Michaelmas Term
[2012] UKSC 47
On appeal from: [2011] EWCA Civ 1412

JUDGMENT

Birmingham City Council (Appellant) *v* Abdulla and others (Respondents)

before

Lady Hale
Lord Wilson
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

24 October 2012

Heard on 11 July 2012

Appellant	*Respondent*
Paul Epstein QC Louise Chudleigh Nathaniel Caiden (Instructed by Birmingham City Council Legal and Democratic Services)	Andrew Short QC Naomi Ling (Instructed by Leigh Day & Co)

LORD WILSON (with whom Lady Hale and Lord Reed agree)

1. Birmingham City Council ("Birmingham") appeals against the order of the Court of Appeal (Mummery and Davis LJJ and Dame Janet Smith) dated 29 November 2011, whereby it dismissed Birmingham's appeal against the order of Mr Colin Edelman QC, sitting as a deputy judge of the High Court, Queen's Bench Division, dated 17 December 2010. The deputy judge had dismissed Birmingham's application for a direction that the claims made against it by 174 claimants, joined as parties to the single action, should be struck out.

2. The claimants allege that they are former employees of Birmingham. All except four of them are women. The claims, which were issued in the High Court on 30 July 2010, were founded on an alleged breach of the "equality clause" which, by section 1(1) of the Equal Pay Act 1970 ("the Act"), as substituted by section 8(1) of the Sex Discrimination Act 1975, was deemed to have been included in their contracts of employment. On 1 October 2010 the Act was repealed; and the provisions of it which this appeal requires the court to consider were replaced by provisions to similar effect in Chapter 3 of Part 5, and in particular in Chapter 4 of Part 9, of the Equality Act 2010.

3. Under the Act an equality clause had effect in six different situations specified in section 1(2) at (a) to (c). The claimants allege that the second situation, specified at (b), applied to them, namely "where the woman is employed on work rated as equivalent with that of a man in the same employment". Although section 1(1) and (2) identified the contracts of women as those in which an equality clause was to be included, the provisions applied equally to the contracts of men where the situation was converse: section 1(13). Hence the claims of the four men; but, in what follows, it will be convenient to refer only to the claims of the women. Section 1(2)(b), as substituted by section 8(1) of the 1975 Act, proceeded to provide that, where the second situation applied, the effect of the equality clause was that:

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

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

4. The claimants allege that Birmingham employed them on work rated as equivalent with that of certain men in the same employment pursuant to the National Joint Council for Local Authorities' Services (West Midlands Provincial Council) Manual Workers Handbook 1987, known as the Blue Book, and to a Job Evaluation Scheme referred to in it; but that their contracts did not provide for the payment of the substantial bonuses and other additional payments for which the contracts of the male comparators provided. They therefore claim sums equivalent to such payments pursuant to the terms of their contracts provided for by section 1(2)(b) (i) and (ii) of the Act.

5. Birmingham has not yet filed a defence to the claims. It does not allege that the claimants are out of time in bringing such claims in the High Court: their claims are brought within six years of the date on which their alleged causes of action accrued and so fall within the time set by section 5 of the Limitation Act 1980. Whether Birmingham will seek to dispute that it employed the claimants or, if so, that their work was rated as equivalent with that of the male comparators and whether it will seek to prove pursuant to section 1(3) of the Act, as substituted by regulation 2(2) of the Equal Pay (Amendment) Regulations 1983 (SI 1983/1794), that any variation between the contracts was genuinely due to a material factor other than the difference of sex are all questions which remain to be seen. The claimants suggest that, were their claims to go forward, the real battle would lie in the quantification of their claims, which certainly appears complex, rather than in the establishment of Birmingham's substantive liability to them.

6. Were it not for one feature, the claims could have been presented by way of complaint to an employment tribunal: section 2(1) of the Act, as amended by paragraph 2 of Schedule 1 to the Sex Discrimination Act 1975 and section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998. Such claims are usually brought in the tribunal, which offers to litigants many advantages not on offer in a court, including greater expertise in their determination (even, in a specified situation, provision to them free of charge of an expert report under section 2A(1)(b) of the Act, as inserted by regulation 3(1) of the 1983 Regulations), less cost and, in principle, faster resolution. Indeed, in the course of giving the only substantive judgment in the Court of Appeal, Mummery LJ, whose experience of this area of the law is unrivalled, observed that he had never previously encountered a claim under the Act which had been presented to a court rather than the tribunal.

7. The feature which precludes the claimants from presenting their claims to the tribunal is that they would be out of time for doing so. They concede that Birmingham ceased to employ them on various dates between August 2004 and November 2008. Section 2(4)(a) of the Act provided that the tribunal could not determine a complaint in respect of the contravention of a term modified or included by virtue of an equality clause unless it was presented on or before "the qualifying date"; and section 2ZA(3) provided that in a "standard case" the qualifying date was the date falling six months after the last day on which the woman was employed in the employment. It is agreed that each of the present claims is a "standard case", as defined in section 2ZA(2). The period of six months was extended to nine months in specified circumstances but, even had such existed, the extension would not have enabled these claims to be presented to the tribunal.

8. Birmingham's application to the court for a direction that the claims be struck out has been brought pursuant to section 2(3) of the Act. The subsection, as amended by section 1(2)(a) of the 1998 Act, provided as follows:

> "Where it appears to the court in which any proceedings are pending that a claim or counterclaim in respect of the operation of an equality clause could more conveniently be disposed of separately by an employment tribunal, the court may direct that the claim or counterclaim shall be struck out; and (without prejudice to the foregoing) where in proceedings before any court a question arises as to the operation of an equality clause, the court may on the application of any party to the proceedings or otherwise refer that question, or direct it to be referred by a party to the proceedings, to an employment tribunal for determination by the tribunal, and may stay or sist the proceedings in the meantime."

