significant differing treatments allowed under the Act.

s72(1) 50. Providing that there is no *discrimination* on the *gender ground* differing treatments are permitted for persons with different ages or lengths of *qualifying service* in deciding:

- to fix a particular age or qualifying service (or a mixture of both) as a condition for admission to a *scheme*, entitlement to benefits under the *scheme*, or to use age related criteria for actuarial calculations.

s72(1)(a)

### Example 1

A scheme may fix an entry requirement of attaining age 25 years and 2 years' service prior to admission, provided that there is no discrimination on the gender ground (and subject to PRSA access obligations under section 121 of the Act). A scheme may also fix a maximum age for entry to the scheme, e.g., age 60 in a scheme with an NRD of 65.

s72(1)(b)

### Example 2

A scheme may fix an entry requirement of attaining age 25 years and 2 years' service for staff and a requirement of attaining age 35- and 10-years' service for management prior to admission, provided that there is no discrimination on the gender ground (and subject to PRSA access obligations).

s72(1)(e)

- *for schemes* to fix age or qualifying service, or a combination of both as a condition to the accrual of rights under a *defined benefit scheme*, or to use age as a criterion for calculating the level of contributions to a *defined contribution scheme*, provided, that the imposition of such conditions is appropriate and necessary to the pursuit of a legitimate objective of the employer. Legitimate employment policy, labour market and vocational training objectives are cited in the Act as examples of legitimate objectives which may be pursued by imposing such preconditions (see paragraphs 120 to 121 below).

s72(1)(e)(i)

**Example 3**

Provided an employer can show a legitimate objective is met by the scheme design, a scheme may provide that in relation to a defined contribution scheme on attaining the age of 45 and completing 10 years' service employer contributions and employee contributions will be increased provided that there is no discrimination on the gender ground (and subject to PRSA access obligations).

s72(1)(e)(ii)

**Example 4**

Provided an employer can show a legitimate objective is met by the scheme design, it may be possible to provide different scales of contributions for different employees, e.g., for a defined contribution scheme the following sliding scales:

	Regional	Headquarters
Less than 30 years	5%	10%
30 – 40	10%	15%
40 – 60	15%	30%

s72(1)(e)(ii)

**Example 5**

Provided an employer can show a legitimate objective is met by the scheme design, it may be possible in the case of a defined benefit scheme to provide different rates of accrual (of final pensionable salary for each year of service) for different categories of employee, e.g., the following scales

Years of completed pensionable service	Accrual rate
1 – 10	1/100 <sup>th</sup>
11 – 20	1/60 <sup>th</sup>
21 – 40	1/50 <sup>th</sup>

## Exceptions for the civil status and sexual orientation grounds

- s72(3) 51. *Schemes* are permitted to provide more favourable death benefits to *spouses* of deceased married *members* than would apply to the partners of unmarried *members* including same sex partners. Such *spouses* could be declared to be eligible for death benefits for which other persons are not eligible.

## Exceptions for the civil status and family status grounds

- s72(2) 52. Provided there is no breach of the *principle of equal pension treatment* on the *gender ground*, a *scheme* may restrict eligibility for death benefits to dependants of *members* with *civil status* and/or *family status*. See paragraphs 26 and 29 above.

## Indirect discrimination

- s68 53. Eligibility provisions can be a source of *indirect discrimination* claims. Historically the exclusion of part-timers from *schemes* (now broadly speaking no longer permitted following the enactment of the Protection of Employees (Part-time Work) Act, 2001) created significant claims for *indirect discrimination*. The *indirect discrimination* arose in cases where, for example, such an exclusion impacted on many more persons of one gender than would have been proportionate to the make-up of the employer's workforce generally.

Section 68 provides that *indirect discrimination* occurs where an apparently neutral rule of a scheme would put a member or prospective member with a relevant characteristic in relation to any of the *discriminatory grounds* at a particular disadvantage compared with other members or prospective members, unless the rule is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

## Access - reinstatement and backdating contributions

- s80(5) 54. Where access to an *occupational pension scheme* has been denied and this is being corrected, the backdated admission of a *member* shall be subject to the payment by the *member* of 'appropriate back contributions' to the *scheme* (see paragraphs 115 and 116).



## Retirement ages

### General principles

- s70            **55.** The *principle of equal pension treatment* prohibits employers from treating persons differently on *discriminatory grounds* in deciding on the *normal pensionable age* for members of a scheme.
- s70(3)        **56.** Different *occupational benefits* are permissible for different categories of *member* provided that the different treatment does not constitute a breach of *the principle of equal pension treatment*.
- s80,  
s81            **57.** Where there is inequality the discriminatory *rule* is null and void, and must be addressed by *levelling up* (i.e., providing the more favourable treatment to all affected members in this case by giving the members the **earlier** normal pension age) until the scheme rules are changed to comply with the principle of equal treatment (see paragraphs 112 and 113).

### Exception for age ground

- s72(1)(c),  
s72(1)(d),  
s72(4)        **58.** It is not *discrimination* on the *age ground* to fix different 'retirement ages' for different employees or groups of employees provided it is not a breach on the gender ground.

## Contributions

### General principles

- s70            **59.** The *principle of equal pension treatment* prohibits a *rule* from treating *members* differently on *discriminatory grounds* in providing:
- for the level of contributions payable by *members* to a *scheme*, and
  - for the level of employer contributions to a *defined contribution scheme*.
- s70(3)        **60.** Different *occupational benefits* can be provided in respect of different *members* so long as the *principle of equal treatment* is not breached. In the context of a *defined contribution scheme*, different contribution rates are permissible for different categories of *member*,

provided that the different treatment does not constitute a breach of *the principle of equal pension treatment*.

