

# THE INDUSTRIAL TRIBUNALS

CASE REF: 17980/18

**CLAIMANT:** Dr (Jean) McClune

**RESPONDENT:**

1. Northern Ireland Courts & Tribunal Service
2. Department for Communities
3. Department of Justice
4. Ministry of Justice

## DECISION ON A PRE-HEARING REVIEW

The decision of the tribunal is that the tribunal does not have jurisdiction to hear a complaint in relation to the automatic-enrolment in a pension scheme under the Pension (No 2) Act (Northern Ireland) 2008. That element of the claimant's claim is therefore dismissed.

### CONSTITUTION OF TRIBUNAL

**Employment Judge (sitting alone):** Judge Greene

### APPEARANCES:

The claimant appeared in person.

The respondents by Mr P McAteer, of counsel, instructed by the Departmental Solicitor's Office.

1. This hearing was dealt with by submissions, written and oral. The tribunal was provided with two written submissions, including authorities, a skeleton argument and extracts from Harvey on Industrial Relations and Employment Law.

### CLAIM

2. The claimant's claim is that she was not automatically enrolled in the pension scheme directed by government because she was an office-holder and not a worker. She alleges that omission is a breach of the Pensions (No 2) Act (Northern Ireland) 2008 section 3. She also argued, in the course of the Pre Hearing Review, that this omission may be construed as an unlawful deduction from wages pursuant to The Employment Rights (Northern Ireland) Order 1996. The respondents' dispute the claimant's claims on a number of grounds, including that the tribunal lacks jurisdiction to entertain the claimant's pension claim and that there is not any unlawful deduction from wages claim made by the claimant in her claim forms.

## THE ISSUES

3. At a Case Management Discussion on 18 April 2019, in relation to claim, case reference 17980/18, the Vice-President directed that a Pre Hearing Review would convene to determine:

*“Whether the Industrial Tribunal has jurisdiction to hear the complaint in relation to the automatic enrolment in a pension scheme, under the Pensions (No 2) Act (Northern Ireland) 2008, or otherwise?”*

4. The Pre Hearing Review came on for hearing on 15 August 2019.

## FINDINGS OF FACT

5. The tribunal did not hear any evidence from either party but, in so far as is relevant to the current Pre Hearing Review, the following matters appeared to the tribunal not to be in dispute between the parties:-
  - (i) From 1 October 2005 the claimant has been a medical member of Disability Tribunals (DLA/Attendance Allowance/PIP and Incapacity Benefits/ESA).
  - (ii) Following the enactment of the auto-enrolment legislation in relation to pension schemes the claimant was not enrolled in such a scheme by any of the respondents.
  - (iii) In or around April 2016 the claimant queried why she had not been auto-enrolled but was not provided with an explanation other than that her earnings were non-pensionable.
  - (iv) In or about 31 July 2017 the claimant was informed that her non-enrolment in the pension scheme was because she was ineligible as an office-holder.
  - (v) Despite further representations by the claimant none of the respondents made any change to that decision.
6. In failing to auto-enrol her in a pension scheme the claimant believes that the respondents are in breach of the Pension Regulator’s Guidance, specifically paragraph 38.
7. The claimant claims that she should have been enrolled in the relevant pension scheme by the respondents or one of them and she claims that she should now be enrolled retrospectively with any back pension contributions made to enable that to be effective.
8. The respondents contend that the claimant is not a worker or a job holder but is a holder of an office and is not employed under a contract and therefore is not entitled to auto-enrolment under the terms of the Pensions (No 2) Act (Northern Ireland) 2008 or at all.
9. The respondents also contend that the tribunal does not have jurisdiction to entertain the claimant’s claims.

10. The claimant lodged an additional claim on 7 January 2019, case reference 1116/19, against the Ministry of Justice in the same terms as the current claim. The respondents submit that both claims should be heard together.
11. In the course of the submissions there was much argument advanced by the claimant, and denied by the respondents' counsel, that the claimant's claim could also be construed as an unlawful deduction from wages claim pursuant to The Employment Rights (Northern Ireland) Order 1996. The respondents submit that there is not any mention of an unlawful deduction from wages claim in either of the claimant's claim forms.

