

Appeal No. UKEATS/0007/12/BI  
UKEATS/0008/12/BI

**EMPLOYMENT APPEAL TRIBUNAL**  
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal  
On 14 & 15 August 2012

**Before**  
**THE HONOURABLE LADY SMITH**  
**(SITTING ALONE)**

UKEATS/0007/12/BI

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MS CHRISTINE FOLEY

APPELLANT

NHS GREATER GLASGOW & CLYDE AND OTHERS

RESPONDENTS

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MS ISABELLA DONNELLY

APPELLANT

NHS GREATER GLASGOW & CLYDE AND OTHERS

RESPONDENTS

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JUDGMENT

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## **APPEARANCES**

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Neither present nor represented

## **SUMMARY**

### **EQUAL PAY ACT – Damages/compensation**

Equal Pay. Jurisdiction. Statutory limitation.

Claimants alleged that their previous NHS Trust employers breached their rights under the **Equal Pay Act 1970**. Trusts dissolved and their liabilities under or in connection with the Claimants' contracts of employment transferred to the respondents by Staff Transfer Orders (under paragraph 26 of Sch 7A to the **National Health Service (Scotland) Act 1978**). Not a TUPE transfer. Whether claims required to be presented within six months of date of dissolution. On appeal, held that the Tribunal had not erred in finding that time started running from that date.

Separately, lack of consultation with a Claimant was held, on appeal, not to demonstrate that the six month time limit contravened the EU principle of effectiveness. The matter was clear and there was no basis for a reference to the ECJ.

## **THE HONOURABLE LADY SMITH**

### **Introduction**

1. About 10,000 equal pay claims have been brought against various health boards in Scotland. Four “test” cases in respect of all those claims were heard at a PHR by the Employment Tribunal sitting at Glasgow, Employment Judge, L Doherty. These appeals arise from two of them - one which was presented in 2006 and one which was presented in 2007 - and are in respect of an issue which was common to all the claims. That issue is, put shortly, whether or not their claims are time barred insofar as they relate to allegations of the Claimants having received unequal pay prior to 1 April 2004, that being the date when their employment was transferred from certain NHS Trusts to the Respondents.

2. Both Claimants have union representation. Ms Foley is represented by the GMB, who also represent 649 other claimants. Ms Donnelly is represented by IFON (The Independent Federation of Nurses), who also represent 85 other claimants.

3. Some 9,000 of the group of 10,000 claimants are represented by Unison and the remaining claimants do not have union representation. Neither the Unison claimants nor the unrepresented claimants have appealed against the decision of the Tribunal which was to the effect that their claims were time barred insofar as they related to their allegations of having received unequal pay prior to 1 April 2004.

### **Background**

4. Prior to 1 April 2004, Ms Foley and Ms Donnelly, the Claimants in these appeals, were not employed by the Respondents, who are a health board. They were employed by NHS Trusts. Changes to the governance arrangements for health service delivery in Scotland were,

however, proposed in “Partnership for Care: Scotland’s Health White Paper” which was launched on 27 February 2003. Its key themes were “...corporacy, integration, decentralization, service redesign, and patient focus”. Dissolution of the NHS Trusts was a pre-requisite to achieving its objectives. The need for consultation on that matter was recognised<sup>1</sup>. In a memo issued by the Chief Executive of NHS Greater Glasgow (Mr T Divers), guidance given included:

**“NHS Boards to consult on proposals to dissolve NHS Trusts as separate legal entities, and for their functions, staff and assets to transfer to new operating Divisions of the NHS Board by 1<sup>st</sup> April.”**

5. A proposal that all the NHS trusts in Scotland should be dissolved and their functions, staff and assets be transferred to various NHS Boards – including the Respondents - was accepted. All members of staff were advised, by letters dated 11 March 2004 (which referred to the White Paper), of a number of matters including that their employment would be transferred to the Respondents, that the move would be regulated by “Staff Transfer Order” (“STO”) which offered equivalent provisions to TUPE and that, in practical terms, they would retain their then current terms and conditions of service. There was also consultation with staff through mechanisms such as Area Partnership Forums. Prior to the implementation of the transfer, there was what the Tribunal refers to as “a degree of consultation”. There was consultation with the GMB but there was no consultation with IFON as it was not a recognised union. Ms Foley was aware of the transfer and was given the opportunity to comment on it. Ms Donnelly was aware that, as at 1 April 2004, there were certain changes in the NHS at managerial level.

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<sup>1</sup> Schedule 7A paragraph 26(3) of the **National Health Service (Scotland) Act 1978** provides that no NHS Trust shall be dissolved “until after completion of such consultation as may be prescribed.” The “Partnership for Care” White Paper included provision for consultation in Chapter 7 (which covered *inter alia* the proposal to abolish the NHS Trusts as part of a move to single local organisations): “As a first step, we will: consult with NHS Boards, trade unions and staff organisations and public sector partners including the Convention of Scottish Local Authorities on the possibility of closer co-operation in the provision of support services.”

6. Dissolution orders<sup>2</sup> dated 25 March 2004 followed and their provisions included:

“Transfer of property, rights and liabilities

3. All property (excluding heritable property), rights and liabilities of the Trust shall transfer to the Board.

Transfer of staff

4. The staff who are immediately before 1<sup>st</sup> April 2004 employed under a contract of employment with the Trust shall be transferred to the Board.

Provision in relation to contracts of staff transferred

5. Upon the transfer provided for by article 4 above –

(a) the contracts of employment shall have effect as if originally made between the member of staff and the Board;

(b) all of the Trust’s rights, powers, duties and liabilities under or in connection with each of the contracts of employment shall transfer to the Board; and

(c) anything done prior to that transfer by or in relation to the Trust in respect of any of the contracts of employment shall be deemed to have been done by or in relation to the Board.”

7. Thus it was that the Claimants came to be employed by the Respondents. The change was not by means of a transfer to which the **Transfer of Undertakings (Protection of Employment) Regulations 1981** (“TUPE”) applied.

8. On 1 October 2004, the Respondents implemented “Agenda for Change” which was accepted as being a valid job evaluation study. That may, accordingly, mean that insofar as the Claimants allege that the Respondents failed in their equal pay obligations, their claim is in respect of only a five month period; however, parties remain at issue regarding that. For present purposes, the significant point is that the Claimants allege that they suffered unequal pay when employed by the NHS Trusts that formerly employed them.