## Exceptions for gender ground

- s71(1)(a)(i)** **61.** It is not a breach of *the principle of equal pension treatment* on the *gender ground* for an employer to vary the contributions paid to a *defined contribution scheme* for male and female *members* to the extent that difference arises from removing or limiting the difference in the amount or value of the benefits expected to be provided under the *scheme*.

### Example

A defined contribution scheme may provide for a higher employer contribution rate for salaried staff than for hourly paid staff.

- s71(1)(a)(ii)** **62.** In the event that an employer determines the contributions to a *defined benefit scheme* by reference to either particular *members* or persons of a particular gender, the Act confirms that a difference in the level of contribution on the basis of gender is permitted if the purpose behind the difference is to ensure the adequacy of funds necessary to cover the cost of the benefits under the *scheme*.

- s71(1)(c),  
s81A(1)** **63.** It is not a breach of *the principle of equal pension treatment* on the *gender ground* for a *scheme* to treat women differently in connection with pregnancy and childbirth, provided that such treatment including as to contributions is consistent with the requirements of section 81A of the Act.

## Discretionary benefits

### General principles

- s79** **64.** The *principle of equal pension treatment* applies to the exercise of a discretion by a person in the granting of an *occupational benefit* under a *scheme*.

**65.** This statutory requirement is unlikely to make any difference to trustees of occupational pension *schemes* whose duties under trust law would in almost all cases prohibit *discrimination* between different categories of member on *discriminatory grounds*.

**66.** This requirement may impact on decision makers who are not bound by trust law such as employers and decision makers in *schemes* which are not established under trust. Any such persons must now have regard to the requirements of Part VII in considering the exercise of a discretion (e.g., regarding increases to pensions in payment).

#### **Example**

In exercising a discretion to grant increases to pensions in payment Trustees must take care not to cause discrimination. If the majority of lower paid pensioners are female, a decision to grant increases only to pensions below a specified amount may give rise to a claim of *discrimination on the gender ground*.

## **Annuity rates**

### **General principles**

**s70** **67.** The *principle of equal pension treatment* prohibits a *scheme* from treating *members* differently on *discriminatory grounds* in deciding the capital cost associated with a certain amount of *benefit* secured (i.e., the ‘annuity rate’). However, there are exceptions on the age and gender grounds.

**68.** Particular examples would be:

- in the case of a *defined contribution scheme*, by the application of different annuity rates for different categories of member,
- in the case of a *defined benefit scheme*, by granting differing service credits in respect of transfer payments received or differing transfer payments (paid out in respect of deferred benefits) to different members.

### **Exceptions for gender ground**

**s71(1)(b)** **69.** It is permissible to use annuity rates which differentiate by gender in calculating:

- the benefits provided under a *defined contribution scheme* to the extent that the difference is justifiable on actuarial grounds,

- the amount of:
  - a transfer payment in respect of *occupational benefits* provided under a *defined benefit scheme*, or
  - a reversionary pension payable to a dependant following surrender of part of the member's defined benefit pension,

to the extent that the difference results from the effects of the use of actuarial factors differing according to gender at the time when the funding of the *scheme* is implemented.

### Exceptions for age ground

s72(1)(f) **70.** It is permissible to use differing factors attributable to different ages in actuarial calculations, including those relating to annuity rates and similar calculations.

## Leaving Service

### General principles

s70 **71.** The *principle of equal pension treatment* prohibits a *scheme* from treating *members* differently on *discriminatory grounds* in determining what benefit options are available to *members* and how those benefits are calculated.

**72.** *Benefits* on leaving service other than by retirement normally take the form of one or more of the following: a refund of *members'* contributions, a deferred *benefit*, or a *transfer payment* to an alternative pension arrangement.

s70(3) **73.** Differing treatment as to the availability of refunds of contributions and/or transfer payments is possible, so long as it does not amount to direct or *indirect discrimination* on a discriminatory ground.

**74.** The amount of a transfer value under a *defined contribution scheme* is determined by the value of the member's account. For differences in transfer payments in a *defined benefit scheme* see Annuity rates above.

## Exceptions for gender ground

s71(1)(b) **75.** It is permissible to use *actuarial* calculation factors which differ according to gender in determining the amount of:

- the deferred benefit which can be secured by the application of the value of the *members* account in a *defined contribution scheme*,
- the transfer payment which is payable in respect of a member's deferred benefit entitlements in a *defined benefit scheme*,
- the service credit to be awarded in respect of a transfer payment received into a *defined benefit scheme*.

### Example

In the case of a defined contribution scheme where male and female comparators have retirement accounts of the same value, it is permissible for the male member to receive a higher annual pension.

In the case of early retirements from a defined benefit scheme where male and female comparators are entitled to the same pension at normal retirement age, it is permissible to reduce the male member's pension to a lesser extent than the female member's pension.

## Exception for age ground

s72(1)(f) **76.** It is permissible to use differing factors attributable to different ages in actuarial calculations, including those relating to annuity rates and similar calculations.

## Defined benefit schemes

### Accrual rate

#### General principles

s70            77. Benefits under a *defined benefit scheme* are usually of a fixed amount or based on salary and length of service. *Rules* of a *defined benefit scheme* should not contain different accrual rates for such benefits where such differences would constitute a breach of the *principle of equal pension treatment*.