## **THE LAW**

12. The Pensions (No 2) Act (Northern Ireland) 2008 provides that a job holder who is at least 22 years of age and has not reached pensionable age must have provided for him by his employer prescribed arrangements by which the job holder becomes an active member of an automatic-enrolment pension scheme with effect from the automatic-enrolment date (sections 1 & 3 the Pensions (No 2) Act (Northern Ireland) 2008).
13. Contravention of any of the employer duty provisions does not give rise to a right of action for breach of statutory duty. Nothing in the employer duty provisions of Chapter 2 of the 2008 Act affects any rights of action arising apart from those provisions. The employer duty provisions to which reference is made are sections 2-11 of the Pensions (No 2) Act (Northern Ireland) 2008.
14. Chapter 2 of the 2008 Act sets out how compliance is to be effected. That responsibility lies with the Regulator with a review before the Pensions Regulator Tribunal.
15. A worker has the right not to be subjected to any detriment by any act or a deliberate failure to act by the worker's employer done on the ground that:
  - (i) any action was taken, or was proposed to be taken, with a view to enforcing in favour of the worker a requirement to which section 55 of the 2008 Act applies or
  - (ii) the employer was prosecuted for an offence under section 45 as a result of action taken for the purpose of enforcing, in favour of the worker, a requirement to which section 55 applied or
  - (iii) any provision of Chapter 1 applies to the worker or will or might apply. (section 55 Pensions (No 2) Act (Northern Ireland) 2008).
16. It is immaterial, in relation to the detriment provision, whether or not the requirement applies in favour of the worker or whether or not the requirement has been contravened but for these sub-sections to apply the claim that the requirement applies and, if applicable, the claim that it has been contravened, must be made in good faith (section 55(2) Pensions (No 2) Act (Northern Ireland) 2008).
17. The 2008 Act specifically empowers an industrial tribunal to deal with a detriment claim. A worker may present a complaint to an industrial tribunal that the worker

has been subjected to a detriment in contravention of section 55 of the 2008 Act. (section 56 Pensions (No 2) Act (Northern Ireland) 2008).

18. The law relating to pensions in general lies outside the work of Harvey on Industrial Relations and Employment Law, but one relevant aspect is that when as a result of concern about falling pension savings and an aging population it was decided to oblige employers to enrol eligible workers in qualifying pension schemes it was considered that workers would need protection in respect of the rights that were given. It was therefore enacted, with effect from 30 June 2012, that an individual may complain if he or she suffers a detriment as a result of this right to automatic-enrolment (Pensions (No 2) Act (Northern Ireland) 2008) (Harvey on Industrial Relations and Employment Law D11 [200]).
19. An employer must not deliberately ... subject a worker to any detriment ... on the ground that ... any provision of [Pensions (No 2) Act (Northern Ireland) 2008 Part 1 Chapter 1 (ss1-33)] might, will or does apply to the worker; or any action was taken (or was proposed to be taken) with a view to enforcing in favour of the worker a requirement imposed under Chapter 1; or the employer was prosecuted for an offence under [Pensions (No 2) Act (Northern Ireland) 2008 s45]. For workers who also qualify as employees detriment does not include dismissal as defined by [The ERO 1996 Part VI (Pensions No 2) Act (Northern Ireland) 2008) s55(4)] but they have a remedy because it is automatically unfair to dismiss in those circumstances someone who qualifies as an employee [Pensions (No 2) Act (Northern Ireland) 2008 s57]. (Harvey on Industrial Relations and Employment Law D11 [206]).
20. An employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of this deduction (article 45 The Employment Rights (Northern Ireland) Order 1996).
21. A worker may present a complaint to an industrial tribunal claiming that he has suffered a deduction from his wages in contravention of article 45 of the 1996 Order (Article 55 The Employment Rights (Northern Ireland) Order 1996).
22. Pursuant to The Employment Rights (Northern Ireland) Order 1996 wages means, in relation to a worker, any sum payable to the worker in connection with his employment, excluding any payment by way of a pension, allowance or gratuity in connection with the worker's retirement bursaries or as compensation for loss of office (article 59 (1) and (2) The Employment Rights (Northern Ireland) Order 1996).
23. In European jurisprudence entitlement to pension is regarded as deferred pay. That being the case, it might be thought that an employer's contribution to a worker's pension provider during employment or the payment of pension following retirement would both fall within the definition of wages in [The Employment Rights (Northern Ireland) Order 1996 article 59(1)]. However, as explained in Paragraph [352], payment of pension in connection with retirement is specifically excluded from the statutory definition of wages by [The ERO 1996 article 59(2)(c)]. In addition, as Judge Peter Clarke made clear in **Somerset County Council v Chambers [2017] IRLR 1087, EAT**, employer's pension contributions do not fall within the definition either. (Harvey on Industrial Relations and Employment Law B1 [349]).

24. In **Chambers** the claimant was a member of the local government superannuation scheme to which both employer and employee made contributions. He changed his role at the council which led to a dispute as to whether he remained in the scheme. The employer therefore withheld its contributions to the scheme and the claimant brought an unlawful deductions claim. The Employment Judge upheld his claim and made an award to the claimant, apparently equal to the employer's pension contributions that should have been made on his behalf. The EAT held that he had been wrong to do so. The pension contributions were not wages. As Judge Peter Clarke put it:

*'As s27(1)(a) [article 59(1)(a)] makes clear, wages means any sums payable to the worker in connection with his employment, it does not mean contributions paid to a pension provider on his behalf.'*

The view that payments by an employer into a pension fund on the employee's behalf are not wages was recently endorsed by the EAT in **University of Sunderland v Drossou [2017] IRLR 1087**. Although the case decided that employer pension contributions should be included in the calculation of a week's pay for the purposes of [ERO 1996 arts 16-25] the EAT were clearly of the view that such contributions do not fall within the definition of wages in [article 59(1) 1996 Order], not least because they were not sums directly 'payable to the worker' as the [article 59] definition demands. As a result, any failure to pay such contributions, or failure to pay them at the expected frequency and/or rate, may not form the subject of an unlawful deductions claim before an employment tribunal (Harvey on Industrial Relations and Employment Law B1 [349.01]).

25. The **Chambers** and **Drossou** cases focus solely on the *employer's* contribution to the scheme. However, it is submitted that different principles would apply to *employee* pension contributions deducted from gross salary and paid over to the relevant pension provider. If for example the employee were to withdraw his written consent to such deductions being made and the employer were to make the deductions anyway, a claim for unauthorised deductions could surely be made. This seems to be recognised by [art 46(4) ERO 1996] which exempts certain payments to third parties from the definition of a deduction – but only where there is contractual authority or prior written consent by the worker ... (Harvey on Industrial Relations and Employment Law B1 [349.02]).

## **APPLICATION OF THE LAW AND THE FINDINGS AND FACTS TO THE ISSUES**

### **Pensions (No 2) Act (Northern Ireland) 2008**

26. In considering this Pre Hearing Review issue the tribunal had regard to the evidence before it contained in the documents of record and the submissions made by the representatives on behalf of the parties.
27. Having considered the evidence and the submissions the tribunal concludes that it does not have jurisdiction to hear a complaint in relation to the automatic-enrolment in a pension scheme under the Pensions (No 2) Act (Northern Ireland) 2008 or otherwise. In so concluding the tribunal had regard to the following matters:-
- (i) There is not any statutory provision, opened to the tribunal, which confers jurisdiction on an industrial tribunal in relation to the auto-enrolment in a

pension scheme following the 2008 Act, save those relating to detriment and dismissal.

- (ii) The structure of the 2008 Pensions Act imposes on the Pensions Regulator the responsibility for ensuring compliance. That is set out at Chapter 2 of the 2008 Act.
- (iii) Section 34 of the 2008 Act specifically states that any contravention of any of the employer duty provisions does not give a right to an action for breach of statutory duty.
- (iv) Section 34 of the Act also states that nothing in the employer duty provisions of Chapter 2 of the 2008 Act affects any rights of action arising apart from those provisions.
- (v) Chapter 2 of the 2008 Act also makes clear that employer duty provisions are references to any provisions of sections 2-11 or of any regulations made under those sections. The tribunal was not referred to any regulations made under any of those provisions.
- (vi) Section 35 of the 2008 Act sets out what the regulator may do to ensure compliance.
- (vii) There was not any other provision in the 2008 Act which confers on an industrial tribunal the power to consider any alleged breaches of the employer duty provisions of the Act, apart from detriment and dismissal.
- (viii) The Employment Rights (Northern Ireland) Order 1996 does not confer any jurisdiction on an industrial tribunal in relation to enforcing compliance with the Pensions (No 2) Act (Northern Ireland) 2008 or by which an applicant may seek to enforce the employer duty provisions in Chapter 2 of the 2008 Act.
- (ix) The 2008 Act confers on an industrial tribunal limited jurisdiction in relation to the protection of employment rights and specifically the rights not to suffer a detriment or a dismissal (ss 55-58).
- (x) Article 135D of the ERO 1996 in Chapter 1 (right not to be unfairly dismissed by Part XI (unfair dismissal)) deems a dismissal unfair if the reason or principal reason for the dismissal is that; (a) any action was taken or proposed to be taken to enforce in favour of an employee Chapter 1 of the 2008 Act or (b) the employer was prosecuted for an offence under section 45 of the 2008 Act as a result of action taken to enforce in favour of an employee a requirement under Chapter 1 of the 2008 Act, or (c) any provision of Chapter 1 of the 2008 Act applies to the employee or will apply or might apply. This amendment to the ERO 1996 was made by s 57 of the 2008 Act.
- (xi) The claimant sought to avail of the right not to suffer detriment, contained in section 55 of the 2008 Act, in order to argue that the tribunal has jurisdiction to entertain her complaint. She argued that she had suffered a detriment by not having been auto-enrolled in a pension scheme.

- (xii) The right not to suffer detriment provision under section 55 is only engaged where an applicant has suffered a detriment on the ground that an action was taken or proposed to be taken with a view to enforcing in favour of the worker a requirement to which the section applied or the employer was prosecuted for an offence under section 45 of the Act as a result of action taken for the purposes of enforcing in favour of the worker a requirement to which the section applies or any provisions of Chapter 1 applies to the worker or will or might apply.
- (xiii) In order for section 55(1)(a) to be engaged the detriment suffered [the non-auto-enrolment in the pension scheme] must be on the ground that an action was taken or was proposed to be taken with a view to enforcing in favour of the worker a requirement to which the section applies. In other words the non-enrolment has to happen to the claimant because she had taken action or proposed to take action to enforce a claim for auto-enrolment in the respondents' pension scheme.
- (xiv) In fact the position in the instant case is that the respondents decided not to auto-enrol the claimant and by reason of that decision the claimant brought a claim or sought to compel the respondents to auto-enrol her in the pension scheme. So therefore it cannot be said that the ground for her non-enrolment in a pension scheme was because she was seeking to enforce a right to be automatically enrolled in a pension scheme. The claimant's claim before the tribunal to enforce auto-enrolment in a pension scheme is not the ground of the detriment sufficient (non-enrolment in a pension scheme). Rather the claim is the result of the non-enrolment in a pension scheme).

28. Accordingly, the tribunal answers the Pre Hearing Review in the negative. A consequence of that decision is that that element of the claimant's claim is dismissed.

### **Unlawful Deduction from Wages**

- 29. The claimant did not specifically in her claim forms, make a claim for unlawful deduction from wages. Administratively her claim was noted as being a claim for an unlawful deduction from wages. The Pre Hearing Review issue did not include the unlawful deduction from wages claim as part of the Pre Hearing Review.
- 30. However, argument was advanced by the claimant and by the respondents in relation to any potential unlawful deduction from wages claim. The parties therefore sought that the tribunal would indicate its views on whether an unlawful deduction from wages claim could be made in the circumstances of this particular claim.
- 31. The tribunal had the advantage of argument from both sides as to whether an unlawful deduction from wages claim could be made in the circumstances of this particular claim.
- 32. The tribunal concludes that an unlawful deduction from wages claim was not a claim that could be sustained, in its view, in the circumstances of this particular claim. In so concluding the tribunal had regard to the following matters.

- (i) The definition of “wages” set out at article 59 of The Employment Rights (Northern Ireland) Order 1996 at sub-section (2)(c) excludes from the definition of wages,

...

- (c) any payment by way of pension, allowance or gratuity in connection with the worker’s retirement or as a compensation for loss of office,

- (ii) The claimant advanced the argument that this seemed to her to relate to the payment of a pension when it was due and not to the contributions made to a pension fund.

- (iii) However, the issue as to whether contributions to a pension fund fall within the definition of wages has already been considered by the EAT. It concluded that contributions to a pension fund were not wages as they were contributions to a third party, the pension provider, and not to a worker as article 59(1) of the 1996 Order requires. It seems therefore that this argument is not open to the claimant. (See **Somerset Country Council v Chambers [2017] IRLR 1087 EAT.**)

- (iv) It is therefore difficult to see on what basis the claimant might advance an argument that the failure to enrol her in a pension scheme and the contributions from the employer that would have to be made could constitute wages pursuant to the 1996 Order and therefore ground an application for unlawful deduction from wages.

33. Whilst the respondents were firmly of the view that the claimant’s claim forms do not disclose a claim for an unlawful deduction from wages the claimant did not agree to that and the Pre-Hearing Review issue does not require the tribunal to adjudicate on the matter.

34. The tribunal notes that the Pre Hearing Review was in relation to claim, case reference 17980/18, and not the subsequent claim brought by the claimant, case reference 1116/19. The tribunal notes that the second claim is in the same terms as the first claim. It is of the view that the same considerations, as set out, above would apply.

**Employment Judge:**

**Date and place of hearing: 15 August 2019, Belfast.**

**Date decision recorded in register and issued to parties:**