Case numbers: 2600121/96 & others

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Mrs L A Betts and others	**and**	The Boots Company Plc

At a Hearing

held at: **Nottingham**
before: **Mr J K Macmillan** **Chairman** — **Mr K Chester** **Mrs D Bullock** **Members**

on: **20, 21, 22, 23, 24 February and 1 March 2006**
the tribunal having reserved judgment, the tribunal now gives judgment as follows. The reasons for this judgment are attached.

Representation

For the Claimants: Mr J Hobson of Counsel
Instructed by Russell Jones & Walker, Manchester
For the Respondent: Mr N Paines QC of Counsel
Instructed by Slaughter & May, London

JUDGMENT

1. The complaints of Mrs Eddy, Mrs Fisher, Mrs Houltby, Mrs Jackson, Mrs Main, Mrs Wilson and Mrs Winch fail and are dismissed.

2.1 The complaint of Mrs Betts succeeds in respect of the period 12th October 1982 to 31st March 1988; the remainder of her claim is dismissed.
2.2 The complaint of Mrs Burdon succeeds in respect of the period 2nd July 1984 to 31st March 1988; the remainder of her claim is dismissed.
2.3 The complaint of Mrs Conway succeeds for the full period of claim between 1st July 1978 and 31st March 1988.
2.4 The complaint of Mrs Machin succeeds for the full period of claim between 27th October 1987 and 31st March 1988.

2.5 The complaint of Mrs Shone succeeds in respect of the period 5th June 1989 to 31st August 1993; the remainder of her claim is dismissed.

3. The tribunal declares that each of the Claimants whose claim succeeds is entitled to be retrospectively admitted to the Respondent's pension scheme for the period specified in paragraph 2 of this Judgment.

4. The full terms of the declaration are set out in the appendix hereto.

REASONS

A. The issues

1. These 12 claimants are a representative sample of some 52 past and present employees of The Boots Company Plc who complain that, as part time workers, they were excluded from the company pension scheme, and, such exclusion being indirectly discriminatory against women, it was unlawful both under UK law (section 1 of the Equal Pay Act 1970) and European law (Art 141 Treaty of Rome). They each seek a declaration that they are entitled to be retrospectively admitted to the pension scheme from the date on which they began work for the company - or, if later, the 8th April 1976 that being the earliest date from which such a claim can succeed (***Defrenne –v- Sabena (No.2)*** (1976) ECR 455 ECJ) – to the date on which either by virtue of an increase in their hours or a reduction in the eligibility threshold, they became eligible to join the scheme.

2. The respondent admits that the exclusion of the claimants from the scheme by virtue of their part-time status was indirectly discriminatory against women but denies that these claimants (it has settled many other part time worker pension cases brought against it) are entitled to succeed as they all failed (for periods of time of varying length) to opt into the scheme on becoming eligible, such failure being evidence that they would not have joined at any earlier date even if the scheme rules had permitted them to do so, and they have therefore suffered no detriment. The claimants reply that they joined as soon as they became aware that they were eligible and therefore there was no delay.

3. In the alternative the respondent contends that, if adverse conclusions cannot be drawn from the claimants' delay in joining, if they had been eligible to join at an earlier date it is improbable in the extreme, at least in the case of many of the claimants, that, for a variety of reasons, they would have done so, and therefore in the exercise of its discretion, the tribunal should either decline to make a declaration altogether or make it only for a shorter period of time than the periods of exclusion from the scheme.

4. As the hearing progressed it emerged that because they had started work for the respondent at a time when membership of the scheme had been compulsory for all full time employees, three claimants (Mrs Betts, Mrs Burdon, and Mrs Machin) were entitled to succeed for that part of their periods of claim during which membership for full timers remained compulsory (up to the 31st March 1988) and Mrs Conway was entitled to succeed in respect of the whole of her claim which, because she became

eligible to join the scheme on that date, ends on the 31st March 1988. The concession does not apply to the other claimants who all started work for the respondent before the 6th April 1978 at which time membership of the scheme for full time married women was optional and, the respondent contends, their failure to opt in on becoming eligible many years later shows that they would not have opted into the scheme at that time.

5. Of the other 40 claimants who failed to opt into the scheme on becoming eligible, 11 (where there is no dispute about the essential facts) are to have their cases determined by me sitting alone on the basis of written representations, and the parties have agreed that in the cases of the remaining 29 they will treat the decisions of this tribunal on these sample cases not as binding test case authority but as authoritative guidance.

