Case No: 519518/95

EMPLOYMENT TRIBUNALS

at: London Central

BETWEEN:

Claimant		**Respondents**
Ms C Pike	**and**	1. Somerset County Council 2. Secretary of State for Education and Skills

Representation

For the Claimant:	Mr D Stilitz of Counsel Instructed by: Graham Clayton Solicitors
For the First Respondent:	Not representation
For the Second Respondent:	Mr R Hill of Counsel Instructed by Mr A Jezierski, for Treasury Solicitor

REASONS

1. Mrs Pike is one of some 65 claimants whose cases form a discrete subset of the part-time worker pension litigation (***Preston & others -v- Wolverhampton Healthcare NHS Trust & others (No. 3)*** [2004] ICR 993 EAT). All of the claimants are teachers who retired with a pension, but then returned to teaching part-time and were prevented by the rules of the Teachers Pension Scheme from making further contributions to their pension in respect of their part-time work. They are known collectively as the post retirement claims. In order to succeed in such a claim, it is necessary, following ***Nelson -v- Carillion Services Ltd*** [2003] ICR 1256 CA, for the claimants to establish that the rule preventing retired teachers who returned to the profession part-time from contributing to the pension scheme had a disproportionate impact on women and was therefore indirectly sex discriminatory and unlawful under both the Equal Pay Act 1970 and Article 141 of the Treaty of Rome.

2. The issue of where the burden of proof in such cases lay was to have been test issue no. 1 in ***Preston No. 3*** before me in June and July of 2002 and the question was formulated thus: "*Where a Respondent does not admit that the qualifying hourly threshold for admission to the pension scheme has a disproportionate impact on*

women, is the burden on the applicant to prove a disproportionate impact or upon the respondent to disprove disproportionate impact." At the start of the hearing all of the respondents in the test cases conceded that the imposition of a qualifying hours threshold does have a disproportionate impact on women and the point was therefore never argued. Two of the ***Preston*** test claimants, Mrs Brack who was employed by Manchester City Council and Mrs Ham who was employed by Birmingham City Council, were retired teachers who had returned to teach part-time but who had been excluded from the Teachers Pension Scheme because of their part-time status. In his amended response to their claims in May 2001, the Secretary of State made the following concession.

> "*3. It is admitted that the reason why the applicants' service was not pensionable was that they were already in receipt of pension under the Teacher's Superannuation Scheme. Regulation 5 of the Teachers' Superannuation Regulations 1976 and regulation B2(2)(b) of the Teachers' Superannuation (Consolidation) Regulations 1988 provided that the service of a person in part-time employment who was already in receipt of a pension under the scheme was not pensionable service. It is admitted that staff in full-time employment were eligible to join the Scheme even if in receipt of pension.*
>
> *4. It is admitted that the provision of the above Regulations by which the applicants' service was not pensionable in so far as they were in receipt of pension and not in full-time employment had a disparately adverse impact upon women*."

3. In his amended grounds of resistance in these proceedings dated 24 December 2004, the Secretary of State avers that no such concession has been made in Mrs Pike's case, and as Mrs Pike's case stands as the test case for all of the post retirement claims (other than those of Mrs Brack and Mrs Ham) nor has it been made in the remaining post-retirement claims, and, in so far as it is necessary to do so, the Secretary of State sought the tribunal for permission to withdraw the concession in respect of all of the claimants other than Mrs Brack and Mrs Ham; "*relying on the analogous power of the tribunal to allow an amendment to the Notice of Appearance if it is in the interests of justice to do so*".

4. Paragraph 17 of the amended grounds of resistance says:

> "*The Secretary of State has never held statistics as to whether the exclusion of retired teachers who are re-employed as part-timers from accruing further pensionable service in the TPS would produce disparate adverse impact. It is just to allow the Secretary of State to withdraw his concession as the issue of disparate adverse impact is a triable issue on which the burden of proof is on the Applicant* [sic] *and the Secretary of State has a reasonable prospect of success and is in any event raised by the First Respondent who was not a party to the concession. Furthermore, there is no evidence that the Applicant has prejudiced her position in reliance on the concession.*"

5. At a case management discussion on 19 December 2005 I ordered that I should deal with two issues by way of further case management discussion:-

> "*1.2.1 Is the concession made by the Secretary of State in the cases of Brack and Ham that the relevant provision of the Teachers' Superannuation Regulations has a disproportionately adverse impact on women binding upon him in respect of the other post retirement claims?*
>
> *1.2.2 If so, are any employing Respondents other than Manchester City Council and Birmingham City Council (being the employing Respondents in the cases of Brack and Ham) bound by that concession?*"