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<sup>2</sup> Promulgated under paragraph 26 of Schedule 7A to the **National Health Service (Scotland) Act 1978**.  
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## **The Issues**

9. At a PHR, the Tribunal considered the following terms of reference which had been agreed amongst parties:

“(i) Does the dissolution of the NHS Trust employer of the claimant on the dates provided in the schedule give rise to a transfer which sets a six month time limit on the claimant for making an equal pay claim against the NHS Trust in terms of Section 2(4) of the Equal Pay Act 1970?

(ii) Is the claimant out of time for making a claim against the NHS Trust?

(iii) If the Tribunal only has jurisdiction to consider the claimant’s claim of equal pay against Greater Glasgow Health Board (i.e. for the period from the date of Trust dissolution until the date on which the claim was presented), is it correct that there is no claim of back pay for the period from 01/10/2004 until the date of the claim and therefore the only period to be considered in this case is between the date of the NHS dissolution and 31/09/2004?”

## **The Tribunal’s Judgment**

10. The Tribunal made findings in fact which were based on both documentary and oral evidence (given by the Respondents’ Chief Executive, Robert Calderwood). Other than the facts to which I have already referred, it should perhaps be noted that she found that the transfers from the NHS Trusts to boards such as the Respondents involved strategic change and removed a layer of bureaucracy but that did not really impact on the ways in which the Claimants worked. They had, however, as above noted, some awareness of what was happening and they knew that the name of their employer had changed.

11. Having heard detailed submissions, she issued the following judgment:

“The judgment of the Tribunal is that (i) the dissolution of the NHS Trust employer of the claimants gave rise to a transfer which set a six month time limit on the claimants for making an equal pay claim against their NHS Trust in terms of Section 2(4) of the Equal Pay Act 1970; (ii) accordingly the claimants are out of time for making a claim against their NHS Trust employer; (iii) the Tribunal only has jurisdiction to consider a claim for equal pay against the respondents for the period from the date of the dissolution of the claimants’ NHS Trust employer, until the date upon which the claim was presented.”

12. The references in that judgment to the Claimants making claims against their NHS Trust employer is obviously an error. The claims they make are against the Respondents.

### **The Tribunal's Reasons**

13. Put shortly, the Employment Judge considered that she was bound by authority to reject the Claimants' arguments. Those authorities were, first, the case of **Preston and others v Wolverhampton Healthcare NHS Trust and others (No 3)** [2006] ICR 606 ("**Preston No.3**") and, second, **Sodexo Ltd v Guttridge and others** [2009] ICR 1486 (CA); [2009] ICR 70 (EAT) ("**Guttridge**").

14. The Employment Judge rejected the Claimants' principal argument which was that there was no change in "employment" as between the relevant NHS Trusts and the Respondents so she was not, accordingly, bound to reach the same conclusions as in **Preston No.3** and **Guttridge**. Whilst accepting that the Claimants continued in the same jobs, performing the same roles and that the change on dissolution of the trusts could fairly be categorised as the removal of a layer of bureaucracy (para 149) she went on to conclude:

"150. It was not accurate however in the Tribunal's view, to categorise the change as nothing more than a change in name of the employer, as to do so ignores the fact that upon transfer the claimants' Trust employer was dissolved. Regardless of the fact that operationally for the claimants little or nothing changed, as a matter of law their contracts of employment, (and hence their employment), with the Trusts came to an end. The legal effect of this could not be ignored because the terms and conditions subsequently remained the same, or because of the nature of the changes in the management of their employer organisation, or because, unlike a TUPE transfer their pension rights transferred to their new employer."

15. She also observed that where there is a TUPE transfer, it is not uncommon for employees' working conditions to remain essentially the same and for there to be little change in management structures.

16. Recognising that a non TUPE transfer would not be subject to the information and consultation requirements of those regulations, she observed:

“While the Tribunal accepted that not all the claimants were engaged with the consultative process, it did find the respondents had engaged in a consultative exercise and that there was a degree of consultation. The information imparted to staff about the transfer was very similar to what might be imparted to employees under a TUPE transfer.....the letter and information sheet sent to staff on the 11<sup>th</sup> March advised that the transfer was regulated by Staff Transfer Orders which ensured equivalent protection to the TUPE regulations.”

and she regarded the fact that these steps had been taken as supporting the conclusion that there was a change of employment. At paragraph 159, she added that it was:

“...impossible to ignore the fact the Statutory Orders are the vehicle for the creation of legal rights on transfer.”

17. She considered that the effect of the creation of those rights was to “create a legal fiction” comparable to the one created by TUPE or by the operation of s.218(3) of the **Employment Rights Act 1996** which was:

“necessary because the claimants’ employment with the Trust came to an end and their employment was transferred to the respondents. There was change in employment.” (para 159)

### **Relevant Law**

18. The applicable law in this area has been subject to considerable discussion in recent years, in the European Court of Justice, in the House of Lords, in the Court of Appeal and in this Tribunal. I do not seek to graft new branches onto such an impressive jurisprudential tree and the following is to explain what, when considering the issues that arise in this appeal, I find of assistance in them and what I consider to be binding on me.

*(i) Statutory Provisions*

19. Section 1 of the **Equal Pay Act 1970** (“EPA”) provides, insofar as is material:

“1 Requirement of equal treatment for men and women in the same employment

(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the “woman’s contract”), and has the effect that –

...

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment –

(i) if (apart from the equality clause) any term of the woman’s contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman’s contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman’s contract does not include a term benefiting that man included in the contract in the contract under which he is employed and determined by the rating of the work, the woman’s contract shall be treated as including such a term;

(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment –

(i) if (apart from the equality clause) any term of the woman’s contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed that term of the woman’s contract shall be treated as so modified as not to be less favourable.

...

(6) Subject to the following subsections, for the purposes of this section –

(a) “employed” means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;

...

and men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.”