It will be convenient to describe the provision prior to the semi-colon as the first part of the subsection and the provision following it as the second part.

9. It was Birmingham's case before the deputy judge that the claims should have been presented to the tribunal; that the reasons why each claimant had failed to present her claim in time to the tribunal were irrelevant; that the claims "could more conveniently be disposed of" by the tribunal notwithstanding that such disposal would be by way of immediate dismissal for want of presentation in time; and that in those circumstances the first part of section 2(3) conferred on him a discretion to strike out the claims which he should proceed to exercise.

10. In dismissing the application the deputy judge expressed himself in categorical terms, as follows:

> "On the true construction of section 2(3), it cannot be more convenient for a claim to be disposed of separately by an employment tribunal in circumstances where the...tribunal could not determine the claim on its merits but would be bound to refuse jurisdiction to deal with the claim because it was time barred."

He added that, had his conclusion about the meaning of the word "convenient" been otherwise, he would have held that to strike out the claims in such circumstances would be to offend against the "principle of equivalence" under EU law, which I will address in para 32 below. Finally, said the deputy judge, he would have declined to exercise any discretion which might have arisen under the first part of the subsection.

11. But in the Court of Appeal (as it does in this court) Birmingham put its case differently. By that stage it had conceded that the reasons why each claimant had failed to present her claim in time to the tribunal were relevant. It invited the court to rule that, except where a claimant could provide a reasonable explanation for her failure to do so, her claim should be struck out; and it sought an order that its application be remitted to the High Court for inquiry into the identity of such claimants (of whom it conceded that there would be some) as, by reference to such an exception, could successfully resist the striking out of their claims.

12. In his judgment Mummery LJ held that the "basic assumption" behind the first part of section 2(3) was that both the court and the tribunal would have jurisdiction to decide the claim on its merits; that the purpose behind the provision was, in that context, to identify the forum more fitted for its resolution; that, in that Birmingham was not alleging that the claims represented an abuse of the process of the court, the reasons why the claims had not been made to the tribunal were irrelevant; and that the deputy judge's decision had been correct. Nevertheless Mummery LJ expressed himself in terms more qualified than those used by the deputy judge: he said that, in the exercise of the discretion under the first part of the subsection, the fact that a complaint to the tribunal would be time-barred would be no more than "a circumstance of considerable weight in most cases". He added that it would be exceptional for the reasons for not presenting a complaint in time to the tribunal to be relevant to the exercise of the discretion but that, for example, they would be relevant where they were such as to render the claim made to the court an abuse of its process. As an aside, Mummery LJ addressed the word "separately" in the first part of the subsection, upon which nothing in the appeal turned; and he observed, helpfully, that Parliament may in particular have had in mind the presentation to the court of a mixed claim, of which one component was

of breach of an equality clause and of which others were such as the tribunal had no jurisdiction to entertain. In the light of his conclusion Mummery LJ explained that he had no need to address the principle of equivalence.

13. We may readily expostulate that it cannot be more convenient for a claim to be disposed of in a forum in which, at the outset, and without reference to its merits, it would be required to be dismissed. But the issue in this appeal is somewhat more complicated than that. What, asks Birmingham, was Parliament's purpose in providing a strict time limit for the presentation of claims to the tribunal if those who fail to comply with it can have their claims heard elsewhere? The suggested absence of any good answer to that question leads, says Birmingham, to a need for us to stifle our expostulation and, in a more measured way, to conclude that the immediate disposal in the tribunal of a time-barred claim would be otherwise than more convenient only in the case of those claimants who were to provide a reasonable explanation for their failure to present their claims to it in time.

14. Other than in nomenclature, the terms of section 2(3) of the Act did not change between enactment and repeal. It is necessary to look carefully at the original context of the subsection. The Act, although enacted on 29 May 1970, provided that in principle it should come into force on 29 December 1975; the purpose of the lengthy delay was to afford time to employers to adapt to its new requirements. Article 119 of the EEC Treaty, later renumbered article 141, was replaced by article 157 of the Treaty on the Functioning of the European Union, which now provides that:

> "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."

The scope of the earlier article was explained in article 1 of the Council's Equal Pay Directive No 75/117 adopted on 10 February 1975. Once the Act of 1970 was in force, the UK, which had become a member of the European Community on 1 January 1973, thereby discharged its obligations, at any rate in relation to Great Britain, under the article, as explained by the directive. But, as the date of its enactment shows, the Act was not originally a response to the need for the UK to discharge its Community obligations. It was the result of a long public campaign for equal pay for women on the part of feminists, trade unionists and fair-minded citizens generally.

15. Parliament resolved that the mechanism of the provision for equal pay for women should be by its very insinuation into their contracts of employment.

Section 1(2) originally provided that "It shall be a term of the contract under which a woman is employed...that she shall be given equal treatment with men...". With effect from the date when the Act came into force, the section was radically recast by the Sex Discrimination Act 1975, which had been enacted in the interim. But the contractual mechanism was retained. The substituted section 1(1) thenceforward provided that:

> "If the terms of a contract under which a woman is employed...do not include ... an equality clause they shall be deemed to include one."

16. In 1975 the employment tribunal, or industrial tribunal as it was called prior to August 1998, had no general jurisdiction to determine a claim that a contract of employment had been broken. Its general jurisdiction to do so was introduced only much later, in the wake of a suggestion made by Lord Browne-Wilkinson in *Delaney v Staples (trading as De Montfort Recruitment)* [1992] 1 AC 687, 698B; it was achieved by the Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623), and even then the jurisdiction was, as it remains, hedged about. Back in 1975 the jurisdiction of the tribunal, which had been established pursuant to the Industrial Training Act 1964, was limited to the determination of claims by employees of breach of specified statutory, non-contractual, rights, for example to payment in the event of redundancy. In that Parliament intended that claims by women of breach of the equality clause in their contracts could be determined by the tribunal, it followed that jurisdiction to do so had specifically to be conferred on it by the Act. Such was achieved by section 2(1). Although another formulation of the subsection was substituted even before it came into force, the original formulation is worth noting. It provided that:

> "... a claim for arrears of remuneration or damages in respect of a failure to comply with an equal pay clause … may be referred to and determined by an industrial tribunal, and may be so referred either by the person making the claim or by the person against whom it is made."