6. Mr Hill, who appears today for the Secretary of State and who was not involved in the case management discussion, accepts that issue 1.2.1 is not happily formulated and has made his submissions to me on the basis of my powers under Rule 10(2q) of the Employment Tribunals Rules of Procedure 2004 to give a party leave to amend a claim or response. However, it is clear that the response which needs to be amended is not the response in these proceedings but the response in the cases of Brack and Ham, both of which remain live, and which were, in effect, the test cases for this issue at the time of ***Preston (No.3)*** which is why it is common ground that without the amendment the Secretary of State is bound by the concession in all of the remaining post-retirement cases. The Secretary of State's purpose would therefore be achieved if I was to grant leave for paragraph 4 of the Secretary of State's response in Brack and Ham to be amended thus:-

> "*In the cases of Mrs Brack and Mrs Ham only (but not further or otherwise) it is admitted that the provisions of the above Regulations by which the Claimants' service was not pensionable in so far as they were in receipt of pension and not in full-time employment, had a disparate adverse impact upon them.*"

That would have the effect of limiting the concession to Mrs Brack, Mrs Ham, Birmingham City Council, Manchester City Council and the Secretary of State. Neither Birmingham City Council nor Manchester City Council have any other post-retirement claims against them.

7. Very shortly before this hearing commenced, it was conceded on behalf of the represented claimants (being 37 of the total of 63 claimants excluding Mrs Brack and Mrs Ham) that none of the employing respondents other than Birmingham City Council and Manchester City Council, are bound by the Secretary of State's concession in Brack and Ham which is why the employing respondents are not represented before me today. That concession is plainly rightly made.

8. I am grateful to both Mr Stilitz and to Mr Hill for their skeleton arguments which they have expanded in the course of oral submission, and for the answers which they have endeavoured to give to a number of questions which I raised which I regard as important to the exercise of my discretion. Both have drawn my attention to paragraphs 35 and 36 of the Judgment of the Court of Appeal in ***Sowerby -v-***

Charlton [2005] EWCA Civ 1610 where the Court of Appeal said this about granting leave to a party to withdraw a concession:

> "*35. Finally, the unreported judgment of Sumner J in* ***Braybrook v Basildon & Thurrock University NHS Trust*** *(7th October 2004) appears to us to offer valuable guidance (at para 45) on the way in which a court should exercise its discretion when determining whether or not to permit the withdrawal of an admission that was made after an action was commenced. After referring to a number of earlier cases he said :-*
>
> > *'45. From these cases and the CPR I draw the following principles.*
> >
> > *1. In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective.*
> >
> > *2. Amongst the matters to be considered will be:*
> >
> > *(a) the reasons and justification for the application which must be made in good faith;*
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> > *(b) the balance of prejudice to the parties;*
> >
> > *(c) whether any party has been the author of any prejudice they may suffer;*
> >
> > *(d) the prospects of success of any issue arising from the withdrawal of an admission;*
> >
> > *(e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.*
> >
> > *3. The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing.*'
>
> *36. Above all, the exercise of any discretion will always depend on the facts of the particular case before the court. The words "will consider all the circumstances of the case" have particular resonance in this context.*"

9. I must say a little more about the background circumstances of the post retirement claims which will go some way to explaining why they are at the moment a final hearing is not imminent. When the concession was made in Brack and Ham it was in the context of a search being made for suitable cases to act as vehicles to enable the test issues to be argued and determined. Although they were presumably

chosen because the claimants were retired teachers who were affected by Regulation B2(2)(b) of the 1988 Regulations, I accept with little difficulty Mr Hill's submission that it was not then realised just how many cases raised the same issue. This has only become apparent in the years since my judgment in ***Preston No. 3*** in July of 2002 as the process of settling the public sector claims has unfolded and these cases have emerged one by one. It was by no means always apparent from claim forms that the claimant was a teacher in post retirement employment and the point has often emerged only in correspondence. Over a period of perhaps two years and with some difficulty a total of some 65 cases, including Brack and Ham, have now been identified. Whilst it is hoped that that is the totality of the post retirement claimants, it is not possible to say with any confidence that that is in fact the case. That they give rise to issues not dealt with in ***Preston (No.3)*** is reasonably clear: precisely what those issues might be, beyond the question of disparate impact and objective justification, is not yet clear.