B. The law

6. The basis of the applicable law was established by me, sitting alone, in the second of the main test cases in the part time worker pension litigation ***Preston and others –v- Wolverhampton Healthcare NHS Trust and others (No.3)*** (Case number 507497/95) in a reserved decision dated the 2nd August 2002, the full text of which can be found on the Employment Tribunals website[1]. Neither of the holdings which are relevant for these cases was appealed and, although accepted by the parties to the test cases as binding on them, are therefore not binding either on this tribunal or the parties in these proceedings. However, both Mr Hobson for the claimants and Mr Paines QC for the respondent accept the correctness of the basic premises which I there endeavoured to lay down, their disagreement being confined to any expansion of those premises necessary to apply them to the facts of individual cases, and the conclusions which the tribunal should arrive at when applying them to the cases of these claimants.

7. Test issue 5.4 posed the question: *"If [a claimant] can establish a breach of the equality clause, is she entitled to a declaration of access to the scheme as of right or only in the exercise of the tribunal's discretion?"* I answered that question (at paragraph 154) thus: *"[A claimant] is not entitled to a declaration of entitlement to access to the pension scheme as of right upon establishing a breach of the equality clause, but only in the exercise of the tribunal's discretion."* The legal arguments which lead me to that conclusion can be found at paragraphs 135 to 153 and it is not necessary for us to repeat them here. At paragraph 164 I briefly considered whether on the facts of a particular case a claimant (Mrs Croucher) could be denied a declaration. Regrettably these cases (other than in the case of Mrs Shone, and then only in one rather obvious respect) do not give scope to this tribunal to add to the guidance which I was asked to give on this topic in ***Preston (No. 3)***.

8. The principal issue which arises in these cases was considered as test issues 5.1(a) and (b):

> *"(a) Will a claim brought by [a claimant] who had been excluded from membership of her employer's pension scheme because she worked less than the minimum qualifying hours threshold, necessarily fail merely because she did not join the scheme at the earliest possible moment after qualifying to do so?*

[1] at www.employmenttribunals.gov.uk/part_time_workers_pensions.asp

(b) In what circumstances is there a breach of the equality clause in respect of that period of [a claimant's] claim which predates her becoming eligible to join the scheme, if she failed to join the scheme upon becoming eligible."

9. Before considering the answers which I gave and how I arrived at them, the questions require a little explanation. The United Kingdom law of equal pay, the Equal Pay Act 1970, works by implying into the contract of employment of every woman an equality clause which requires that in matters relating to pay she is treated equally with a male colleague doing the same or similar work to her or work which is of equal value to her work. The right to be a member of a pension scheme is 'pay' for this purpose. Where she receives less pay or is denied access to her employer's pension scheme, *prima facie* there is a breach of the equality clause.

10. I answered those questions at paragraph 183 of the decision:

"1. [A claimant's] claim in respect of a period of exclusion from a scheme will not fail merely because she did not join the scheme upon becoming eligible to do so"

2. There is a breach of the equality clause, in respect of which [a claimant] will normally be entitled to a declaration of right of access to membership of the scheme, for any period of claim during which the [claimant] was excluded from membership because of her part-time hours and her full-time comparator was obliged to be a member of the scheme. Whether the [claimant] did or did not join the scheme on becoming eligible to do so, or only joined after a significant delay, is irrelevant". (This ruling explains the concessions made in the cases of Mmes Betts, Burdon, Machin and Conway.)

"3. There is no breach of the equality clause for any period of claim during which [a claimant] was excluded from membership of the pension scheme because of her part-time hours but membership of the scheme for her full-time comparator was <u>not</u> obligatory, where [a claimant] did not join the scheme on becoming eligible to do so, or only joined after a significant delay, unless the [claimant] can satisfy the tribunal on the balance of probabilities, that she would have joined during the period of exclusion, had she been eligible."

11. Why is there no breach of the equality clause in such a case with the consequence that the claimant's complaint fails rather than just putting her at risk of failing to persuade the tribunal to exercise its discretion in her favour and grant a declaration? The answer (which I explored in rather more detail in ***Preston (No 3)*** at paragraphs 155 to 158) is simply that to amount to a breach of the equality clause a mere difference in treatment is not enough: the difference in treatment must be to the claimant's detriment, and not to be eligible for membership of something which one would not (or perhaps because of one's personal circumstances, could not) have joined even if eligible, is clearly no detriment.

12. The approach to be adopted by the tribunal to such cases was explored in paragraphs 180 to 182 of ***Preston (No. 3)*** and it would be helpful to repeat at least some of the guidance which I there gave:

"180. …In these cases, the [claimant's] failure to join the scheme upon becoming eligible to do so, or only after a significant delay (any [claimant] can, I think, be afforded a period of grace to make up her mind which would not jeopardise her earlier claim but in respect of which, as the scheme rules no

longer exclude her, a claim would not lie) may be highly relevant in determining whether there has been a breach of the equality clause…

181. The burden of proof is of course, as in all civil proceedings, on the [claimant] and it will therefore be for a [claimant] who did not opt in on becoming eligible to do so … to satisfy the tribunal that she would nonetheless have joined during the period of exclusion had she been able to. If she can satisfy the tribunal that she would have joined, she will have established a breach of the equality clause…. I hasten to emphasise that [her reasons for not joining] would not entitle her to succeed in respect of that part of her claim which falls after the date on which she became eligible for membership; [they] can only ever be of relevance to that part of the claim during which she was excluded from membership by the scheme's rules.

182. …Ultimately, any [claimant] who did not opt into the scheme or did not opt into it for a significant period after becoming eligible to do so and who wishes to pursue her claim in respect of the period during which she was excluded from membership by the scheme rules, must be able to satisfy the tribunal on the balance of probabilities that had she been eligible to join during that period of exclusion, she would have joined it. This will necessarily involve an explanation of why she did not join when she became eligible to do so'

C. The significance of delay

13. The respondent has taken the view that any claimant who did not join the scheme within three months of becoming eligible is guilty of significant delay and has therefore suffered no detriment. There are two flaws in this position: that delay of itself is a disqualification and that any particular length of delay can be regarded as a cut off or watershed. Even if this latter proposition were true, [there is no warrant for it in ***Preston (No.3)***] in our judgment 3 months is too short and, if it is their only argument, the respondent is unlikely to succeed against any claimant who appears to have had a reason for not joining the scheme at an earlier date and who has delayed for say 4 or even 5 months. Note that we do not qualify the word 'reason' by any adjective such as 'good' or 'valid'. It is not for a tribunal to determine whether the decision not to join within a certain period was logical, sensible, rational or even comprehensible. The tribunal's function is to determine whether the claimant's explanation for the delay in joining negatives the evidential presumption of an absence of detriment during the period of exclusion to which a lengthy period of delay gives rise. An inability to comprehend the claimant's reasons for the post-eligibility delay however, is very likely to undermine her ability to discharge the burden of proving that it does.

14. As the presumption is evidential rather than legal, delay by itself cannot be decisive, although it clearly will have some, and particularly with long delays, probably a major, part to play in influencing the tribunal in deciding whether a claimant would have joined the scheme at an earlier date had she had the opportunity. A useful parallel can be found in the law of constructive unfair dismissal where, it is frequently said, that in order to succeed not only must a claimant resign in response to the respondent's breach of contract, she must do so 'promptly' or 'without delay'. But, as was held in ***W. E***. ***Cox Toner (International) Ltd –v- Crook*** (1981) ICR 823 EAT, by itself delay does not connote acquiescence by the employee in the employer's breach (and thus re-affirmation of the contract and, in essence, the cancellation of the breach)

although the longer the delay the more likely it is the employee will be held to have acquiesced.

15. Delay and its absence may both in fact be illusions, equally capable of deceiving the casual observer. The claimant who delays several months before joining the scheme may just be ultra cautious or even down right dilatory, and would have taken as long to decide to join whenever the opportunity to do so had arisen. Or she may be subject to a domestic regime which requires her to obtain her husbands approval before making such a decision and when the opportunity to join first arises he just happens to be abroad or seriously ill. Or in recent times she may have been labouring under financial or other constraints that prevent her from joining the scheme that were not operative factors even 6 months before. In none of these cases does the delay in joining signify an absence of earlier detriment.

16. On the other hand the claimant who joins promptly may be doing so only because her hours have increased to take her across two thresholds simultaneously; the threshold for membership of the scheme and the threshold of disposable income that makes membership of the scheme affordable for the first time. Or she might have simply decided, coincidentally with the lowering of the threshold, that perhaps she has reached the age where she should start thinking about a pension (although this would not be the case if the trigger for her thinking about pensions was her newfound eligibility rather than her age, if eligibility at an earlier date would also have prompted thoughts about pensions). Or soon after becoming eligible some factor quite unrelated to her employment – a dependent child suddenly finding work for example – might have enabled her to take a course of action which was previously impracticable.

17. In the cases with which we are now concerned of course, each of the claimant's offers the same explanation: they did join promptly – or sufficiently promptly to allay suspicions of absence of earlier detriment – as soon as they discovered that they had become eligible. They may have discovered the fact of their eligibility via different means and have delayed for different periods of time thereafter and they worked in locations across England and Scotland in manufacturing, distribution and retail, but the underlying explanations are identical.

D. The evidence

18. The respondent has no direct evidence that any of the claimant's were invited to join the pension scheme on first becoming eligible. They rely instead, as Mr Paines puts it, on a defence of system: more precisely the existence and proven effectiveness of their system for alerting the newly eligible to their right to join the scheme and inviting them to join it, seen against a background of corporate enthusiasm for the scheme at all levels from the Chairman (who appeared in a company video promoting the scheme) to the recognised trade union USDAW which actively supported it, and the desire at all levels to bring as many Boots employees under its aegis as possible. In contrast, the claimants all rely on a failure (in fact multiple or serial failure) of the system as the basis of the earlier ignorance of their right to join.