It is relevant to what follows at para 21 below to note the word "referred": it may be seen that, pursuant to the Act as originally drawn, a woman "referred", as opposed to "presented", a claim to the tribunal. The unusual use of the verb appears to have been considered necessary in order also to encompass the employer's right to seek from the tribunal a ruling in relation to a claim proposed to be made against it.

17. Although it thus conferred on the tribunal jurisdiction to determine a claim of breach of contract in this regard, Parliament did not oust the jurisdiction of the court to determine such a claim. That there was concurrent jurisdiction in the tribunal and the court is plain from (among others) the subsection, namely section 2(3), which is central to this appeal; and, over the four subsequent decades, such has been frequently acknowledged and never doubted.

18. Attention should now turn to the period of limitation provided by Parliament for the reference of a claim to the tribunal of breach of an equality clause. Its original provision was in section 2(4), as follows:

> "No claim in respect of the operation of an equal pay clause relating to a woman's employment shall be referred to an industrial tribunal otherwise than by virtue of subsection (3) above, if she has not been employed in the employment within the six months preceding the date of the reference."

This provision remained in force until 19 July 2003, when, as supplemented by a new section 2ZA, as inserted by regulation 4 of the Equal Pay Act 1970 (Amendment) Regulations 2003 (SI 2003/1656), it was replaced by more sophisticated provisions which catered also for what were described as a "concealment case", a "disability case" and a "stable employment case". Fresh treatment of a "stable employment case" had been necessary in order to comply with the "principle of effectiveness" under EU law. Such is the principle which requires that "the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law... are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law": *Preston v Wolverhampton Healthcare NHS Trust*, ECJ, (Case C–78/98) [2001] 2 AC 415, para 31. One of the preliminary rulings of the ECJ in that case was that the application of section 2(4) to a "stable employment case", as established for the purposes of domestic law, offended against the principle of effectiveness; the ruling was duly adopted by the House of Lords in *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] UKHL 5, [2001] 2 AC 455, paras 32-33 and the decision precipitated the reform. For a "standard case" the period of limitation remained as six months after the end of the employment.

19. It is impossible to make a direct comparison between the period of limitation provided for the making of a claim (or, from 2003, a claim in a "standard case") to the tribunal, namely six months from the end of the employment, and the period provided for the making of such a claim to the court, namely six years from the accrual of the cause of action. In that such claims can be made, and frequently are made, to the tribunal during the currency of the

claimant's employment, the period of limitation for making a claim to the tribunal is by no means as short as might at first appear. But there was another restriction, not strictly cast as a provision of limitation but having such effect, to which reference should be made. It does not aid comparison between the two periods because it applied equally to proceedings in the tribunal and to proceedings in court. It was section 2(5) and, as originally drawn, it provided as follows:

> "A woman shall not be entitled, in proceedings brought in respect of a failure to comply with an equal pay clause (including proceedings before an industrial tribunal) to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than two years before the date on which the proceedings were instituted."

In *Levez v TH Jennings (Harlow Pools) Ltd* [2000] ICR 58 the employment appeal tribunal held, following a comparison with the ambit of the right of employees to make other contractual claims not reflective of Community law, that the period of only two years in section 2(5) offended against the principle of equivalence under EU law. In the *Preston (No 2)* case, cited at para 18 above, the House of Lords held, by way of adoption of another of the preliminary rulings of the ECJ in the same case, that, in relation at any rate to part-time workers, mostly being women, who had been excluded from occupational pension schemes, the subsection also offended against the principle of effectiveness under EU law: see paras 10 to 12. The result was, in 2003, the replacement of the subsection, and its supplementation for England and Wales by section 2ZB, of which the effect was that, for the "standard case" (being, for this purpose, somewhat differently defined), a period of six years was substituted for that of two years.

20. A striking feature of the limitation period of six months set by section 2(4) of the Act was that Parliament never made it extendable. For almost all of the many other claims which, by 2010, could be made to the tribunal, Parliament prescribed limitation periods which it permitted the tribunal to extend; in some cases to extend them insofar as it was just and equitable to do so and, in other cases in which it had not been reasonably practicable for the complaint to be presented in time, to extend them for such further period as the tribunal might consider reasonable: see *Harvey on Industrial Relations and Employment Law*, 2012 update, Division PI "Practice and Procedure", para 84. It is strongly arguable that Parliament tolerated an unusually absolute time limit for the presentation to the tribunal of a claim under the Act only because it recognised that, were she to fall foul of that time limit, the claimant would nevertheless be likely to remain in time for making her claim in court.

21. But I cannot resist one further piece of historical conjecture. It relates to the phrase "otherwise than by virtue of subsection (3) above" in the form in which

section 2(4) remained in force until 2003 and which I have set out at para 18 above. One's initial reaction – such was certainly the reaction of highly experienced leading counsel at the hearing of this appeal – is that the exclusion of the limitation period achieved by that phrase related to the second part of section 2(3), set out at para 8 above, namely to the ability of a court to refer to the tribunal a question as to the operation of an equality clause which arose in pending proceedings and to stay them in the meantime. It seems to me however that one's initial reaction might be wrong. In principle a reference by a court to a tribunal of a specific question raised in proceedings pending before it could not in any event fall foul of a period within which a claim had to be presented to the tribunal; so, on the initial analysis, the phrase would be redundant. Indeed, more specifically, the phrase was inserted into section 2(4) as an exception to the provision that "[n]o *claim* … shall be referred to [a] tribunal..." (italics supplied). But the second part of section 2(3) did not provide for the reference of a *claim*; it provided for the reference of a *question*. It was, by contrast, the first part of the subsection which provided, albeit obliquely, for the reference of a *claim*, namely by the claimant to the tribunal as the intended sequel to the court's conclusion that her claim could more conveniently be disposed of there and to its consequent striking-out. I recognise that judges can become dangerously enamoured of points introduced by themselves. So I venture only tentatively that, by the phrase introduced into section 2(4), Parliament intended to make entirely clear that there could never be circumstances in which a claimant could suffer the striking-out of her claim in court on the basis that it could more conveniently be disposed of in the tribunal even though she would be time-barred for presenting her claim there. The phrase, together therefore with this point, was swept away in 2003, when section 2(4) was replaced; but nothing suggests that, had such been Parliament's initial intention, it remained its intention no longer.

22. In now contending that, except where they can provide a reasonable explanation for their failure to present their claims in time to the tribunal, the claims of the claimants should be struck out under section 2(3) of the Act, Birmingham relies heavily on observations made in the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 and on the decision of Slade J in *Ashby v Birmingham City Council* [2011] EWHC 424 (QB), [2012] ICR 1, in which she applied the observations to claims materially similar to the present.

23. In the *Spiliada* case shipowners sued shippers for breach of contract in having loaded on to their ship a cargo of wet sulphur which had corroded it. The House of Lords held that the judge at first instance had rightly granted leave to serve the shippers out of the jurisdiction so that the action in England might proceed. The shippers had opposed leave on the basis that the shipowners should have sued them, if at all, in British Columbia, where any such action would by then have been time-barred. Subject to three points of distinction which he identified at pp 480G-481E, Lord Goff, with whose speech the other members of

the committee agreed, held that the principle which governs the grant of leave to serve out of the jurisdiction and the stay of the action on the ground of "forum non conveniens" was the same. It was, so he held at p 476C, whether, in the absence of special circumstances, the suggested alternative forum was appropriate for the trial of the action in the sense of being more suitable for all the parties and the ends of justice. But, at pp 476H-477A, he added a rider that, where the choice was between competing jurisdictions within a federal state, a strong preference should be given to the forum chosen by the claimant upon which, by its constitution, the state had conferred jurisdiction.

24. It is Lord Goff's treatment of a time bar in the alternative jurisdiction on which Birmingham relies. He observed, at pp 483E-484E:

> "Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country... The appropriate order, where the application of the

> time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay, or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction; this is apparently the practice in the United States of America."

Lord Goff added, at pp 487H-488A, that, had he considered that the court of British Columbia was the appropriate forum, he would have appended such a condition to the refusal of leave.

25. In the *Ashby* case Slade J heard an appeal against the decision of a circuit judge to strike out, pursuant to section 2(3) of the Act, claims brought in the county court by 14 women who were former employees of Birmingham and who alleged its breach of the equality clause in their contracts. The issue in the appeal was identical to the issue in the present proceedings in that, by the date of the issue of their claims in court, the women would have been time-barred for presenting them to the tribunal. Following the hearing before Slade J but prior to the delivery of her judgment, the deputy judge gave his judgment in the present case; and it was brought to her attention. But she disagreed with it. She observed, at paras 71 and 78, that the fact that the claims would be time-barred if presented to the tribunal did not preclude a conclusion that they could more conveniently be disposed of there. She suggested, at para 56, that assistance in the construction of section 2(3) was to be gained from the observations of Lord Goff in the *Spiliada* case and thus held, at para 78, that the reason why the women had not presented their claims in time to the tribunal had to be taken into account. She therefore allowed the women's appeal but without prejudice to the right of Birmingham to reapply to the county court for their claims to be struck out under the subsection if and insofar as it might wish to contend that in all the circumstances they had not reasonably explained their failure to present their claims in time to the tribunal.

26. I agree with Mummery LJ in his judgment in the present proceedings, and, with respect to her, I disagree with Slade J in the *Ashby* case, about the relevance to the construction of section 2(3) of the observations of Lord Goff in the *Spiliada* case. The words which, by the subsection, Parliament has required us to apply to the facts before us are "more conveniently". "[I]ts statutory objective", said Mummery LJ of the subsection, "is the distribution of judicial business for resolution in the forum more fitted for it." Lord Goff was required to consider a much broader canvas. He observed, at p 474E:

> "I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the

> relevant jurisdiction. However the Latin tag... is so widely used to describe the principle... that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of 'mere practical convenience'."

The proposition that an action brought inappropriately in England should sometimes not be allowed to proceed even though it can no longer be brought in the foreign jurisdiction in principle appropriate to it is in my view of no assistance in determining whether, in circumstances in which Parliament has specifically allowed a claimant to bring her entirely domestic claim in court, it could more conveniently be disposed of by the tribunal. No doubt in most cases it will be more convenient for the tribunal to dispose of a claim in respect of the operation of an equality clause, provided that it can still be brought there, rather than for the court to do so. If the claim can no longer be brought there, the effect of Birmingham's submissions in this appeal, founded on the decision of Slade J, would be to convert the reasons why the claimant had failed to present her claim in time to the tribunal into the factor determinative of whether it be struck out by the court. But I do not regard the reasons for her failure as relevant in any way to the notion of convenience. In my view Birmingham aspires in effect to re-write section 2(3); and to introduce into the law a principle which would in some cases in effect serve to shorten the period of limitation allowed by Parliament for the bringing of claims in court.

27. A modified version of Birmingham's submissions finds favour with Lord Sumption and Lord Carnwath. Whereas Birmingham contends for an inquiry limited to that single feature, namely the reasons for a claimant's failure to present her claim in time to the tribunal, they consider that the proper operation of section 2(3) requires a multi-factorial inquiry not just into that feature but into all others which might bear upon whether, in the interests of justice, a claim should be struck out; they would therefore remit the claims of the 174 claimants for individual consideration along such lines. I entirely understand the aspiration to attribute a greater degree of efficacy to the rules of limitation in sections 2(4) and 2ZA of the Act. On any view they lie curiously alongside the right to issue proceedings in court, governed by a rule of limitation which, in a number of cases albeit certainly not in all, will prove to be more indulgent to claimants. But in my respectful view the aspiration drives my two colleagues to treat section 2(3) with an unacceptable degree of violence. The adverb in the subsection is "conveniently". Of course the disposal of a claim can be achieved by application of rules of limitation; but in my view the adverb qualifies the type of disposal addressed in the subsection and mandates a straightforward practical inquiry into the forum more convenient for investigation of the merits. It is analogous to the practical inquiry which attends the permission given to a claimant by rule 7.3 of the CPR to "use a single claim form to start all claims which can be conveniently disposed of in the same proceedings". I would deprecate a multi-factorial inquiry into what Lord Sumption

neatly describes as the disembodied interests of justice in place of the inquiry for which, on the natural reading of the subsection, Parliament has provided.

28. In *Restick v Crickmore* [1994] 1 WLR 420 the Court of Appeal considered five appeals by claimants who in the High Court had brought proceedings which were required to be brought in the county court and which the judges below had struck out even though the claimants had become out of time for bringing them in the county court. The decision of the Court of Appeal was that section 40(1) of the County Courts Act 1984 had given the judges a power, which they should have exercised, to transfer the proceedings to the county court instead of striking them out. It may have been a controversial construction of the subsection but it was a just decision. Stuart-Smith LJ, with whom the other members of the court agreed, said, at p 427E-G:

> "The construction I prefer accords with the well established policy of the courts: provided proceedings are started within the time permitted by the Statute of Limitations, are not frivolous, vexatious or abuse of the process of the court and disclose a cause of action, they will not as a rule be struck out because of some mistake in procedure on the part of the plaintiff or his advisers... The ordinary sanction for failure to comply with the requirements will be in costs."

The present claimants have a far stronger case than the appellants in the *Restick* group of cases for the effective survival of their claims in that they were never required to proceed in the tribunal.

29. I would hold that the present claims cannot more conveniently be disposed of by the tribunal and that Birmingham's invocation of section 2(3) of the Act was rightly rejected both by the deputy judge and by the Court of Appeal. I prefer the categorical terms favoured by the deputy judge to the qualified terms favoured by Mummery LJ. The latter referred to cases of abuse of process. Nothing can detract from the inherent jurisdiction of the court to strike out a claim in respect of the operation of an equality clause if it were to represent an abuse of its process; one example might be that of a claimant who had been invited to present a complaint in time to the tribunal but who had spurned the invitation in order to secure what the court considered to be an illegitimate advantage by bringing the claim before itself. But the subject of section 2(3) was not abuse of process; and I would hold, for the purpose both of the first part of the subsection and of its successor, namely section 128(1) of the Equality Act 2010, that a claim in respect of the operation of an equality clause can never more conveniently be disposed of by the tribunal if it would there be time-barred.

30. No doubt one aspect of Birmingham's concern about the prospect that claims in respect of the operation of an equality clause may be brought against employers in court, rather than in the tribunal, relates to the court's general rule, which does not apply in the tribunal, to make an order for costs against the unsuccessful party. But the court may make a different order and, in deciding what order (if any) to make in respect of costs, it must have regard to all the circumstances, including the conduct of the parties: CPR r 44.3(4)(a). It is to this latter inquiry that the factor incorrectly urged as relevant to this appeal might well become relevant. The court's conclusion that, instead of bringing it in court, a claimant should, in all the circumstances, reasonably have presented her claim, in time, to the tribunal might well be relevant to its survey in relation to costs under the subrule: insofar as, had she done so, she would not have obtained an order for costs, such might well be relevant to the court's decision as to the appropriate order.

31. Even in circumstances in which the presentation of a claim to the tribunal would be time-barred, the power of the court under both the second part of section 2(3) of the Act and its successor, namely section 128(2) of the 2010 Act, to refer to the tribunal a question as to the operation of an equality clause still remains; and should not be forgotten. Nevertheless Parliament might well wish to consider introducing a relaxation of the usual limitation period for the presentation of a claim to the tribunal in cases in which a claim in respect of the operation of an equality clause has been brought, in time, before the court and, were it not for the effect of the usual limitation period, would more conveniently be disposed of by the tribunal.

32. I have doubts about the value of assuming, contrary to the above, that the effect of section 2(3) of the Act is, as contended for by Birmingham, to preclude a hearing of the claimants' claims on the merits even in court, save if they fall within the exception for which it now allows; and, upon that assumption, of proceeding to consider whether such an effect infringes the EU principle of equivalence. Such is the principle which requires that "the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law [should be] not less favourable than those governing similar domestic actions": para 31 of the judgment of the ECJ in the *Preston* case, cited at para 18 above. But I will address the point, on which the court heard only limited argument, briefly. My view, contrary to that of the deputy judge, is that this is not a freestanding point: section 2(3) conferred upon the court a discretion and, were any exercise of the discretion in favour of a strike-out to offend against the principle of equivalence, the obligation of the court would be not so to exercise it: *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546. So the point is linked to the proper exercise of the discretion, which was the deputy judge's separate and final reason for dismissing Birmingham's application.

33. But the decision of the House of Lords in the *Preston (No 2)* case, cited at para 18 above, seems to me to place formidable difficulties in the path of the claimants' invocation of the principle of equivalence. In the *Preston* litigation some 60,000 part-time workers, mainly women, complained to the tribunal that their exclusion from their employers' pension schemes infringed the equality clause introduced into their contracts by the Act. Acknowledging their own obligation to make the appropriate back-dated contributions into them, they sought recognition of their entitlement to membership of the schemes, to be backdated over what, in some cases, had been their many years of employment. Test cases were identified in order to resolve preliminary issues in relation to the application to them of section 2(4) and (5) of the Act; and in *Preston v Wolverhampton Healthcare NHS Trust (No 1)* [1998] 1 WLR 280 the House of Lords referred three questions to the ECJ for preliminary rulings as to whether, in any of the three respects, the application of the subsections infringed the principles of equivalence or of effectiveness. I have referred, at paras 18 and 19 above, to two of the preliminary rulings of the ECJ. Its third (which did not concern cases of stable employment) was, at para 35, that the six months rule did not offend against the principle of effectiveness and, at para 49, that, in the light of the greater ability of the national court to identify a comparator, it was for that court to determine whether it offended against the principle of equivalence. Such was, therefore, an exercise which, upon the return of the case to it, the House of Lords conducted in *Preston (No 2),* cited at para 18 above. It determined that the rule did not offend against the principle of equivalence. Albeit with considerable hesitation on the part of three of its members, the committee decided that there was a sufficiently similar comparator in the form of an action under domestic law for damages by an employee against an employer for failure to pay to the trustees of a pension scheme on his or her behalf the sums for which the contract of employment had provided: para 22 of the speech of Lord Slynn. But the committee was not satisfied that the six months rule for a claim under the Act was less favourable than the six years rule which would apply to such an action: paras 24 to 31 of his speech. In particular he stressed, at para 30, that a claim brought in the tribunal within six months of the end of the employment might in some cases stretch much further back than six years from the date of the claim.

34. The decision in *Preston (No 2*), which some might now consider border-line but from which the court was not invited to depart, is therefore authority for the proposition that, in its application to what after 2003 was known as the standard case, the six months rule in section 2(4) of the Act did not offend against the principle of equivalence. The claimants concede that, were the subject of the present appeal to be the time limit for a claim to the tribunal, the decision would foreclose the point against them. But, in an argument accepted by the deputy judge, they suggest that the subject is, instead, the time limit for a claim to the court. I disagree. For Birmingham seeks, by the operation of section 2(3), in effect to import into the time limit for a claim to the court – and subject to the exception for which it now makes allowance – the time limit for a claim to the tribunal. The

deputy judge proceeded first to note the suggested comparators in the present case, namely the men entitled under the express terms of their contracts to the additional payments, and then, for the purposes of the comparison, to imagine that Birmingham had refused to make such payments, with the result that the men had sued for them in court. He held that, by comparison with their position, the effect of Birmingham's submissions about the proper application to the claimants of section 2(3) would offend against the principle of equivalence. But I discern no material difference between the deputy judge's comparison and that made in relation to pension provision by the House of Lords in the *Preston (No 2)* case. I do not consider that Birmingham's contentions, however flawed, offend against the principle of equivalence.

35. I would dismiss the appeal.

LORD SUMPTION (with whom Lord Carnwath agrees)

36. The majority of the Court proposes to dismiss the appeal. I shall therefore be brief in explaining why, for my part, I would have allowed it. In bald summary, the decision of the deputy judge and the Court of Appeal frustrates the policy underlying the provisions of the Equal Pay Act relating to limitation. Since those provisions are an important part of the statutory scheme, I find it impossible to accept that this result can have been intended by Parliament.

37. It is common ground that in principle the courts and the employment tribunals have concurrent jurisdiction to hear claims for breach of the statutory equality clause in a contract of employment. The issue on this appeal arises from the fact that Parliament has provided by sections 2(4) and 2ZA of the Equal Pay Act that in proceedings before an employment tribunal various limitation periods are to apply (depending on the type of case) which differ from those that would apply under the general law in proceedings before a court. Under the Act as originally enacted, there were three differences. First, the period was shorter, six months as opposed to six years. Second, it ran from the end of the end of the employment relationship, and not from the accrual of the cause of action. Third, there were no provisions for deferring the running of the period, such as those which would apply to proceedings in court under the Limitation Act 1980 and the Latent Damage Act 1986. Under the Equal Pay Act as it stood in 2005 (the relevant time for the purpose of this case), the position is exactly the same in a "standard case" like this one. But by that time the statutory scheme had been refined by amendment so as to defer the running of time in cases of "concealment" and "disability".

38. The question comes down to this. If a particular claim would be time-barred before an employment tribunal but not before a court, is it open to a court to strike it out on the ground that it ought to have been brought before an employment tribunal within the period provided for by section 2(4)? Since the court has no power to transfer a case directly to the employment tribunal, and no one suggests that the present proceedings are an abuse of the court's process, this depends entirely on section 2(3).

39. Section 2(3) empowers a court in which a claim under the equality clause is pending to strike it out if it could "more conveniently be disposed of separately by an employment tribunal." Although the present question can fairly be described as turning on the construction of this provision, the issue is particularly difficult to resolve by reference to the mere language of the Act. The relevant provisions are poorly drafted, and a complex history of ill-thought-out amendments has contributed nothing to their coherence. This is therefore a case in which it is more than usually important to examine the underlying purpose of Parliament in (i) conferring jurisdiction on employment tribunals over equal treatment claims, and (ii) providing for special periods of limitation to apply to such claims in those tribunals.