20. There is a time limit with which the Claimants required to have complied for the Tribunal to have jurisdiction to entertain their equal pay claims: see section 2(4) of the Act, read together with section 2ZA<sup>3</sup>. Section 2, so far as is material, provides:

**“Disputes as to, and enforcement of, equal treatment**

**Any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration or damages in respect of the contravention may be presented by way of a complaint to an employment tribunal.**

...

**(4) No determination may be made by an employment tribunal in the following proceedings:**

**(a) On a complaint under subsection 1 above;**

...

**unless the proceedings are instituted on or before the qualifying date (determined in accordance with section 2(Z)(A) below.”**

21. Section 2ZA is headed “‘Qualifying date’ under section 2(4)” and is as follows:

**“(1) This section applies for the purpose of determining the qualifying date, in relation to proceedings in respect of a woman’s employment, for the purposes of section 2(4) above.**

...

**(3) In a standard case the qualifying date is the date falling six months after the last day on which the woman was employed in the employment.”**

22. It is common ground that this is a “standard case” within sections 2ZA(3). It is, in particular, not a “stable employment case” (for which see s.2ZA (2) and (4)). Whilst the reference to the period of 6 months running from the end of the “stable employment relationship” in paragraph 167 of the Employment Judge’s reasons might suggest otherwise, it is clear from the relevant facts and, indeed, from her reference in the same paragraph not to s.2ZA(4) but to s.2ZA(3) that it was a “standard case” and was treated as such by her.

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<sup>3</sup> Inserted by the **Equal Pay Act 1970 (Amendment Regulations) 2003** SI 1656/2003 reg 4.

23. Prior to the 2003 regulations, section 2(4) of EPA provided for the limitation of claims in terms which were not materially different from those which apply in a “standard case”:

“No claim in respect of the operation of an equality clause relating to a woman’s employment shall be referred to an employment tribunal .....if she has not been employed in the employment within six months preceding the date of the reference.”

(ii) *Europe*

24. Case C-78/98 is the judgment of the ECJ in Preston v Wolverhampton Healthcare NHS Trust [2000] ICR 961, known as “Preston No.1” on a reference in which the first question was:

“Is a national procedural rule which requires that a claim for membership of an occupational pension scheme (from which the right to pension benefits flows) which is brought in the Industrial Tribunal be brought within six months of the end of *the employment to which the claim relates* compatible with the principle of EC law that national procedural rules for breach of Community law must not make it excessively difficult or impossible in practice for the claimant to exercise her rights under Article 119?” (my emphasis)

25. The second question was also about the application of the principle of effectiveness<sup>4</sup> and related to those circumstances where claimants had been employed by the same employer on a series of separate contracts of employment.

26. At paragraph 6 of their judgment, the court states:

“Under section 2(4), any claim in respect of the operation of an equality clause must, if it is not to be time-barred, be brought within a period of six months *following the cessation of employment*.” (my emphasis)

27. At paragraph 22, the court refers to cases to which the first question related and stated:

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<sup>4</sup> i.e. that national procedural rules must not make it excessively difficult or virtually impossible in practice for rights under Article 119 to be exercised: *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* Case 430-431/93 [1995] ICR 1 -4705 ECJ per Adv Gen Jacobs at para 17, followed by the court at paras 17 and 19.

“.....the claimants *had ceased their employment with their employer* more than six months before bringing proceedings in the Industrial Tribunal and, under section 2(4) of the EPA, they are therefore deprived of any right of action to secure recognition of their earlier part-time service for the purpose of calculating their pension rights.” (my emphasis)

28. It accordingly seems plain that the context which the court had in mind was one in which the starting point for the six month limitation period under discussion was taken to be the end of the claimants’ employment with the employer which had failed in its obligations to afford them equality, in those cases, by admitting them to the relevant occupational pension schemes.

29. The court were satisfied that the principle of effectiveness was not breached in the cases to which the first question applied. At paragraph 33 they observed that the setting of reasonable limitation periods not only satisfied the principle of effectiveness but also satisfied “the fundamental principle of legal certainty” and at paragraph 34, stated:

“...the imposition of a limitation period of six months, as laid down in section 2(4) of the EPA, even if, by definition, expiry of that period entails total *or partial* dismissal of their actions, cannot be regarded as constituting an obstacle to obtaining the payment of sums to which, albeit not yet payable, the claimants are entitled under Article 119 of the Treaty. Such a limitation period does not render impossible or excessively difficult the exercise of rights conferred by the Community legal order and not therefore liable to strike at the very essence of those rights.” (my emphasis)

30. Later, at paragraph 67, when discussing the second question in the reference, the court repeats its message about limitation periods being, in principle, in accordance with the principles of Community law:

“As pointed out in paragraph 33 of this judgment, the Court has held that the setting of reasonable limitation periods is compatible with Community law inasmuch as the fundamental principle of legal certainty is thereby applied. Such limitation periods cannot therefore be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law.”

31. Those observations are made in the context of the court having accepted that the start date for the running of the six month period was the date that employment with the relevant employer came to an end.

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32. Before leaving **Preston No.1**, given a line of argument advanced by Mr Napier, I would observe that whilst the limitation period was found to breach the effectiveness principle in those cases in which the claimants could show that, although employed under a series of contracts, the context was one of “stable relationship” that was not because of any concern that those claimants might not be aware that six month period would start to run at the end of each employment. Rather, it was because they would require to bring a continuous series of actions and would not be able, in one action, to include their claims against the same employer that related to an earlier period in that stable relationship. It also seems worthy of note that the court envisaged fresh limitation periods applying if the periodicity of the contracts was broken or “....because the new contract does not relate to the same employment as that to which the same pension scheme applies.” That is, their approach was not to identify the concept of employment with the relevant contract of employment, a theme which reappears in both **Preston No. 3** and **Gutridge**.

*(ii) Domestic Authorities*

33. The cases which were the subject of the reference in **Preston No.1** returned to the House of Lords and were determined so as to apply the judgment of the ECJ (**Preston & Others v Wolverhampton Healthcare NHS Trust & others** [2001] 2 WLR 448 (“**Preston No.2**”). In the set of “**Preston**” cases known as **Preston No. 3**, the claimants had, by means of a TUPE transfer, moved into the employment of a new employer, Powerhouse Ltd, more than six months prior to their presenting their EPA claims. All the claims related to the claimants allegedly having been denied access to an occupational pension scheme. The sharp question that thus arose was: when did time start running? Did it start running from the date of the TUPE transfer?