#### Exception for age ground

s72(1)(e)    78. It is permissible however for a *defined benefit scheme* to fix different ages or qualifying service, or a combination of both, as conditions for different accrual rates for different employees or categories of employee provided:

- (a) in the context of the relevant employment to do so is appropriate and necessary by reference to a legitimate objective of the employer, including legitimate employment policy, labour market and vocational training objectives; and
- (b) such different accrual rates do not result in a breach of the *principle of equal pension treatment* on the *gender ground*.

## Commutation/gratuities

#### General principles

s70            79. Usually a retirement lump sum is available as an option in lieu of an equivalent amount of pension. For *members* of public sector *schemes* which provide a set lump sum gratuity in addition to the pension entitlement (and other *schemes* where *members* have no option but to take a lump sum in lieu of pension), the amount of the lump sum should be the same for *members* who have the same accrued pension entitlements.

## Exceptions for gender ground

- s71(1)(b) **80.** The amount of pension surrendered in exchange for a lump sum payable may vary as between male and female *scheme members*, if the amount is determined on the basis of actuarial calculation factors that differ according to gender. Such differences are permissible where a member may voluntarily opt for a lump sum in lieu of an equivalent amount of pension.
- s71(1)(b) **81.** Differences in the value of certain benefits are also permitted where they arise as a result of the application of different actuarial factors based on gender. Such actuarial differences are permitted in the case of the conversion into a capital sum of part of a periodic pension.

## Exceptions for disability ground

- s73(3) **82.** A *scheme* may provide, subject to Revenue requirements, for accelerated commutation for a *member* taking early retirement due to serious ill-health.

## Survivors' benefits

### General principles

**83.** The purpose of survivors' benefits is to provide for those who had been dependent on the earnings of the *member* before his/her death. The *principle of equal pension treatment* requires that the same benefits (either in the form of pensions and/or lump sums) be provided for spouses and dependants in respect of both male and female *members* of a scheme in the event of a member's death.

### Exceptions for civil status and family status grounds

- s72(2) **84.** Provided there is no breach of *the principle of equal pension treatment* on the *gender ground* a *scheme* may provide more favourable benefits:
- (a) on the death of a deceased member with *family status* and/or *civil status*, or
  - (b) to children, on the subsequent death of such member's spouse/partner,

than would apply in respect of *members* without *family status* or of a different *civil status* (see paragraphs 26 and 29 for examples).

### Exceptions for civil status and sexual orientation grounds

s72(3) **85.** It is permissible for a *scheme* to pay spouse's benefits without breaching *the principle of equal pension treatment* on the grounds of *civil status* and/or *sexual orientation* provided this would not result in a breach of *the principle of equal pension treatment* on the *gender ground*.

#### Example

Positive discrimination in favour of married people is permitted as long as the same benefit is provided in respect of male and female members of the scheme, e.g., it is permissible to pay a spouse's death in service benefit but to provide no equivalent benefit for unmarried or same-sex partners.

### Early and late retirement terms

#### General principles

**86.** The amount of pension payable from *normal pensionable age* is normally adjusted to take account of early or late retirement. This means reducing the accrued pension by reference to an appropriate actuarial calculation factor in the case of early retirement and increasing the accrued pension in the case of late retirement.

**87.** The principle underlying this process is that the value of the reduced early retirement pension (or increased late retirement pension) is the same as the value of the accrued pension at *normal pensionable age* and that the impact of early or late retirement on the individual is financially neutral.



### Exception for gender ground

- s71(1)(b) **88.** As the value of the benefits is based on the life expectancy of the recipient, the adjustment may vary as between men and women if it is determined using actuarial calculation factors which differ according to gender.
- s70(3),  
s71(1)(b)(ii)(IV) **89.** Variations in early retirement terms are permissible where early retirement is a voluntary option for *members*.

### Exception for disability ground

- s73(3) **90.** *Schemes* may have *rules* providing more favourable *occupational benefits* to be paid to a member with a *disability* where the member avails of early retirement on grounds of that *disability*. A person without a disability is not entitled to this more favourable treatment.
- s73(2)

## Voluntary contributions to purchase defined benefits

### General principles

- s70 **91.** Such variation in early or late retirement terms for men and women is not permissible where early or late retirement is mandatory. It is common practice for many *defined benefit schemes* to allow *members* to purchase additional years of service. Where this option is provided it must be provided without *discrimination* on any *discriminatory ground* subject to paragraphs 92 and 93 below.

### Exception for gender ground

- s71(1)(e),  
s71(2) **92.** It is not discrimination to provide different treatment to male and female *members* in relation to the purchase of additional years of service.
- s71(2) **93.** The underlying principle governing these arrangements is that the individual who opts to purchase additional benefits would normally bear the full actuarial cost of the additional benefits provided in his/her case. The cost of providing these benefits may vary as between male and female *members* if actuarial calculation factors which differ according to gender are used in determining the cost. This is permissible, given the fact that the purchase of additional benefits is optional for *members*.

## Part IV - Non-compliance and complaints

This part of the notes explains some prescribed instances of non-compliance with the principle of equal treatment and details of the complaint's procedures.

### Non-compliance

94. In this section guidance is given as to the consequences for the administration of a *scheme* of non-compliance with the *principle of equal pension treatment*.

### Effect of the Act where there is non-compliance

s80 95. A *rule* of a *scheme* which does not comply with the *principle of equal pension treatment* is rendered null and void by the Act to the extent that it infringes the *principle*.