40. Employment tribunals (originally "industrial tribunals") were established by the Industrial Training Act 1964, initially for the limited purpose of hearing appeals against the imposition of industrial training levies. Their jurisdiction has always been wholly statutory, but it has been progressively expanded over the past half-century. At the time when the Equal Pay Act was originally passed in 1970, the main business of the tribunals was the determination of claims for statutory redundancy payments, a jurisdiction conferred on them in 1965. By the time that the Act came into force in substantially amended form in 1975, its jurisdiction also extended to unfair dismissal claims. By 1970, and even more by 1975, employment tribunals were well established as cheap, informal, expert tribunals, comprising predominantly lay members and operating under a simplified procedure, in which parties need not be legally represented (or indeed represented at all) and in which costs orders were not ordinarily made. These were, and remain, substantial advantages not just for parties appearing in them, but for the disembodied interests of justice. It can be assumed that they were significant factors in Parliament's decision, when enacting the Equal Pay Act 1970, to confer jurisdiction upon them in equal treatment cases. Their specialist expertise in employment practice was perhaps of particular value in these cases, because they commonly turned on an expert evaluation of the claimant's job by comparison with a relevant comparator: see section 1(5). Notwithstanding these advantages, the court's jurisdiction was retained, but it follows from the criterion laid down by section 2(3) for striking out equal treatment claims brought in court that the draftsman envisaged that the court's jurisdiction would be invoked only if the subject matter of any particular claim made it the more convenient forum. The

paradigm case (although not necessarily the only one) would be proceedings involving mixed claims arising out of the same employment relationship, some of which were within the jurisdiction of the employment tribunal, while others were not. Hence the reference to claims brought in court that could more conveniently be disposed of "separately" by an employment tribunal.

41. Turning to the purpose of the special limitation provisions in the Act, it is right to make two points by way of introduction. The first is that issues of limitation are bedevilled by an unarticulated tendency to treat it as an unmeritorious procedural technicality. This is, I think, unjustified. Limitation in English law is generally procedural. But it is not a technicality, nor is it necessarily unmeritorious. It has been part of English statute law for nearly four centuries. It has generated analogous non-statutory principles in equity. Some form of limitation is a feature of almost all other systems of law. And it has been accepted in principle in the jurisprudence of both the Court of Justice of the European Union and the European Court of Human Rights. Limitation reflects a fundamental and all but universal legal policy that the litigation of stale claims is potentially a significant injustice. Delay impoverishes the evidence available to determine the claim, prolongs uncertainty, impedes the definitive settlement of the parties' mutual affairs and consumes scarce judicial resources in dealing with claims that should have been brought long ago or not at all. These considerations, which are common to most litigation, are particularly germane to equal treatment claims. The characteristics of a job are liable to change radically, especially at a time of economic upheaval, industrial rationalisation or technological advance. The selection of appropriate comparators and their comparative evaluation are inherently more uncertain exercises when they relate back several years to a state of affairs which may no longer exist. In addition, equal treatment claims are by their nature liable to affect large classes of employees of a particular firm and may therefore have important financial implications for the employer, which will be particularly disruptive if they arise out of the position of ex-employees who left long ago.

42. The second introductory point is that the dismissal of a claim on the ground that it is time-barred is a disposal of the claim. Limitation is a defence. A dismissal on that ground is a judicial decision giving effect to that defence. It was submitted to us that the introductory words of section 2(4) ("No determination may be made by an employment tribunal…") mean that the provision is a limitation on the employment tribunal's jurisdiction. There is authority that provisions in this form, or substantially similar, do go to jurisdiction: see, most recently, *Radakovits v Abbey National* Plc [2009] EWCA Civ 1346; [2010] IRLR 307. I am by no means convinced that this is correct, but it is unnecessary to decide the point because section 2(4) plainly gives rise to a defence in proceedings before an employment tribunal, even if it also operates as a limitation on the tribunal's jurisdiction. The words cannot mean that the tribunal is disabled from determining whether the

claim is time-barred. The only consequence of treating section 2(4) as going to jurisdiction is therefore that the defence cannot effectually be waived.

43. The legislative policy underlying section 2(4) of the Act, both in its original and its amended form, is clear. It is to confer a degree of protection on the employer. There is no other purpose that can be imputed to the legislature, and none was plausibly suggested in argument. In "standard" and "stable employment" cases the object was to restrict the employer's exposure to equal treatment claims to those which were brought while the employment relationship still subsisted, or within a short time thereafter, so as to enable him to draw a line under any employment relationship at that point.

44. Why were these provisions absolute? Unlike Lord Wilson (paragraph 20), I do not think that in the statute as originally enacted, the absolute character of this time bar was due to the availability of a concurrent jurisdiction in court which would not be affected by it. If this issue had been considered by the draftsman at all, he would surely have made specific provision for reconciling the two procedures. Likewise, I cannot, with respect, agree with his historical conjecture (paragraph 21) about the reason for exclusion from section 2(4) in its original form of a "claim" referred to an industrial tribunal by virtue of section 2(3). I agree that the drafting is unclear, but the exclusion seems most naturally to refer to the only form of reference for which provision is made by section 2(3), even if (as he rightly says) that is not strictly a reference of the "claim" as such. In any event, neither argument can arise on the terms of the Act as it has stood since its amendment in 2003. The absence of any provision for deferring the running of time in "standard" and "stable employment" cases is in my view more plausibly explained by the importance which the legislature attached to the time-bar. At the time when the Equal Pay Act was passed, section 26 of the Limitation Act 1939 (now section 32 of the Limitation Act 1980) provided for the deferral of the running of a limitation period under the general law in cases of fraud and concealment. There was, however, no corresponding provision applicable to equal treatment claims under the Equal Pay Act, even in cases of concealment. Over the years Parliament has introduced other grounds of deferral into the general law of limitation. It is, however, notable that the possibility of deferring the running of time was not introduced into the Equal Pay Act until 2003, when it was amended by statutory instrument. Even then it was limited to two narrowly defined categories of case, namely those in which the facts giving rise to an equal treatment claim were deliberately concealed by the employer from the employee during the subsistence of the employment relationship, and those in which the employee was under a disability during the period of six months after the termination of the relationship or (in a concealment case) after the day on which she discovered the facts deliberately concealed from her. All of these provisions have been re-enacted in substantially the same form by sections 120, 122-123 and 129-130 of the Equality Act 2010.