10. There is a further complication. It became apparent part way through the process of identifying the claims that there were different reasons for a claimant's retirement and it was not at first clear whether this gave rise to different issues. In particular, it was clear that there was a small sub-subset (about one third of them) of claimants who had retired early on ill health grounds. It has only comparatively recently been recognised that these do give rise to an issue which did not occur in the cases of Mrs Brack and Mrs Ham as these claimants have received, under the rules of the Scheme, an enhanced pension. In the case of Mrs Pike, that enhancement was a little less than 50% in terms of the numbers of years of pensionable service. There is a further sub-subset of teachers who were made redundant and who in consequence have also received an enhanced pension, but these probably do not give rise to a separate issue as any such enhancement does not arise under the rules of the Scheme, but is in the discretion of the employing authority.

11. The Secretary of State is particularly concerned that I should give leave to amend in respect of the ill health retirement returnees, although he accepts that the issue in their case is not one of disproportionate impact but of objective justification of their exclusion from the Scheme. The issue of disproportionate impact affects them equally with the mainstream of the post retirement cases.

12. The reason for the Secretary of State's original concession was that although at the time the concession was made, the European jurisprudence seemed to clearly place the burden of proving disproportionate impact on the claimants, the UK jurisprudence suggested that the burden might be on the respondent, and the paucity of the statistics available suggested that the respondent would not be able to discharge that burden. Mr Stilitz criticises the lengthy delay between the judgment in ***Nelson -v- Carillion*** which made clear that the position under UK law was the same as under European law, and the Secretary of State's formal application to withdraw the concession in Brack and Ham, but it seems to me that the delay is largely dictated by the timetable of these proceedings which, as I have explained, is itself a function of the difficulty in identifying all cases which fall within the subset, and I do not think that any criticism can be made of the Secretary of State for that gap in time.

13. Mr Stilitz rightly submits that the Secretary of State could, if he had been so minded, have reserved his position in respect of disproportionate impact in Brack and Ham if there was any doubt in the matter but, on the basis of good legal advice, he chose to concede the point instead. The fact that he now regrets having done so is not a good ground for allowing the concession to be withdrawn. Whilst that is plainly right, it is worth repeating that at that stage Brack and Ham seemed to be but two cases amongst several tens of thousands in respect of which the concession was being made.

14. For the very reason which the Secretary of State felt it necessary to concede the point in the first place – the paucity of the statistics for much of the period in question - it is clear that if I allow the application to amend the appearance in Brack and Ham, it cannot be said that the Secretary of State has little prospect of succeeding on the issue now that the burden of proving disparate impact is know to be on the claimants. But here the question of prejudice to the claimants arises. The reason why there is a paucity of statistics to enable the issue of disproportionate impact to be judged in what is generally regarded as the most reliable way, is that the Secretary of State has no records from which statistical conclusion can be drawn, at least for the majority of the years in question, and only what appear to be incomplete records for the remainder. That is not to say that statistics cannot be constructed from other evidence and it may well be that enquiry of employing authorities will enable at least a partial *post hoc* construction to take place, but it is a factor which I must bear in mind when exercising my discretion.

15. Mr Stilitz naturally points to the lengthy delay between the making of the original concession and what will be, if I allow the application, the date on which the issue will be heard by a tribunal and submits that the claimants are clearly prejudiced by that delay in that their ability to find the necessary statistics or to adduce evidence to fill the gaps caused by the absence of those statistics would necessarily have been greater the sooner they were alerted to the need to do so. Whilst I can see some force in that argument, in my judgement it is largely, if not entirely, undermined by the concession made yesterday on behalf of the claimants that none of the employing respondents, other than Birmingham and Manchester City Councils, are bound by the Secretary of State's concession. Therefore, in order to succeed to the full extent, the claimants will have to prove disproportionate impact against the employing respondents in precisely the same way and in reliance on precisely the same statistics that, if I allow the Secretary of State's application, they will also require to succeed against the Secretary of State.