### Time limits for gender ground

s80(1) 96. *Rules* are made null and void from different effective dates depending on the date the *rule* was made and the matter addressed by the *rule*. The main time limits are:

- **discriminatory rule on access** is null and void from 8 April 1976 or if later the date on which it purports to come into force;
- **other discriminatory rules** (except for self-employed and *rules* made post 5 April 2004) are null and void from 17 May 1990 (or earlier if proceedings were started before that date but in any event not earlier than 8 April 1976).

97. Effective dates for other discriminatory *rules* on the *gender ground* are:

- **discriminatory rule applicable to self-employed persons** is null and void from 1 January 1993 or if later the date on which it purports to come into force;

- **discriminatory rule made post 5 April 2004** (a *rule* which is stated to come into force on or after 5 April 2004) is null and void with effect from the date on which it purports to come into force.

## Time limits for other grounds

s81(1), s81(2) **98.** Discriminatory *rules* on all grounds, except gender grounds, are made null and void from different effective dates depending on the date the *rule* was made and the matter addressed by the *rule*.

- **discriminatory rule on ground of race** is null and void from the date on which it purports to have effect not being a date earlier than 19 July 2003,
- **discriminatory rule on any other ground apart from gender and race** is null and void from the date on which it purports to have effect not being a date earlier than 2 December 2003.

## Family leave

s81B(1) **99.** *Occupational benefit schemes* are required by *the principle of equal pension treatment* to ensure that a *member*.

- continues in membership of a *scheme*, and
- continues to accrue rights under a *scheme*;

during any period of *qualifying family leave* in the same manner as if he or she were at work and being paid normally during that period. A *rule* which is inconsistent with this requirement under the Act does not comply with *the principle of equal pension treatment*.

s81B(2) **100.** Where a *rule* is inconsistent with *the principle of equal pension treatment* the trustees or the employer must take such measures as are necessary to ensure that the *member* is treated by the *scheme* as if he were at work and being paid during the period of *qualifying family leave*.

**101.** There is no obligation to remunerate or provide superannuation benefits by reference to a period of family leave which is not *qualifying family leave*.

s75(1) **102.** Nothing in the Act makes unlawful any act done in compliance with the Maternity Protection Act, 1994 or the Adoptive Leave Act, 1995.

## Maternity absence

**s81A(2)**      **103.** *Occupational benefit schemes* are required by *the principle of equal pension treatment* to ensure that a *member*.

- continues in membership of a *scheme*, and
- continues to accrue rights under a *scheme*,

during any period of *qualifying maternity absence* in the same manner as if she were at work and being paid normally during that period. A *rule* which is inconsistent with this requirement under the Act does not comply with *the principle of equal pension treatment*.

**s81A(3)**      **104.** Where a *rule* is inconsistent with *the principle of equal pension treatment* the trustees or the employer must take such measures as are necessary to ensure that the *member* is treated by the *scheme* as if she were at work and being paid during the period of *qualifying maternity absence*.

**s22 MPA94**      **105.** In addition to the above requirements the *member* will usually have rights under the Maternity Protection Act, 1994 (as amended by the Maternity Protection (Amendment) Act, 2004. Section 22 of the Maternity Protection Act, 1994 provides that where an employee is on maternity absence she shall be deemed to have been in employment for that period and such absence will not affect any right related to the employee's employment (other than remuneration).

**106.** There is no obligation to remunerate or provide superannuation benefits by reference to any period of maternity absence which is not *qualifying maternity absence*.

**s81A(1)**      **107.** Nothing in the Act:

- prevents a *scheme* from providing special more favourable treatment for women in connection with pregnancy or childbirth,
- makes unlawful any act done in compliance with the Maternity Protection Act, 1994 or the Adoptive Leave Act.

## Collective agreements

s81            **108.** The Act extends in certain limited aspects to:

- collective agreements relating to employees,
- employment regulation orders and registered employment agreements under the Industrial Relations Act, 1946.

**109.** A rule or term of an agreement or collective order which would not if it were a *rule* of a *scheme* comply with the principle of equal pension treatment, is to the extent that it does not comply, null and void. The requirements to level up (see paragraph 112), provide backdated access (subject to payment of contributions) (see paragraphs 114 to 116), and the preservation of rights prior to the *rule* becoming null and void described in paragraphs 96 to 98 apply to such a rule or term.

## Employment contracts

s81D            **110.** The Act extends in certain limited aspects to a term (express or implied) of an employment contract which would not if it were a *rule* of a *scheme* comply with *the principle of equal pension treatment*. Such a term is, to the extent that it does not comply, null and void. The requirements to level up (see paragraph 112), provide backdated access (subject to payment of contributions – see paragraphs 114 to 116), and the preservation of rights prior to the rule becoming null and void described in paragraphs 96 to 98 apply to such a rule or term.

## Addressing non-compliance

### Implementing equalisation

s80(3)            **111.** Subject to certain limited exceptions for employees who have left service and other transitional provisions (see paragraphs 117 and 118 below), where a rule of a scheme is rendered null and void on the *gender ground* the different treatment must be removed in the manner set out in paragraphs 112 to 116 below.

## Levelling up and levelling down

**s80(1),  
s81(1)&(2)**      **112.** Where a *rule* is rendered null and void for breach of *the principle of equal pension treatment*, the more favourable treatment must be provided to both X and Y in respect of the appropriate period of membership in the *scheme* with effect from the relevant date (see paragraphs 96 to 98. ('levelling up')).

**113.** The differing treatment may be equalised on the less favourable basis but only with effect from the date on which the *scheme rule* is amended to comply with *the principle of equal pension treatment* ('levelling down').