45. Accordingly the three salient features of the Equal Pay Act for present purposes are: (i) that it provides in the public interest as well as in the interests of parties for particular categories of employment disputes to be referred to a specialised tribunal, applying a procedure particularly adapted to the hearing of such disputes, (ii) that it lays down in the interests of employers a highly restrictive regime of limitation for cases brought in the specialist tribunal, and (iii) that it contains a careful and qualified definition of the circumstances in which older claims can be brought in the specialist tribunal. Parliament cannot rationally be thought to have intended that a far less restrictive regime should apply at the unfettered option of the employee, by the simple device of bringing his claim in a court of general jurisdiction which is less appropriate to such claims because it has neither the same specialist experience nor the specially adapted procedures thought suitable for this class of case.

46. Nonetheless, in conferring jurisdiction over equal treatment claims on employment tribunals Parliament left in being the jurisdiction that the ordinary courts had always had over contractual disputes arising out of employment. Moreover, the protection of section 2(4) is not available in equal treatment cases before the courts, because it is in terms confined to cases before the employment tribunal (compare section 2(5) in which the restriction on the period in respect of which damages may be awarded is applied to such claims wherever brought). The only rational answer to this conundrum lies in the application of section 2(3). If an action founded exclusively on a breach of the statutory equality clause were brought in court before the time limit had expired for bringing it in an employment tribunal, one would expect it to be struck out as a matter of course under section 2(3) so that it could be brought in the appropriate forum. It could, in the language of the subsection, "more conveniently be disposed of" by an employment tribunal. If the claim is brought in court after the tribunal time limit has expired, the test is exactly the same, but the circumstances are in one respect different. The decision whether to strike out will still depend on whether it can "more conveniently be disposed of" by an employment tribunal, but the employment tribunal will inevitably have to dismiss the claim because of the time-bar. The Court of Appeal took the view that for this reason a claim could only very rarely be "more conveniently disposed of" in a tribunal which would be bound to dismiss it as time-barred. They appear to have had in mind rare cases where the mere fact of bringing the claim in court could be characterised as an abuse of the court's process. In this court, the majority considers that a claim can never "more conveniently be disposed of" by an employment tribunal if it would be time-barred there. With respect, I cannot accept either version. Both of them depend upon the proposition, which I understand to be accepted by the majority, that the notion of "convenience" in section 2(3) is directed only to the efficient distribution of judicial business between the available forums. I think that this is far too narrow a test, because it excludes the broader interests of justice which in my opinion should be decisive. "Convenient" is used in section 2(3) in a sense analogous to that which it has in the expression "forum non conveniens". The question is

whether the disposal of the claim in an employment tribunal is appropriate in the interests of justice: see *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 474-475 (Lord Goff).

47. I would accept without hesitation that the fact that the claim will be time-barred in the employment tribunal is a highly relevant factor, but I cannot accept that it is conclusive or nearly so. As I have pointed out, the dismissal of a claim because it is time-barred is a disposal. It may, depending on the circumstances, be a just disposal. I would not wish to press the analogy with forum non conveniens too far, for it is only an analogy. But, as Lord Goff pointed out in the *Spiliada* case, it is not necessarily unjust to require a claim to be heard in a jurisdiction where it would be time-barred, if the nature of the case is such that that is the more appropriate jurisdiction: see pp 483-484. Indeed, the case for doing so is likely to be stronger where (i) the alternative and appropriate forum is another English forum, provided by law for this very class of case; and (ii) the court is seeking to give effect to the policy of the legislature in imposing a time-bar on claims brought in the appropriate tribunal. In such cases, the justice to the claimant in having his claim determined by a court on its merits without regard to the time-bar is exactly commensurate with the injustice to the employer of being deprived of a defence. Other relevant considerations which seem to me to bear on the justice of requiring the claim to be brought if at all in the employment tribunal include: whether the claimant acted reasonably in failing to bring his claim before the appropriate tribunal in time; whether the passage of time since the expiry of the tribunal time-bar has made the issue substantially more difficult to determine justly; and whether the employer would be exposed to a substantial liability in costs in court which he would not have faced in the tribunal. The latter is likely to be a particularly significant factor in a case where the litigation is funded under a conditional fee agreement. It will be apparent that I have considerable sympathy for the approach adopted by Slade J in *Ashby v Birmingham City Council* [2012] ICR 1, although I would not limit the range of relevant factors to those which arose on the facts of the case before her.

48. If, as I have suggested, the limitation provisions of the Equal Pay Act reflect the policy of the legislature as to the circumstances in which an employer ought to be exposed to stale claims, it must in my opinion be wrong to treat the only statutory mechanism available for giving effect to it as inapplicable in the precise circumstances which engage that policy. The view that court proceedings in support of an equal treatment claim should rarely or never be struck out where they would be time-barred in an employment tribunal has the effect of making the statutory protection of the employer available to him only at the option of the employee. The effect is to deprive it of most of its content. Indeed, on this view, a claimant in a "concealment" or a "disability" case could bring his claim in an employment tribunal and, having failed to persuade the tribunal that he was entitled to defer the running of time, then bring precisely the same claim in court

49. I find it difficult to derive any assistance on these points from *Restick v Crickmore* [1994] 1 WLR 420, to which both the Court of Appeal and Lord Wilson (paragraph 28) attach importance. In that case, the Court of Appeal criticised the decision of the judges below to strike out proceedings which should have been brought in the county court, in circumstances where they would have been time-barred there. That was a decision about a very different statutory scheme, whose critical feature was the existence of a statutory power to transfer the proceedings to the county court instead of striking them out. Since a transfer would have preserved the plaintiffs' limitation position, it was held to have been the appropriate course.

50. I agree with the majority that to strike out the claim would not be inconsistent with the EU principle of equivalence, for the reasons given at paragraphs 32-34 of the judgment of Lord Wilson.

51. I would for these reasons have allowed the appeal and remitted the case to the High Court to determine whether in the interests of justice it should be allowed to proceed there.