34. By judgment dated 19 December 2003, HHJ McMullen QC, sitting in this Tribunal, held that it did not. Time did not start running until the end of the claimants' employment with Powerhouse.

35. That decision was reversed by the Court of Appeal on 7 October 2004. It held that the claims were out of time.

36. Their Lordships, in a decision the ratio of which is, of course, binding on me, held that the claims were out of time. The six month limitation period ran from the date of the transfer to Powerhouse.

37. Lord Hope of Craighead gave the leading speech. It has been much pored over and analysed. I do not propose to repeat an exercise which has already been carried out so assiduously by others. I confine myself, for present purposes, to indicating what I take from it for the purposes of the present cases. First, Lord Hope points out that the issue raises a "single point of statutory construction" (paragraph 1) and:

**"As with any other issue of statutory construction, the question begins and ends with the words of the statute." (paragraph 22)**

38. Second, he observes that

**"...The time limit affects *every* claim which depends on facts that occurred prior to the date of the TUPE transfer." (paragraph 4 – my emphasis)**

39. That is, his reasoning is not confined to circumstances where the facts were that women were denied pension rights.

40. Third, he states that the effect of TUPE is:

“.....to replace the common law rule that a change in the identity of an employer terminates a contract of employment: *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.” (paragraph 16)

41. Fourth, he states that the question posed by the use, in the relevant statutory provision, of the term “employment” is:

“ ...whether the woman was employed “in the employment” within the six months preceding the reference of the claim to the tribunal.” (paragraph 23)

and that that means that the plain and natural meaning of the term is that the claim must be brought within six months:

“...of the end of the employment to which the claim relates.” (paragraph 23<sup>5</sup>)

finding support for that formulation in the wording of the first question in the reference in **Preston No.1**. The employment to which the claimants’ claims related was, in **Preston No.3**, employment prior to the date of transfer because their complaints – which happened to relate to an occupational pension scheme – were allegations of breaches of equality clauses which had come into operation prior to that date. That seems clear from his statement:

“The answer, where the claim is in relation to the operation of an equality clause relating to an occupational pension scheme before the date of transfer, is that it relates to the woman’s employment with the transferor.”

42. That is, it was not that the claims related to the pre-transfer period because they were - being pension claims - claims which had not passed to Powerhouse (see **TUPE 1981** reg 7).

Rather, it was because the equality clause relied on had come into being (per s.1 of EPA) prior to transfer and had not been remedied by the transferor.

43. Fifth, “employment” was different from “contract of employment”. Accordingly, the fact that the claimants’ contracts of employment, by virtue of TUPE, continued, did not assist in answering the question that the statute posed.

44. In **Unison v Allen & Others** [2007] IRLR 975, Elias J (as he then was), at paragraph 55, said:

“Read fairly, we think that Lord Hope was treating the employment with the transferor and transferee as separate and distinct employments, as of course they would have been prior to TUPE. The fact that TUPE affected the contractual position of the parties has not affected the analysis of what amounts to employment within the meaning of s.2(4). The concept of employment is the same whichever aspect of the contract is engaged, and whether the liability transfers under TUPE or not. It is an error in this context to focus on the contract. In each case where the alleged breach relates solely to employment with the transferor, the relevant employment is that with the transferor.”

45. I would respectfully agree. In particular, it seems clear that Lord Hope approached matters on the basis that the transfers to Powerhouse in **Preston No.3** brought an end to the claimants’ pre-transfer employment. A fresh “employment” began thereafter.

46. I turn then to **Gutridge** where the claims arose after a TUPE transfer and were, put shortly, that the claimants had not, whether before or after transfer, received equal pay as compared to certain male comparators. That is, the claims did not relate to pension rights and so the TUPE exception regarding the retention by a transferor of liability in respect of such rights, did not apply. Elias J analysed **Preston No.3** once more, this time for the purposes of a case which involved not only allegations that the transferor had been in breach of an equality clause

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<sup>5</sup> See also paragraph 26: “The only question is: to which employment does the claim relate?”

but that the transferee was also personally in breach of an equal pay obligation. At paragraph 33, under reference to the speech of Lord Hope, he said:

“...although the speech was not wholly without its difficulties, time began to run from the date of the transfer with respect to all rights arising under an equality clause, and not merely with respect to pension rights, at least with respect to cases where the alleged breach was solely by the transferor. Unlike this case, it was not alleged that the transferee was in breach of any obligation conferred directly on him”

47. **Preston No.3** was, accordingly, seen by him as having wide application and as not being restricted to pension cases. It applied to every case where there had been a transfer and claimants alleged that there had been EPA breaches by the transferor prior to transfer. As will be apparent from my comments above, that is a conclusion with which, once more, I would respectfully agree. At paragraphs 35 and 36, Elias J stresses that his analysis is that Lord Hope rejected any notion of the concept of employment being identified with the relevant contract of employment. Then, at paragraph 41, he adds:

“The liability which is the subject of the claim can sensibly be said to be the liability against the transferor. TUPE does not affect the nature of that liability; it merely shifts the burden of the party which ultimately has to bear the cost.”

48. At paragraph 44, he summarises the effect of the decision in **Preston No.3** as being that:

“...the six month time limit runs from the date of transfer itself for all equal pay claims which derive from the equality clause with the transferor, at least with respect to alleged breaches by the transferor. This is so whether liability for breach transfers pursuant to TUPE or not.”

49. Again, I would respectfully agree. I explain below why I reject Mr MacNeill’s submission to the contrary.

50. In paragraphs 55, 58 and 59, his conclusions include the following:

“In my judgment the true position is that the claimant is enforcing a contractual right which is derived from the equality clause operating with respect to the transferor.”(55)

“.....regulation 5(2) transfer two kinds of relevant liabilities with respect to the equality clause. First there is the liability for what was done (or not done) by the transferor prior to the transfer.....the time limit for enforcing that claim is, following *Powerhouse*, six months from the date of transfer.....”(58)

“Second, there is a continuing liability to honour the contractual terms in place at the point of transfer and this placed an obligation on the transferee personally to fulfil those contractual obligations. This liability transfers under TUPE regulations 5(1). In so far as reliance has to be placed on the equality clause as it operated with respect to the transferor in order to establish the contractual right that has been transferred under TUPE, that clause must be deemed to have transferred also. The relevant employment under section 2ZA is therefore the employment with the transferee.” (59)

51. That analysis, with which again I am in full agreement, would appear to support a conclusion that where, as in the present case, the Claimants allege (i) breach of an equality clause which came into force prior to transfer but was not remedied by the transferor and (ii) breach by the transferee of an equality clause to which he became contractually bound as from the date of transfer, they are actually making two claims. If the claims succeed then the transferee, in such circumstances, must, subject to whatever are the applicable time limits provide a remedy by way of paying compensation for breach of contract by another (the transferor). He must also, on the other hand, separately provide a remedy for his own breach of contract which may involve paying compensation or taking action to eliminate inequality of pay or both. On that analysis it is also clear that each claim relates to a different “employment”. Moreover, the means of transfer of obligations from one employer to another is not important. It is, it seems clear, the fact of transfer to a new employer that matters.

52. The Court of Appeal, by a majority, expressly approved that reasoning and conclusions (see: Wall LJ at paragraphs 80, 88, 95 and 96, and Pill LJ at paragraph 106). Smith LJ did not agree. She accepted that, in principle:

“.....Although a transferred employee’s contract of employment is deemed to have been made originally between the employee and transferee (and to have been made originally between the employee and transferor (and although that situation creates a fiction) the fiction does not extend to the point that the employee has never been employed by the transferor but only by the transferee. *The two employments are separate* although the contract is deemed to have been made originally with the transferor.” (my emphasis)

and it might have been thought that her use of the italicised expression was by way of preface to an acceptance of the proposition that time ran from the date of transfer since the employment to which the claims related (claims relating to pre-transfer failures by the transferor) ended at that date. However, she was persuaded that Preston No.3 did not apply to the facts in Gutridge and for reasons which included her concerns about apparent injustices which might arise, she concluded that time had not started to run, the relevant link being between the employee and the employer who would be liable to pay for the breaches, namely the transferee.

53. What I take from these authorities is as follows:

- Three questions arise:
  - What was the employment to which the Claimants' claims related?
  - Had that employment ended?
  - If so, when?
- "Employment" is not to be determined by asking whether or not the Claimants' contracts of employment were terminated;
- The trigger for the running of the six month time limit is the date of cessation of the employment to which the claims relate;
- The question of 'who pays?' for the breach of the equality clause is irrelevant when identifying whether or not ( and if so, when) employment has ended;
- The six month time limit may operate so as to result in complete or partial dismissal of the claim. If the latter that can only be because one employment has ceased but a subsequent employment is either ongoing or it ceased less than six months prior to presentation of the claims;
- The six month time limit affects every equal pay claim;

- The decision in **Preston No.3** applies not only to claims in respect of pre-transfer pension rights but to all equal pay claims in respect of acts or omissions of the transferor; and
- Although the facts of **Gutridge** involved a TUPE transfer, the principles stated by Elias J and approved by the Court of Appeal are equally applicable to all cases where employees experience a change of employer on the transfer from one employer to another, whether by means of TUPE or otherwise.

### **The Appeal**

#### *Submissions for Ms Foley*

54. Mr MacNeill had two principle submissions.

55. First, even assuming that the majority of the Court of Appeal in **Gutridge**, were correct, there were material distinctions between a TUPE transfer (with which **Gutridge** was concerned) and the transfer in the present case which, on the facts, involved nothing more than a reallocation of responsibilities between statutory bodies both specifically created for the same purpose, namely the delivery of health services to the public. The absence of substantive change was a principle of the changes which were implemented. The effect of those differences was to demonstrate that the Tribunal had erred in considering matters only on the basis of the common law. That was artificial. It was necessary to have regard to the wider nature of the change.

56. Mr MacNeill also made observations as to what, on the Tribunal's approach, was the outcome, namely that from the date of transfer a claimant had a valid claim going back five years (see: s.2ZC) which was enforceable against the Respondents. Six months after the date of transfer, she would still have that claim but the next day she would only have a right to claim

which dated back to the date of transfer. His implication seemed to be that that was unfair and that therefore, the Tribunal's conclusion must be wrong.

57. Mr MacNeill's second submission was that even if the present cases were not distinguishable from the circumstances of a TUPE transfer, I should not follow **Gutridge**, as it misinterpreted **Preston No.3**, the decision in which applied only to pension claim cases. He invited me to follow the reasoning of Smith LJ in the Court of Appeal.

58. Mr MacNeill also submitted that if I did not accept either of the above propositions, that he adopted Mr Napier's submissions. Whilst recognising that they depended, principally, on the particular circumstances of Ms Donnelly, it may be, he submitted, that what mattered was the effectiveness of the domestic law.

#### *Submissions for Ms Donnelly*

59. Mr Napier adopted Mr MacNeill's submissions on what he referred to as an *esto* basis but his primary submission was different. Further, Mr Truscott took objection to it being advanced at all because it was, he submitted, an issue which was being raised for the first time. It had not, Mr Truscott said, been raised before the Tribunal. Nor had fair notice of it been given in the Notice of Appeal. I agreed, after an overnight adjournment, to hear the submission but under reservation of the objection. Mr Napier relied on an argument which had been advanced on behalf of the Unison claimants (and adopted by counsel for Ms Donnelly) recorded by the Tribunal at paragraphs 99, 101, 107, 108, 210, 166, 207, 209 and 214 (which, I note, deal principally with a submission that a purposive approach was required although there is brief reference, in paragraph 209, to it having been argued during submissions that the principle of

effectiveness was engaged). Regarding the Notice of Appeal, he pointed to paragraph 7.8 which states:

**“The Tribunal erred in its approach to the principle of effectiveness and its approach to the duty to take a purposive approach to domestic legislation.”**

However, during the overnight adjournment, he drafted and intimated a four page outline submission, the essence of which I refer to below.

