Pay Equality: When is there a right to claim?

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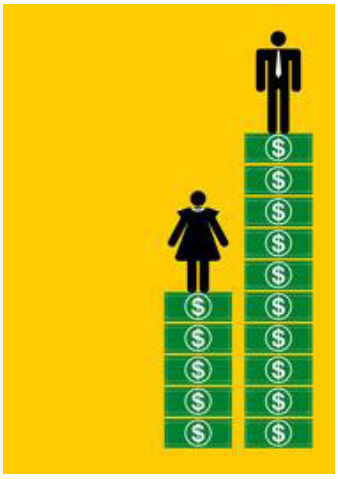
By Betsan Criddle

The important decision of the Supreme Court in ***Birmingham City Council v Abdulla*** establishes that a claimant who is out of time to pursue an equal pay claim in the Employment Tribunal ("ET") may issue a claim in the civil court as of right if that claim is in time.

Gender pay inequality claims remain unique in the discrimination field, in that the mechanism for enforcement is contractual rather than tortious: the statutory equality clause modifies the terms of the woman's contract to be no less favourable than the terms of her male comparator's contract. Accordingly, the ET and the civil courts have always enjoyed a concurrent jurisdiction over equal pay claims, albeit that in practice, claims are lodged in the ET, given its specialist expertise and the lack of costs penalty for bringing an unsuccessful claim.



The time limits for bringing a claim also differ as between the jurisdictions. In the ET, a claim must be presented within six months of the end of the employment relationship to which the claim relates, usually (but not invariably) the end of the discriminatory employment contract. The ET has no discretion to extend time in the woman's favour to consider an out of time claim. By contrast, a claim in the civil court can be issued within six years of the breach, which can be later. This gives rise to the prospect of out of time ET claims nevertheless being in time in the civil courts.

In ***Abdulla***, the Council sought to rely on section 2(3) Equal Pay Act ("EqPA") 1970 (now section 122 Equality Act ("EqA") 2010), which gives a civil court the power to strike out an equal pay claim if it appears that the claim "could more conveniently be determined" by the ET. The Council argued that this meant that, where a claim issued in the civil courts would be out of time if presented in the ET, it should be struck out unless the woman could show a reasonable excuse for not having presented the claim in the ET.

The majority disagreed. The ability to strike out a claim because it could be dealt with more conveniently before the ET (for reasons of expertise and costs) did not mean that the civil claim should be struck out, leaving the woman without any potential remedy. Lord Wilson, giving the majority judgment, considered the absolute nature of the ET time limit an important consideration: no discretion to extend time in the ET is consistent with the prospect of a right to bring a civil claim at a later date (see paragraph 21). Importantly, the majority held that it would never be relevant to conduct a factual inquiry into why the claim had not been submitted earlier in the ET. This is a welcome rejection of yet another procedural hurdle being placed in the way of determination of equal pay claims, an area of law that is bedeviled by such arguments.

Will this decision lead to a rash of equal pay claims being issued in the civil courts? The answer is almost certainly no. Equal pay claims remain rare outside the public sector where mass claims concerned with structural pay inequalities between male and female occupational groups have dominated in recent years. Where claims are issued, they tend to arise together with other claims at the end of the employment relationship. That fact, together with the practical benefits of ET proceedings in terms of expertise and costs is likely to keep equal pay claims within that sphere.

Further, although Lord Sumption in the minority raised the prospect of employers being troubled long after the event by equal pay claims which were evidentially difficult to defend (see paragraph 41), no damages in respect of breach of a term modified by the equality clause can be awarded for a period earlier than six years back from the date of claim (see s.2(5) EqPA and s.132 EqA). A woman seeking to enforce her rights in respect of historical pay inequality may find that her claim is worth little. The real issue is likely to remain persuading women to enforce their rights even though female pay still – almost universally – lags behind that of men.

Betsan Criddle is a specialist employment and discrimination law barrister at Old Square Chambers, with particular expertise in the field of equal pay including limitation. She acted for the claimants in the key case of Slack v Cumbria County Council which expanded the concept of a stable employment relationship in determining when time runs for bringing a claim.