## Access and back dated contributions

**s80(1),  
s81(1)&(2)**      **114.** Where a person has been denied access to a *scheme* in breach of *the principle of equal treatment* the more favourable terms of access must apply with effect from the relevant date (see paragraphs 96 to 98) until such time as the eligibility requirements are equalised.

**115.** If the *scheme* requires the payment of *member* contributions as a condition of membership the back dated admission of a person as a *member* is subject to payment of those contributions.

**s80(6)**      **116.** The amount of contributions payable depends on the wording of the *scheme*. If the *scheme rules* so provide the amount of contributions due is calculated for the period concerned at the appropriate contribution rate applying during the period by reference to the salary at the time the contributions are being paid. If the *scheme rules* do not so provide, the amount of contributions are to be calculated in accordance with the *rules* of the *scheme* from the beginning of the period.

## Gender discrimination may continue for certain deferred members

**s80(3)**      **117.** Where a *rule* of a *scheme* related to employed persons is rendered null and void on the *gender ground* the discriminatory *rule* may remain in force in respect of the rights and obligations of certain groups of *members* who left service or became pensioners on or before 31 December 1998 (or for rules relating to retirement ages on or before 31 December 2017) as follows:

(a) who left service or retired before 17 May 1990 the *rule* may remain unequal;

- (b) who left service or retired between 17 May 1990 and 31 December 1998, equalisation is required in respect of the period between 17 May 1990 and 31 December 1998 but provisions may remain unequal in respect of service prior to 17 May 1990;
- (c) in respect of *rules* relating solely to retirement ages, who left service or retired between 17 May 1990 and 31 December 2017, equalisation is required in respect of the period between 17 May 1990 and 31 December 2017 but provisions may remain unequal in respect of service prior to 17 May 1990;
- (d) with effect from 1 January 1999 in respect of employees leaving or retiring on or after that date, a *discriminatory rule* (other than a *rule* on retirement ages where the relevant date is 1 January 2018) must be equalised in respect of all of an employee's service including service prior to 17 May 1990.

#### **Gender ground – discrimination may continue for periods prior to 1 January 1993 for self-employed persons**

- s80(4)      **118.** Where a *rule* of a *scheme* for self-employed persons is null and void on the *gender ground*, the *discriminatory rule* may remain in force in respect of a person's rights and obligations relating to a period of membership before 1 January 1993.

#### **Other discriminatory grounds – rights in respect of service prior to application of the principle of *equal treatment***

- s81(4)      **119.** Where a *rule* of a *scheme* is rendered null and void on *discriminatory grounds* other than the *gender ground*, the *discriminatory rule* may remain in force in respect of a *member's* rights and obligations in relation to a period of membership of the *scheme* before the date on which the *rule* became null and void.

## Objective justification

s68(2),  
s72(1)(f)      **120.** Objective justification may be a defence where indirect discrimination or discrimination on the age ground is alleged. However, it is important to note that while very similar language is used, the tests in each case are not identical.

## Indirect discrimination cases

s68(2)      **120(a)** An objective justification asserted by an employer in defence to a claim of indirect discrimination must be based on objective non-discriminatory grounds, i.e. a discriminatory ground may not be invoked to assert an objective justification. Likewise, if the aim itself is discriminatory, the defence cannot be invoked. The Act provides that the discrimination must be justified by reference to a 'legitimate aim and the means of achieving that aim are appropriate and necessary'.

## Direct discrimination cases

s72(1)(e)      **120(b)** Two of the *age ground* exceptions are qualified in slightly different terms. The Act provides in these cases that there is no breach of the *principle of equal pension treatment* if the differing treatment is '*appropriate and necessary by reference to a legitimate objective of the employer, including legitimate employment policy, labour market and vocational training objectives.*'

**121.** The test in each of the statutory provisions is objective and therefore cases on these points will turn on the particular facts involved. It is not possible therefore to provide general guidance as to what constitutes an objective justification. The text box provides summary details of the current relevant cases from other jurisdictions on this area.





## Objective justification – Some cases and examples

### Indirect discrimination

The ***Bilka-Kaufhaus (ECJ 1986)*** case determined that indirect discrimination may be permissible whereas a matter of fact it was found that the discriminatory measures were based on ‘objectively justified economic grounds. If the national court finds that the measures chosen ... correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures [result in indirect gender discrimination] is not sufficient to show that they constitute an infringement of Article [141].’

The case concerned a German company which provided pensions for part-timers provided they had worked full time for at least 15 years. A female employee brought a claim on the basis that female workers were more likely than male colleagues to take part-time work to care for family and children. The exclusion of access on to pensions on criteria that indirectly affected more women than men was held to be contrary to what is now the principle of equal pension treatment unless the employer could show that their exclusion was based on objectively justified economic grounds.

In the ***Allonby (UK Court of Appeal 2001)*** case, it was noted that it would be wrong to conclude that an employer can never justify indirectly discriminatory measures unless such measures are shown to be necessary as the only possible measures. The measures must be tested to establish whether the objectives are legitimate. If so, then consideration of whether the means are appropriate and reasonably necessary for that end takes place. It was also noted that: a ‘justification’ for indirect discrimination should be weighed against the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.

The ***Shillcock (UK High Ct 2002)*** case approved the *Allonby* approach and further noted that: ‘The more serious and disparate the impact on men and women the more cogent must be the objective justification.’

In ***Staffordshire v Black (UK Employment Appeal Tribunal 1995)***, a Council’s policy of encouraging redundancy by means of a particular type of pension enhancement was more beneficial to full timers than to part-timers. The benefits applied to a higher proportion of men than women for the purposes of the applicable test under the UK sex discrimination legislation of the time. The Tribunal held that the Council’s desire not to allocate more resources to fund redundancy payments might be described as ‘necessary’ (i.e., a financial necessity) and therefore resulted from a policy which was objectively justifiable despite the indirect discrimination which the Tribunal concluded was inherent in the Council’s policy.

## Complaints

### Who can complain?

**s81E(1)**      **122.** A person claiming not to be receiving or not to have received *the principle of equal pension treatment*, or a person claiming to have been, or to be, the subject of *victimisation* may seek redress by referring the matter to the Director General of the Workplace Relations Commission (the Director). The Director can appoint a Designated Officer to act on its behalf and make decisions.

**s81E(4)**      **123.** The complainant is the person who refers the matter, or, in the case of a person with an intellectual or psychological disability, a parent, guardian or person in loco parentis.

**s81E(3)**      **124.** Where there is a failure to afford *the principle of equal pension treatment* to persons on the *gender ground*, the aggrieved person may refer their case to the Circuit Court instead of the Director.

**s81F(3)**      **125.** Complainants may appoint any individual or body to represent them in any proceedings. However, because of its overall duties and functions the Authority is not in a position to represent complainants in any proceedings.

**s81J,**  
**s85 EEA,**  
**s85(5A) EEA**      **126.** The Authority may in certain cases refer certain matters to the Director, and the proceedings shall operate as if the matter were referred by an individual complainant.

**127.** The matters, in relation to Part VII, which the Authority may refer to the Director are the following:

- where it appears that *discrimination* or *victimisation* has occurred in relation to a particular person who has not referred the matter to the Director,
- where it appears that there is a failure to comply with *the principle of equal pension treatment* in respect of a person whom it is not reasonable to expect to refer the matter to the Director themselves,
- where it appears that a person has procured or attempted to procure another person to do anything amounting to *discrimination*

or *victimisation* or to breach *the principle of equal pension treatment*.

s85(5) & (5A) EEA **128.** The Authority may in certain cases seek an injunction to prevent certain persons or bodies from carrying out specified conduct.

### Time limits for claims

s81E(5) **129.** Claims in respect of a claim of *victimisation* or a breach of *the principle of equal pension treatment* may be brought while the relevant employment continues or within six months of termination.

s81E(6) **130.** In certain circumstances a complainant may, on application to the Director or to the Circuit Court (as the case may be), have the six month post-employment period in which to bring a claim extended to twelve months where there is reasonable cause to do so. Any decision by the Director to extend the six-month period to twelve months may be appealed by either party to the Labour Court – such an appeal must be made within 42 days of the date of the Director’s decision.

s81E(7) **131.** Where a complainant does not take a case within six months of the end of their employment and the delay is due to a misrepresentation on the part of the respondent, the six-month period only starts from the date the complainant became aware of the fact of the misrepresentation.

### Burden of proof

s76(1)&(2) SI 321/99 **132.** Where in proceedings under Part VII it can be reasonably inferred from the facts established by or on behalf of the complainant that there has been a breach of *the principle of equal pension treatment*, the onus then falls on the respondent to prove otherwise. There are prescribed forms by which questions may be posed by ‘X’ (the complainant) of ‘Y’ (the respondent) in order to obtain material information and Y may, if Y so wishes, reply to any such questions.

s76(3) **133.** Where proceedings arise on a reference from the Authority (pursuant to section 85(1) of the Employment Equality Act) and facts are established by the Authority from which it is reasonable to infer that the activity under referral to the Director did in fact occur, then it is for the respondent to prove that the contrary is the case.

- s98(1) EEA**      **134.** If an employee is dismissed in circumstances amounting to *victimisation* and in any proceedings, it is proven that the employee was dismissed and in good faith did one or more of the acts outlined in paragraph 44 then until the contrary is proven, that proof shall, without more, be evidence that the sole or main reason for the dismissal was the fact that the employee did one or more of the said acts.
- s76(2)**            **135.** If some other enactment or rule of law imposes a more favourable burden of proof on a complainant, then the more favourable burden will apply.

### **Procedure**

- s81J**                **136.** In general, the procedures set out in the Employment Equality Act, 1998 (the EEA) apply in relation to claims for redress made under Part VII.
- s77A EEA**        **137.** The Director may dismiss a claim if he believes that it is frivolous  
**s33 EA**            or has been made in bad faith, which decision may be appealed to the Labour Court within 42 days of his/her decision.

### **Equality mediation officer**

- s78 EEA**            **138.** If it appears to the Director that the case could be resolved by mediation, he must refer the matter to an equality mediation officer. However, if one of the parties to the matter objects to the matter being dealt with by way of mediation, it will proceed to being dealt with by the Director.
- s78(5) EEA**        **139.** If the equality mediation officer resolves the matter he must prepare a written record of the terms of the settlement, signed by both parties to the mediation and send a signed copy to each party and the Director.
- s78(6) EEA**        **140.** If it appears to the equality mediation officer that the matter cannot be resolved by mediation, he will issue a notice to that effect to both parties. Within 28 days of such issuance, the complainant must apply to the Director to resume hearing the case.

## Director General of the Workplace Relations Commission (the Director)

- s79 EEA**      **141.** The Director is responsible for investigating the case and hearing all evidence in those cases where he does not consider it appropriate to refer the matter to an equality mediation officer. The Director shall make a decision as to whether a claim is to be investigated on more than one discriminatory ground.
- s35(a) EA**
- s79(2) EEA**      **142.** Investigations are held in private.
- s79(3) EEA**      **143.** If a question arises as to whether the situation of a complainant is a comparator for the purposes of the EEA, then the Director may investigate this as a preliminary issue.
- s79(1A)**      **144.** Where a claimant makes claims on multiple *discriminatory grounds* (including *victimisation*), the hearing will be heard as one case, but the Director must make a decision on each of these claims.
- s35(a) EA**
- s94 EEA**      **145.** The Director has wide powers in terms of gathering information and the conduct of any investigation. This power extends to entering premises for the purpose of obtaining information. The Director can require any person to produce any records, books or documents which the Director believes might contain material information.
- s95 EEA**      **146.** The Director also has power to require people to attend before him for the purpose of establishing if they have information within their power or control which is relevant to the exercise of the Director's functions under the Act. Any person so requested to attend is obliged to so attend and shall if requested by the Director sign a declaration of the truth of their answers to any questions.
- s96 EEA**      **147.** If it appears to the Director that any person has failed to comply with the requirement to produce information, then the Director may apply to the Circuit Court for an order requiring the specified person to comply with their requirements. A specific exemption is made for the Circuit Court to set aside any requirement to produce any record or information in respect of which the specified person is entitled to claim legal professional privilege.
- s81 EEA**      **148.** If in the course of investigation, the Director or Circuit Court (as the case may be) form the view that the respondent failed to supply information in response to questions submitted in prescribed forms, or if the view is formed that the answers given were false or misleading, the

Director or Circuit Court, (as the case may be) may draw such inferences as they deem appropriate.

**s79(6) EEA**     **149.** Where a determination of the Director is in favour of a complainant, the Director is obliged to make provision for redress.

### Types of redress

**s81H(7)**     **150.** Where an act constitutes victimisation under Part VII of the Act, the Employment Equality Act, 1998 and/or the Equal Status Act, 2000, redress may only be provided under one of those statutes.

**s81H(1)**     **151.** The Director, if he finds there to be a breach of *the principle of equal pension treatment* or finds that *victimisation* has occurred may make one or more of the following orders:

1. an order requiring 'levelling up' in accordance with sections 80 and 81 of the Act (see paragraph 112);
2. an order directing a person or persons to implement *the principle of equal pension treatment* for the future (i.e., from the date on which the *rule* of the *scheme* is amended to comply with *an order under 1 above*);
3. an order directing a person or persons to take a specific course of action in accordance with the order;
4. an order of compensation for the effects of *victimisation* but limited to *victimisation* occurring in the six years prior to the referral of the case to the Director;
5. an order for re-instatement or re-engagement with or without an order for compensation.

**s81H(4)**     **152.** The maximum amount the Director can award by way of compensation under 4 and 5 above where the complainant was in receipt of remuneration at the date of the reference of the case or, if earlier, the date of dismissal, is 104 times their weekly remuneration or, if greater, 104 times the weekly remuneration the person would have received but for the *victimisation*.

**153.** In all other cases the limit is €12,700.

- s81H(9)**      **154.** For the purposes of determining compensation ‘remuneration’ is defined as including *occupational benefits* and any consideration whether in cash or in kind which the employee receives, directly or indirectly, from the employer in respect of the employment.
- s81H(5)**      **155.** Where the Director makes an award of compensation having found a breach of *the principle of equal pension treatment on the gender ground*, in addition to an award of compensation he can also order the payment of interest.

### **Collective agreements**

- s86(1) EEA**      **156.** Claims that a provision of a collective agreement is null and void may be referred to the Director by a person who is affected by the collective agreement or by the Authority.
- s86(3) EEA**      **157.** If the Director considers that the possible nullity of a provision in a collective agreement referred to him is an issue which could be solved by mediation, he must refer the issue to an equality mediation officer. If one of the parties’ objects to this course of action the matter is dealt with by the Director.
- s87(1) EEA**      **158.** The Director or equality mediation officer (as the case may be) may if they think it appropriate provide guidance to the parties to the agreement on how alternative or amended provisions might be included in the agreement.
- s87(2) EEA,**  
**s87(3) EEA**      **159.** A decision of the Director relating to a collective agreement may be appealed to the Labour Court by the claimant or respondent within 42 days of the decision. Such an appeal will be held in private unless one of the parties requests it be held in public, in which case only the non-confidential aspects of the hearing shall be held in public.
- s87(4) EEA**      **160.** The Labour Court is obliged to identify which of the provisions are null and void and provide guidance to the parties as to how alternative provisions might be devised which are lawful to include in the agreement.