60. Mr Napier’s submission was that Mrs Donnelly’s case had the following defining characteristics:

- She was the subject of a transfer which represented the removal of a level of bureaucracy but minimal structural change (Tribunal’s reasons para. 33);
- The change involved “little or no change in the ways in which staff worked when the Trusts were dissolved” (para. 35);
- The transfer was effected by a subordinate legislation (the STO) which left her terms and conditions unchanged ( para. 35);
- The subordinate legislation that was used to effect the transfer, unlike TUPE, made no provision for the informing and consultation of staff representatives before the transfer, and as a matter of fact, there was no consultation with Ms Donnelly’s union (IFON) – para. 40. As far as Ms Donnelly’s own knowledge is concerned there was a finding of the Tribunal (para. 40) that she was aware that on 1 April there would be a change in NHS management. There was no finding that she was aware that the transfer would have any effect on the time limits for bringing a claim against the Board in respect of equal pay relating to her period of employment with the Trust;

- She was given no information about the effect the transfer would have on her ability to bring equal pay claims, and indeed had been issued with documentation by her employer (letter of 11 March 2004) which referred to what the transfer meant in “practical terms” but made no reference to any impact on the running of time limits and a consequential need to act swiftly to ensure rights were preserved;
- The Chief Executive of GGHB had issued a position paper intended to inform staff stating that the move to a single employer “should have no real impact on staff’s contracts of employment”;
- The employment in question, before and after the transfer, was at all times with the NHS which has been judicially described, for at least some purposes<sup>6</sup>, as a “single employer”. See **Kulkarni v Milton Keynes Hospital NHS Trust and another** [2009] EWCA Civ 789 at para. 66, per Smith LJ, approved by Laws LJ in **R v Governors of X School** [2010] EWCA Civ 1 at para 34.

61. His submission was that in these circumstances, the requirement that, within six months of the date of transfer, Ms Donnelly had to raise an equal pay complaint against the transferee Board in order to gain access to her rights to equal pay when employed by the transferor Board, made it excessively difficult for her to access her rights under EU law. The application to her of the six month limit, running from the date of transfer, was in her case a breach of the principle of effectiveness.

62. Key to Mr Napier’s submission was that had the transfer been one where TUPE applied, the position of Ms Donnelly would have been different. She would have been in a situation where the Trust, as her employer, would have been obliged to provide information under Reg.

13 to her “appropriate representatives” on “the legal, economic and social implications of the transfer for any affected employees”. The definition of “appropriate representatives” was found in Reg. 10(2A). In the absence of any recognised independent trade union, or employee representatives, appointed or elected and where the affected employees have failed to elect representatives when invited to do so, then the information has to be given to each affected employee (Reg. 10(8A)). In that situation it would be much harder to say that the procedural rule regarding time limits infringed the principle of effectiveness - the essence of which was to stop harshness in gaining access to rights under EU law - since it would, he said, be likely, assuming the employer complied with its obligations, that information about the impact of the transfer on equal pay claim time limits, would have reached Ms Donnelly. She would thereby have had the chance to do “something” about protecting her rights. That procedure was not, however, one which has to be followed when, as here, the transfer takes place without reference to TUPE.

63. Mr Napier’s submission was not to the effect that all the transfers under the STOs were vulnerable. His argument only applied where the requirements of TUPE to which he referred had not been satisfied. He submitted further that if I was not prepared to find that the principle of effectiveness had been infringed by the Tribunal’s decision but considered I required the assistance of the ECJ then I should make a reference under Art 267 and defer my decision.

64. Any reference in Mr Napier’s submission to the Tribunal in this case having made any decision on the issue of effectiveness was conspicuous by its absence as was any submission that the Tribunal had erred in law on the matter.

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<sup>6</sup> That purpose was to support an argument that the doctor in *Kulkarni* had been denied his rights under Art 6 ECHR. It was not in relation to an argument about equal pay or, indeed, the principle of effectiveness.

65. Allied to his submissions on effectiveness was a later submission that in **Preston No.1**, the ECJ had only addressed the length of the time limit period not the fixing of its start date. Mr Napier also had what he referred to as a ‘general submission’ that the Tribunal had mischaracterised the legal issues and had thus fallen into error. He referred to the reference to “stable relationship” at paragraph 167, which I have dealt with above. That was, he said, perhaps indicative of a confused mindset. He referred to paragraph 150 and submitted that the Tribunal had erroneously equated employment with the contract of employment - that assumed what had yet to be proved. It was necessary to look at the employment not the contract. They were fundamental errors and invalidated the judgment. On being asked specifically whether he was seeking to argue that the fact that Ms Donnelly continued in NHS work showed that she had changed “employment” when she transferred to the Respondents he denied seeking to make any separate case to that effect although it was, he said, an aspect of his argument on effectiveness, hence the last bullet point in the list as set out above.

#### *Submissions for the Respondents*

66. Regarding Mr Napier’s submissions, Mr Truscott said that the matter of consultation was of peripheral concern when the case was before the Employment Tribunal. Had he had notice of the point now taken, questions would have been asked in evidence which he did not ask. Other witnesses would have been called<sup>7</sup>. This was an entirely new point and I should not entertain it.

67. Separately, he submitted that the Tribunal did not err. The decision was consistent with a similar unappealed decision of the Employment Tribunal sitting at Newcastle, concerning the start date for the six month limitation period: **Jones, Harewood and Looker v Blackpool**,

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<sup>7</sup> To which Mr Napier responded by saying that it was up to the respondents to bring whatever witnesses they required.

**Fylde and Wyre Hospitals NHS Foundation Trust and others** 2500560/07, 2510906/06, 2510985/07, decided in 2010 and where it was observed that the time limits for bringing a claim under EPA had “effectively been given a clean bill of health by the ECJ in Preston number 3.” (p.22). He also pointed out that the majority of claimants in the group of 10,000 claims had accepted the Tribunal’s decision in the present group of cases. There was, he submitted, no good basis for not following **Gutridge**, this Tribunal being one which spans the jurisdiction of England, Wales and Scotland and the issue in the case not relating to a matter of Scots law and not being distinguishable from it: **Brown v Rentokil Ltd** [1992] IRLR 302; **Clarke v Frank Sneddon Ltd** [2004] IRLR 564.

68. In Mr Truscott’s submission, there were only two key facts. First, the relevant NHS Trusts were dissolved. Secondly, their employees transferred to the Respondents. The mechanism by which that was achieved was very similar to TUPE. Whilst the Tribunal had, at paragraph 150, made a reference to the Claimants’ contracts of employment, it was not important. The Employment Judge had plainly considered the correct question of whether or not there was a change in employment. At common law (which, this not being a TUPE case, was relevant) **Nokes** still applied and that meant that continuity of employment was broken by the change of employer.

69. As for **Gutridge**, the Court of Appeal should be followed. It was difficult to see how Smith LJ had moved from what he said was a correct statement of principle at paragraph 43, to concluding that time had not started to run at the date of transfer. Her conclusion was inconsistent and failed to recognise that the pre-transfer period was an earlier and separate employment. It may have been prompted by her concern over loss of rights. She had, however, failed to recognise that it was a matter not of loss of rights but of loss of potential rights.

70. Mr Truscott submitted that it was not surprising that time limits should operate in cases such as **Gutridge** and the present ones. Otherwise, years after an employer has ceased to exist, employees could come along and claim, against the transferee, that they considered that that employer who was no longer in existence had, long before, breached EPA.

71. Mr Truscott submitted that arguments that equal pay was of such fundamental importance that there should be no constraints placed on EPA claims had “done the rounds” during which the ECJ had determined that there was nothing offensive in the six month time limit. Paragraph 34 of **Preston No.1** was the answer to the question that arose in the present case. It was a clear statement of principle and was accepted as such in **Preston No.2** at paragraphs 6 -9, 13 and 23.

72. Regarding the issue of effectiveness, Mr Truscott made submissions which were subject to his primary objection that the issue ought not to be considered at all. Insofar as it had been touched on before the Tribunal, it was in the context of a general submission that a purposive construction should be applied in the sense that something should be done by the Tribunal to see to it that the Claimants did not lose their rights.

73. Mr Napier’s argument was, however, he submitted, different and it failed to recognise that the task of this Tribunal was to review the Tribunal’s conclusions made on the facts found by them. He required to identify an error of law on this matter on the part of the Tribunal and he had not done so. It was basic that, to do so, one had to consider what was the argument that was put to the Tribunal and it was not that which Mr Napier now sought to present. He had not pointed to any conclusion of the Tribunal on the issue of effectiveness which amounted to an error of law. Further, there was provision for consultation in the 1978 Act, the Acquired Rights

Directive and the letters of 11 March. It was not a situation where no consultation was required of the relevant emanation of the state.

74. In conclusion, Mr Truscott submitted that what had transferred from the Trusts to the Respondents were potential claims, nothing more. Then, that potential for making a claim was, in each case, extinguished by the expiry of the six month time limit. The Claimants' position would have been no different if there had been no transfer on the dissolution of the trusts. They would still have had only six months in which to claim.

### **Discussion and Decision**

*New Argument on Appeal - Time Limit Excessively Difficult or Virtually Impossible in Practice (the "effectiveness" argument)*

75. I am readily satisfied that Mr Napier's argument on the application of the principle of effectiveness was one which was being raised for the first time on appeal. He but faintly suggested otherwise. I note that it was not raised as an issue in Ms Donnelly's (or Ms Foley's) ET1 and was only mentioned in passing in the submissions of counsel for the Unison claimants when his principal concern was to address the Tribunal on purposive construction. Nor, to my mind, does the passing reference to effectiveness in paragraph 8 of the form EAT3 amount to fair notice of the point which, as it emerged, Mr Napier sought to argue.

76. As a generality a new point will only be entertained on appeal in exceptional circumstances: **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719, approving the principles discussed by Arnold J in **Kumchyk v Derby CC** [1978] ICR 1116 at p.1123<sup>8</sup>. Even

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<sup>8</sup> "Our conclusion is... that there is nothing in the language of the statute to exclude the consideration of a new point of law but that it would in almost every conceivable case, as the National Industrial Relations Court said in *G.K.N. (Cwmbran) Ltd v Lloyd* [1972] I.C.R. 214, be unjust to do so. ... It certainly is not enough, in our judgment, that the point was not taken owing to a wrong, or what turns out in the light of after events to have been a wrong,  
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the fact that the new point is a good point will not necessarily be enough: **Jones v Governing Body of Burdett Coutts School** [1998] IRLR 521). Further, although the Employment Appeal Tribunal has a discretion to allow a new point of law to be raised the normal approach is that where the point would open up fresh issues of fact which (because the point was not in issue) were not investigated or not sufficiently investigated before the Industrial Tribunal, the new point ought not to be allowed to be taken.

77. I observe that, as will be evident from the “Background” section above, there were no findings by the Tribunal as to what would or would not have been said to Ms Donnelly regarding potential equal pay claims, had she been specifically consulted/informed about the legal implications of the transfer nor, indeed, what would have been the genuine understanding of those who would, in the Trust (and/or in her union), have been responsible for that exercise. Nor were there any findings as to what she would have done if she had received any such advice. These matters were not explored in evidence. Nor, I would add, does it appear that there was any exploration of the issue of whether the information that was provided in terms of the letter of 11 March (and the White Paper to which it referred) in fact failed to inform of the “legal implications” of the transfer insofar as, had it been a TUPE transfer, the regulations would have required. I bear in mind that, in any event, the language of reg 10(1) of **TUPE 1981** is not the language of strict liability or warranty and it is not at all clear what would and would not be covered by the expression “legal implications” which suggests something less than full details of what might be a person’s rights/duties as a matter of law in every hypothetical scenario which could, on the anticipated change of factual circumstances, arise. In short, there seems to be no basis in the findings of the Tribunal for Mr Napier’s assertion that it is “likely

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tactical decision by the appellant or his advocate. It would certainly not be enough that the omission was due to the lack of skill or experience on the part of the advocate.”

that information about the impact of the transfer on equal pay claim time limits” would have come to Ms Donnelly’s knowledge.

78. Then there is the question of what could properly have been assumed about the information she would have been given and a further difficulty arises. By 19 December 2010, the state of play so far as judicial determination of the time limit issue was concerned was that it had been judicially determined that time did not start to run from the date of a TUPE transfer. That was HHJ McMullen’s decision in **Preston No.3** (EAT). That remained the position until long after the transfer on 1 April 2004; the Court of Appeal’s decision was issued in October 2004. Whilst recognising that the transfers in the case were not actually TUPE transfers, they were always going to offer equivalent protection to that provided by TUPE. For my part, I see the state of play so far as the then current law was concerned as a substantial if not overwhelming obstacle in Ms Donnelly’s pathway to establishing that it could safely be assumed that she would, notwithstanding the EAT decision in **Preston No.3** have been advised that if she had any equal pay concerns - not that there is any indication that, as at 2004, she *did* have any - she would require to present her claim in relation to them by 31 October 2004. The factual hypothesis on which Mr Napier’s new argument depended had, in my view, accordingly, distinctly shaky foundations.

79. None of these issues were explored before the Tribunal and it is not enough to say that the Respondents could have brought more witnesses. The issue was not one of which fair notice had been given. They are not, accordingly, to be criticised for having failed to anticipate it.

80. Finally, turning to Mr Napier’s submission that all that had been determined by **Preston No.1** was that six months was a reasonable period for the time limit, whilst I can see, on a

simple reading of paragraphs 34 and 67, that that argument could have some attraction, on closer examination it is, I consider, shown to be a superficial one. It ignores the context in which those statements were made in the judgment - which was not that anyone was saying that six months was not long enough for a claimant to “get her act together” and included a recognition that the start date was the “cessation of the employment” - and ignores the fact that all time limits are inextricably anchored to their start dates. The period of any time limit does not, accordingly, fall to be considered in isolation. Thus it was that, in **Preston No.1**, the ECJ when considering the series of contract cases, was not concerned to fix a fairer period than six months but a fairer start date. Overall, it could not be concluded that Mr Napier’s new point was a good one.

81. In all the circumstances, I do not consider that it would be appropriate to allow the new argument to be entertained on appeal and I do not propose to do so.

*Whether the Claims are Distinguishable from TUPE cases*

82. Mr MacNeill’s submission on this point really boiled down to saying that the transfers of employment in these cases were not analogous to TUPE transfers because they involved a reallocation of responsibilities as between statutory bodies and the Claimants’ jobs did not alter in any significant respect. The two statutory bodies were both concerned to deliver a universal public health service pursuant to a long held political imperative. The same may, of course, be able to be said in cases of privatisation of industries/services previously in public ownership. Moreover, it is an analysis which could be applied where, say, part of the business of one company in a group of companies is, because of the need to reallocate responsibilities efficiently within the group, transferred to another company in the same group. The overall

purpose of the group may remain the same and it may be that the jobs of individual members of staff do not really change but that will not mean that there is no TUPE transfer.

83. I observe, further, that in this case, the mechanism of the transfers reflected a TUPE transfer very closely. TUPE was plainly in the minds of those who drafted the STOs. I do not, in all the circumstances, accept that there were material distinctions to be drawn as between TUPE and what happened in these cases.

84. In any event, as I have already indicated, I consider that, on the authority of **Preston No.3** and **Guttridge**, the six month time limit runs, in principle, from the date of transfer in cases of non-TUPE transfer as well as in cases of TUPE transfer. There is nothing in the present cases to indicate that that principle should not be applied.

85. The important point is that, for time limit purposes, the employment to which these claims relate is (i) the Claimants' employment prior to transfer, with the Trusts; and (ii) the Claimants' employment with the Respondents, a separate legal person, after transfer. The first employment had come to an end, on the authority of **Nokes**. The STOs demonstrated a new beginning with the Respondents albeit on the basis that the employees' terms and conditions of employment, under the new circumstances, would be the same as before and "as if" originally made between the employees and the Respondents. That is not, however, indicative of their continuing in the same employment at common law. They were also plainly separate "employments", if one applies the reasoning explained in **Preston No.3** and **Guttridge**.

86. Assuming that the Claimants are correct in their assertion that equality clauses came into operation prior to 1 April 2004 and were breached, the transfer to the Respondents of the

Trusts’ “duties and liabilities”, in terms of the STOs, fixed upon them two separate obligations. One obligation was contingent and one had immediate effect. The former is an obligation to pay compensation for the Trusts’ failures to comply with the equality clauses. The latter is their obligation to, themselves, implement the equality clauses which may or may not involve a liability to pay compensation, depending on whether or not they have also breached the equality clauses. The fact that the Respondents have both obligations does not mean that the claims cannot relate to two separate “employments.”

87. In some respects, this submission was one of general fairness - broadly put that it was manifestly unfair that the passage of one day as between six months and six months and one day after the end of the relevant employment could mean that the Claimant would lose five and half years’ compensation. But all time limits can, at times, appear to operate harshly, particularly where the time limit is missed by but a very short period. That is not to say that they are unacceptable either legally or morally. They operate so as to seek to achieve a fair balance between the interests of those who may have good claims and of those who may have to answer them. They are, it has to be recognised, in some respects a blunt tool, as is highlighted by comparisons such as that drawn by Mr MacNeill. They have, however, long been regarded by the law as the price to be paid for certainty, of itself regarded as an important and valuable principle of justice. Where the interests of justice require that some leeway be afforded, Parliament has legislated for it<sup>9</sup>. It has not done so in the case of the EPA six month time limit.

88. I cannot, in all these circumstances, see that there is any merit in this ground of appeal.

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<sup>9</sup> See e.g. **Prescription and Limitation (Scotland) Act 1973** s.19A; **Employment Rights Act 1996** ss 48(3), 111(2); **Equality Act 2010** s.123(1) and (2).

*Whether Gutridge should be followed*

89. Whilst Gutridge is not binding on me, I do not consider that the facts and circumstances of this case are such as could make it appropriate for me to depart from it. The issue before me does not involve a special feature of Scots law. Furthermore, I agree with it, as discussed above.

90. In all these circumstances, subject to the patent error in the terms of the judgment to which I have already referred, I cannot find any fault with the Tribunal's judgment in this case. Not only was the Employment Judge entitled to find as she did, on the facts before her, she could not, absent error of law, have done otherwise.

#### **Disposal**

91. I will pronounce an order dismissing the appeals.