16. This brings me to what I consider to be the heart of the matter, but it is a question to which neither Mr Stilitz nor Mr Hill can give anything approaching a definitive answer, although Mr Stilitz's initial response to my question reinforced my assumption as to what the position would be. The question is, if I do not allow the Secretary of State's application and the claimants fail to establish disproportionate impact as against their employing respondent, which in Mrs Pike's case is Somerset County Council, what if any value does the subsequent declaration have for the claimant in terms of enhancing her pension? The tribunal's jurisdiction in such cases

is limited to granting a declaration that the claimant is entitled to retrospective admission to the pension scheme for a certain period of time, in this case in respect of certain specified service as (I think in each case) the claimant was of course already a pensioner member of the scheme. Mr Stllitz does not submit that the tribunal has power to award damages for the claimant's exclusion from the Scheme and therefore any tangible benefit to the claimant comes not from the granting of the declaration but from the requirement which flows from it for both the claimant and the employing respondent to make contributions to the scheme sufficient to produce the additional pension generated by the period of service covered by the declaration. The big prize is the employer's contribution, which is 13.2% of salary. The employee's contribution is 6% and although the Secretary of State in practice makes an additional contribution in order to fund the pension, it is not quantified and is not paid into the Scheme in the same way that the employer or employee's contribution would be paid.

17. Mr Stilitz was constrained to admit that he could not necessarily say that a declaration against the Secretary of State only would benefit the claimant at all, although it might be a useful basis on which negotiations could take place with the Secretary of State with a view to persuading him to provide the additional funding. He even suggested that a ***Francovich*** claim might lie (***Francovich -v- Italian Republic*** C-6/90 [1992] IRLR 84 ECJ), *i.e.* a complaint that the Government has failed to properly implement its Treaty obligations into UK law. It appears to be by no means clear, although I must assume that this is at least possible, that the claimants would even be able to make their own contributions into the Scheme. In my judgement, the claimants' concession that the employing respondents are not bound by the Secretary of State's concession in Brack and Ham, coupled with the inability to identify the loss of any tangible benefit to them if I was to allow the Secretary of State's application, tips the scales in favour of allowing the application.

18. I turn finally to the last of the matters to be considered in ***Braybrook***, which is the public interest in avoiding where possible satellite litigation. Mr Hill submits that if I was to allow the application it might in fact have the effect of reducing rather than increasing the litigation. Certainly if I do not allow the application, it seems fairly likely that entirely fresh proceedings will have to be commenced by the claimants, almost certainly elsewhere, for them to obtain any benefit from a declaration against the Secretary of State only, but without reducing the ambit of this litigation in any way. Within this litigation, if the Secretary of State is to be bound by his concession in all of the cases, it will be left to the employing respondents to defend the claims as best they can on the basis of the statistical evidence available, and each respondent may well wish to call evidence of its own. Such statistical evidence as there is, is held centrally by the Teachers' Pension Agency and although witnesses from there could be called, the response to the various claims could not be co-ordinated in the same way as would naturally be the case if the Secretary of State remained an active respondent. It is difficult to quantify the advantage in this context of allowing the Secretary of State to continue to defend the claim but I am satisfied that there is such an advantage. It will certainly not increase the extent of the litigation and it may well decrease it in the sense of making it more focused. For the avoidance of doubt, it is not alleged and I

would not have found if it had been so alleged, that there is any "strategic manoeuvring" involved in the Secretary of States application.

19. The overriding objective is set out in regulation 3 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 and it provides:-

> "*1. The overriding objective of these Regulations and the rules in Schedule 1 .... is to enable tribunals and chairmen to deal with cases justly.*
>
> *2. Dealing with a case justly includes, so far as practicable;*
> *(a) ensuring that the parties on an equal footing;*
> *(b) dealing with the case in ways which are proportionate to the complexity or importance of the issues,*
> *(c) ensuring that it is dealt with expeditiously and fairly; and*
> *(d) saving expense*."

20. Bearing that objective in mind against the criteria set out in ***Braybrook*** (which I do not regard as exhaustive but merely as the main matters to be considered) I am prepared to exercise my discretion to grant the Secretary of State's application and to allow the amendment for the reasons which I have endeavoured to explain.

21. I had hoped to be able to hold a further case management discussion to consider the way forward and in particular to identify the issues which require to be determined in these proceedings and to set a timetable to bring them on for a hearing. However, all of the parties (including those representing the employing respondents who are not present today) agree that it is necessary for them to have time to consider the implications of this Order and for the claimants to consider their position with regard to the obtaining of statistics and in particular how much time they think they will need to complete their enquiries into whether statistics are available or other evidence can be obtained to supplement or substitute for them.

22. The claimants are therefore to write to the tribunal by not later than Friday 11 August 2006 to suggest a date for a case management discussion by telephone conference call which will give them sufficient time to complete the necessary enquiries.

.....
Chairman

Date:

REASONS SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS