EQUAL PENSION TREATMENT

IN

OCCUPATIONAL PENSION SCHEMES

GUIDANCE NOTES

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Equal Pension Treatment in Occupational Benefit Schemes

Guidance Notes

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ABBREVIATIONS

References to provisions of the Pensions Act, as amended, 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” This means “section” and unless otherwise specified is used to refer to sections of the Pensions Act, 1990, as amended. Thus “s27(1)” means section 27, subsection (1) of the Act.


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

“Sch” This means “Schedule” and is used to refer to Schedules to the Pensions Act. Thus “2nd Sch” means the Second Schedule of the Pensions Act, 1990.

“a” This means “article” and is used to refer to the articles of a regulation. Thus “a4(1) & a5 – SI 279/02” means article 4, subsection 1 and article 5 of S.I. 279/02.

“p” This 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 Pensions Act, 1990.
Equal Pension Treatment in
Occupational Benefit Schemes

Guidance Notes

Introduction

1. Part VII of the Pensions Act 1990 (the “Act”), first became effective from 1st 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.


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 5th April 2004 and the amendments introduced by the Equality Act, 2004 are effective from 19th July 2004. In certain circumstances these amendments can have retrospective effect (see paragraphs 96-98).

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

6. Part VII is the only part of the Act which covers in a limited way employment contract terms and terms of collective agreements.
Equal Pension Treatment in Occupational Benefit Schemes

PART I

The 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.
PRINCIPLE OF EQUAL PENSION TREATMENT

s.66(2), s.70  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) Marital 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.

s.69, 70, 78 & 79  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.

s.68, 70  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.

s.65(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.

s.80, 74, 81  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.
Equal Pension Treatment in Occupational Benefit Schemes

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

s.68, s.70, s.78, s.79, s.66(1)(a), s.67, s.65

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 – 18). The principle of equal pension treatment also prohibits indirect discrimination (see paragraphs 20 – 22). The principle of equal pension treatment extends to access to and the exercise of any discretion under a scheme.

Discrimination

s.66(1)(a), s.67

13. Discrimination occurs where a person ("X") is treated less favourably than another person ("Y") 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.

s.66(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 1/80th basis. Y however is not associated with Z and accrues benefits on a 1/60th 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.

s.65

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

s.70(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

s.74

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

s.68(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.

s.68(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.

a3 SI 337/04

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

s.66(2)(a), s.67(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.

s.71

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:
(i) benefits under a *defined contribution scheme*, where such differences are justifiable on actuarial grounds, or

(ii) 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.

**Marital Status Ground**

s.66(2)(b) s.67(1)(b)

25. *Discrimination* occurs between persons based on the *marital status ground* where the less favourable treatment is based on the fact that one person is single, married, separated, divorced or widowed.

s.75(1), s.72(2) s.72(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 *marital 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*. 
Family Status Ground

s.66(2)(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.

s.67(1)(c)

s.65  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 s/he needs continuing, regular or frequent support.

s.75(1)

s.72(2)

s.72(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 or 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

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 marital status dies and his or 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 marital status dies and his or 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.
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.

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 marital 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.

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.

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
s.67(1)(f) 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.

s.72(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.

s.72(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).

s.77 35. The provisions of the Act relating to discrimination on the age ground do not apply to Defence Forces employment.

s.75(2), s.75(3), s.75(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

s.66(2)(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.

s.73(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.

s.77 39. The provisions of the Act relating to discrimination on the disability ground do not apply to Defence Forces employments.

s.75(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.

s.73(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.

Ground of Race

s.66(2)(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

s.66(2)(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

s.65(3) 44. Victimisation occurs where an employee is dismissed or otherwise treated adversely by the employer where the employee:

(i) notifies the Director of the Equality Tribunal or the Pensions Authority of an alleged breach of Part VII;
(ii) complains of a breach of the principle of equal pension treatment to his 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 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.
Equal Pension Treatment in
Occupational Benefit Schemes

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.

ELIGIBILITY FOR SCHEME MEMBERSHIP/BENEFITS

General principles

s.70, 78

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, marital 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.

s. 72(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.

s. 72(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 Pensions Act). A scheme may also fix a maximum age for entry to the scheme eg age 60 in a scheme with an NRD of 65.
s.72(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).

s.72(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.)

s.72(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).

s.72(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:

<table>
<thead>
<tr>
<th></th>
<th>Regional</th>
<th>Headquarters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 30 years</td>
<td>5%</td>
<td>10%</td>
</tr>
<tr>
<td>30 – 40</td>
<td>10%</td>
<td>15%</td>
</tr>
<tr>
<td>40 – 60</td>
<td>15%</td>
<td>30%</td>
</tr>
</tbody>
</table>
s.72(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

<table>
<thead>
<tr>
<th>Years of completed pensionable service</th>
<th>Accrual rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 – 10</td>
<td>1/100th</td>
</tr>
<tr>
<td>10 – 10</td>
<td>1/60th</td>
</tr>
<tr>
<td>20 – 40</td>
<td>1/50th</td>
</tr>
</tbody>
</table>

Exceptions for the Marital Status and Sexual Orientation grounds

s.72(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 Marital Status and Family Status grounds

s.72(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 marital status and/or family status. See paragraphs 26 and 29 above.

Indirect discrimination

s.68 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 puts 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

s.80(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

s.70 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.

s.70(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.

s.80, s.81 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

s.72(1)(c), s.72(1)(d), s.72(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

s.70 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.

s.70(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

s.71(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.

s.71(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.

s.71(1)(c) 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

s.79 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

s.70

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

s.71(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

s.72(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

s.70

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.

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

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

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

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

s.72(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.

COMMTUATION/GRATUITIES

General principles

s.70  
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

s.71(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.

s.71(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

s.72(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 or 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 Marital Status and Family Status Grounds**

s.72(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 marital 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 marital status. (See paragraphs 26 and 29 for examples).

**Exceptions for Marital Status and Sexual Orientation Grounds**

s.72(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 marital 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

s.71(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.

s.70(3), s.71(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

s.73(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.

VOLUNTARY CONTRIBUTIONS TO PURCHASE DEFINED BENEFITS

General principles

s.70 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

s.71(1)(e), 71(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.

s.71(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.
Equal Pension Treatment in Occupational Benefit Schemes

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 complaints procedures.
NON-COMPLIANCE AND COMPLAINTS

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

s.80 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

s.80(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

s.81(1),(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

s.81B(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.

s.81B(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.

s.75(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

s.81A(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.

s.81A(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.

s.22 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 MPA94 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.
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

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

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

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

s.80(1), 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

s.80(1), 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.

s 80(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

s 80(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**

s.80(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**

s.81(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**

s.68(2), s.72(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**

s.68(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**

s.72(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 where as 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?

s.81E(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 of the Equality Tribunal ("the Director")

s.81E(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.

s.81E(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.

s.81F(3) 125. Complainants may appoint any individual or body to represent them in any proceedings. However, because of its overall duties and functions the Pensions Authority is not in a position to represent complainants in any proceedings.

s.81J, s.85EEA 126. The Pensions 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 Pensions 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.

s.85(5) EEA 128. The Pensions Authority may in certain cases seek an injunction to prevent certain persons or bodies from carrying out our particular activity.

Time limits for claims

s.81E(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.

s.81E(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.

s.81E(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

s.76(1)&(2) 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.

s.76(3) 133. Where proceedings arise on a reference from the Pensions Authority (pursuant to section 85(1) of the Employment Equality Act) and facts are established by the Pensions 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.

s.98(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.

s.76(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

s.81J 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.

s.77A EEA 137. The Director may dismiss a claim if he believes that it is frivolous or has been made in bad faith, which decision may be appealed to the Labour Court within 42 days of his decision.

Equality Mediation Officer

s.78 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.
s.78(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.

s.78(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 of the Equality Tribunal

s.79 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.

s.79(2) EEA  142. Investigations are held in private.

s.79(3) EEA  143. If a question arises as to whether the situation of a complainant is a comparator for the purposes of the Act then the Director may investigate this as a preliminary issue.

s.79(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.

s.94 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.

s.95 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.

s.96 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.

s.81 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.

s.79(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

s.81H(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.

s.81H(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.

s.81H(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.

s.81H(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.

s.81H(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

s.86(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 Pensions Authority.

s.86(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.

s.87(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.

s.87(2) EEA, s.87(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.

s.87(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

s.88 EEA, s.89 EEA 161. All decisions of the Director and Labour Court must be in writing. 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.

s.83 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.

s.84 EEA 163. The Labour Court may refer any issue on appeal back to the Director for further investigation. The Director must give a written report to the Labour Court on that matter.

164. During any such investigation, 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.

s.83 EEA 165. The Labour Court may provide any of the same forms of redress as the Director.

s.90 EEA 166. Where a determination is made by the Labour Court on an appeal under Part VII the parties may appeal to the High Court on a point of law, and it may adjourn proceedings pending the outcome of such determination.

s.102 EEA 167. Where a case is referred to the Director under sections 77, 85 or 86 of the EEA, 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**

s.81E(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.

s.81H(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.

s.80(4) EEA s.80(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**

s.91(1) EEA 172. In the event of failure to comply with the final determination of the Labour Court or a final decision of the Director, then on application to the Circuit Court the employer or other person who is bound by the terms of the decision, may be made the subject of a Circuit Court order directing them to so comply.

s.91(2) EEA 173. Similarly, the Circuit Court may direct that the terms of a settlement arrived at through mediation be implemented in accordance with its terms, however in such a situation the court cannot direct any person to pay any sum or do anything which had the matter been dealt with otherwise than by mediation, could not have been provided for by way of redress by the Director.

s.91(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.

s.92 EEA 175. Where the Circuit Court issues an enforcement order it also has power to direct that where compensation was part of the order that court interest on such compensation be payable.

s.92(3) EEA 176. Where a determination or decision requires the employer to reinstate or re-engage an employee the Circuit Court has power to award compensation of such amount as it considers reasonable in respect of the failure of the employer to comply with the determination or the decision.

s.93 EEA 177. 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

s.81F(1) 178. 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. If requested by an authorised officer within the meaning of the Defence Act, 1954 the Director shall investigate, and make a recommendation 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 section104 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.

s.81F(2) 179. 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 recommendation given under section 104.

MISCELLANEOUS

Disputes as to whether scheme is Defined Benefit or Defined Contribution

s.81G 180. Where there is a dispute as to whether a scheme is defined benefit or defined contribution it shall be determined by the Pensions 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 who, in the opinion of the Minister 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

s.81I 181. The Director may request the Pensions Authority to prepare a report and answer questions in relation to occupational pension schemes, on which he may rely in making his decision. The Pensions Authority must give a copy of any such report to the complainant, respondent and any other person to whom it relates.