## Decisions and appeals

- s88 EEA**      **161.** All decisions of the Director and Labour Court must be in writing and published on the internet in such form and in such manner as the Director considers appropriate. The decision may contain written reasons for the decision if the Labour Court or the Director think fit, or if requested to do so by one of the parties. A copy of every decision of the Director shall be given to each of the parties as well as to the Labour Court. Similarly, a copy of every decision of the Labour Court shall be given to each of the parties and be published and made available for inspection at the Labour Court office.
- s89 EEA**
- s83 EEA**      **162.** Every decision of the Director may be appealed, within 42 days of the decision, to the Labour Court by the claimant or the respondent. Any such appeal hearing will be held in private unless one of the parties requests it to be held in public, whereupon such part of the proceedings which are not confidential may be held in public. Any party to a case referred to the Director may appeal a decision. On appeal, parties will be given an opportunity to be heard, to present evidence that is relevant to the appeal and after a decision has been made, a copy of that decision shall be given to the parties in writing. A decision of an adjudication officer shall be construed as a reference to a decision of the Director. The Labour Court has the power to grant redress on appeal as the Director has the power to grant in an investigation.
- s84 EEA**      **163.** The Labour Court may refer any issue on appeal back to the Director for further investigation, except in cases of dismissal in circumstances amounting to discrimination or victimisation, as the Labour Court ceases to have jurisdiction over these matters. The Director must give a written report to the Labour Court on that matter.
- 164.** During any such investigation, except in cases of dismissal in circumstances amounting to discrimination or victimisation, the Labour Court may suspend or adjourn all or part of the appeal pending the Director's report, and it is obliged to take account of the Director's report in reaching its determination.
- s83 EEA**      **165.** The Labour Court may provide any of the same forms of redress as the Director.
- s90 EEA**      **166.** Where a determination is made by the Labour Court on an appeal, except in cases of dismissal in circumstances amounting to discrimination or victimisation the parties may appeal to the High Court



on a point of law, and it may adjourn proceedings pending the outcome of such determination.

**s102 EEA**  
**s44 EA**      **167.** Where a case is referred to the Director under sections 77, 85 or 86 of the EEA or under the Anti-Discrimination (Pay) Act 1974 or the Employment Equality Act 1977 and is not pursued within a year, the Director may strike out that case. If an appeal is brought to the Labour Court and the complainant or the appellant has not pursued the matter after a year, the Labour Court may strike out the reference or the appeal.

**168.** The complainant and the respondent must be notified of any such striking out.

### **Circuit Court**

**s81E(3)**      **169.** A person claiming not to have been afforded *the principle of equal pension treatment* on grounds of gender may choose to refer their case to the Circuit Court instead of the Director.

**s81H(3)**      **170.** Where the Circuit Court has conduct of proceedings it has the same powers as the Director and any redress awarded under Part VII of the Act is not subject to the jurisdictional limit of the Circuit Court.

**s80(4) EEA,**  
**s80(5) EEA**      **171.** The Circuit Court may request the Director to nominate an equality officer to prepare and report on any question specified by the Circuit Court, which report must be furnished to the complainant, the respondent and any other person to whom it relates. The report shall be received as evidence in the proceedings, and the equality officer may be called as a witness by the complainant or respondent to the proceedings

### **Enforcement by Circuit Court**

**s39 EA**      **172.** In the event of failure to comply with the final determination of the adjudication officer or a final decision of the Director, then on application to the District Court the employer or other person who is bound by the terms of the decision, may be made the subject of a District Court order directing them to so comply.

**s39(a) EA**      **173.** Where a person who is a party to a settlement fails to give effect to same, such party may be subject to a Circuit Court order directing the carrying out of the terms of settlement. However, the Circuit Court shall not direct any person to pay any sum or do any other thing which (had

the matter been dealt with otherwise than by mediation) could not have been provided for by way of redress.

**s91(3) EEA**      **174.** Circuit Court enforcement in respect of the failures described in paragraphs 172 and 173 cannot be applied for until the time period for bringing an appeal has expired or in the case of a mediated settlement until 42 days have passed from the date of the written record of the settlement.

**s93 EEA**      **175.** When making an enforcement order under section 91 which relates to reinstatement or re-engagement of an employee the Court may, if it thinks in all the circumstances it is appropriate to do so, direct that a compensation order be made in lieu of the original order. In such event the amount of compensation cannot exceed 104 times the amount of the employee's weekly remuneration and occupational benefits at the rate which the employee was receiving at the date of the reference of the case or what he would have been receiving at that date but for the *discrimination* in question.

## Defence Forces

**s81F(1),  
s104(2) EEA**      **176.** In connection with claims relating to employment in the Defence Forces and where they are made by a member of the Defence Forces such claims must first be made in accordance with section 104 of the Employment Equality Act 1998 as amended. If requested by an authorised officer within the meaning of the Defence Act, 1954 the Director shall investigate, and make a decision in respect of, any matter which has been complained of in accordance with section 114 of the Defence Act, 1954 and which would save for section 104 of the Employment Equality Act be a matter which the Director could investigate under Part VII or which could be the subject of Circuit Court proceedings under section 81E(3) of the Pensions Act.

**s81F(2)**      **177.** A member of the Defence Forces can still make a claim under Part VII if:

- (a) 12 months have elapsed since the matter was referred under section 104 of the Employment Equality Act and the section 104 procedures have not been requested or completed, or,
- (b) the complainant is not satisfied with the decision made under section 104.

## Part V – Miscellaneous

### Disputes as to whether scheme is defined benefit or defined contribution

s81G            **178.** Where there is a dispute as to whether a *scheme* is *defined benefit* or *defined contribution* it shall be determined by the Authority, following an application made to it by one of the following persons:

- the *trustees* of the *scheme*,
- any employer of the persons to whom the *scheme* applies,
- a *member* or prospective *member* of the *scheme*, or
- other persons prescribed in regulations by the Minister for Social Protection who, in the opinion of the Minister for Social Protection ought to be entitled to make such an application.

An appeal to the High Court exists in relation to points of law by a person who brought or was entitled to bring an application.

### Report of Pensions Authority to the Director General

s81I            **179.** The Director may request the Authority to prepare a report and answer questions in relation to *occupational pension schemes*, on which he may rely in making his decision. The Authority must give a copy of any such report to the complainant, respondent and any other person to whom it relates.