19. The claimants have of course all given direct, positive, often forceful and, at least in the great majority of cases, patently honest evidence that, however

sophisticated and magnificent the system, it did indeed fail in their case at its weakest point - where it relied on human agency to deliver the message of their new eligibility.

20. Why might such honest evidence – honest in the sense that the claimant's believe it to be true – be less than compelling evidence? The reasons are numerous and complex, the most obvious being the mere lapse of time since the events with which we are concerned. Mrs Houltby became eligible to join the scheme in 1985; Mrs Jackson, Mrs Main and Mrs Wilson in 1988; Mrs Betts in 1989; Mrs Winch in 1992; and Mrs Burdon, Mrs Eddy, Mrs Fisher, Mrs Machin and Mrs Shone in 1993. It would be unsurprising in the extreme if after the passage of between 20 and 12½ years an event which, if it happened, was then of little or no significance had been forgotten. That event of course was being invited to join the scheme, and it would have been literally inconsequential except for anyone who had wanted to join but had been prevented from doing so by other factors.

21. There have almost certainly been numerous instances in the part time worker pension cases as a whole of claimants who signed forms to say they did not wish to join a pension scheme, and who later started proceedings having forgotten what they had previously done. Two such cases are known to me. The first is Mrs Croucher who is mentioned in paragraph 7 above and the details of whose case can be found at paragraphs 162 and 163 of ***Preston (No. 3)***. On the 18th July 1988 Mrs Croucher signed a form electing not to join her employer's pension scheme but she changed her mind and joined on the 28th October 1991. In connection with the test case hearings in July 2002 she was interviewed by the legal officer of UNISON and had no recollection either of having signed to say she did not wish to join the scheme, or, and of perhaps greater importance having been reminded that she had positively opted not to join, of why she would have decided not to do so. It clearly does not require a compelling, and therefore memorable, reason not to join a pension scheme: indeed it does not require a conscious reason at all.

22. The second is a case which I was due to hear against Derbyshire County Council where the claimant was adamant that she had not been told about her eligibility to join, which collapsed minutes before the hearing was due to start, the respondent having just discovered the form which the claimant had signed many years earlier at the time she became eligible, opting out of the scheme.

23. A related phenomenon occurred in the cases against Boots. Some 50 or so claimants alleged that Boots had operated a policy of continuing to exclude part-timers after the scheme rules had changed to make them eligible, and it was that policy which explained their failure to join the scheme either at all or at an earlier date. The claimants worked at various locations throughout the country and the respondent was able to produce a schedule which demonstrated that at each such location at around the time the claimants were alleging the existence of the policy, one or more of their part time colleagues was actually joining the scheme. All of those claims were withdrawn.

24. There is a natural tendency to fill gaps in our memories by a process of reasoning which can very easily persuade us that we have so accurately reconstructed the event of which we no longer have a live memory, that evidence to the contrary is

viewed with suspicion. The process will often begin by taking as a starting point some fact which can be established without reliance on memory, such as the date of joining the pension scheme, and working backwards to establish the earlier and all important date of when we first knew that we could join the scheme. Having done so, the natural tendency is to overlook that the steps which lead from one to the other were assumptions, albeit honest and natural ones, and for them to rapidly assume the status of incontrovertible fact.

25. Mrs Winch's evidence is a classic example of this process. The first version of her witness statement at paragraph 4 said this:

> *"In June 1993 I increased my hours of work. This increase was made following a conversation with my cousin who had told me that employees working 20 hours or more per week were able to join the pension scheme. I remember the time of this change as I increased my hours at the same time as my colleague Mrs Jeavons who worked at the same branch… I applied to join the pension scheme following the increase in my hours of work."*

26. On its face a compelling explanation, replete with Gilbertian corroborative detail. But, as Mrs Winch quickly realised after seeing the respondent's documents, wrong in its first premise and therefore suspect in its remaining premises. In fact, she increased her hours in November 1992, not June 1993 and although she joined the pension scheme on the 1st July 1993 (a fact which she would probably be aware of from her own record) which would be consistent with her original statement, she had applied to join on the 26th May (which she would probably not have been aware of from her own records). The statement implies that she increased her hours to enable her to join the scheme whereas in evidence she had to concede that she was invited to do so. She still believed however that she had joined the scheme after a conversation with her cousin when she told her of her increase in hours, but accepted that it was possible that the conversation had been in November 1992, not June 1993. She was however correct in one respect as she and Mrs Jeavons had joined the scheme at the same time having had their hours increased at the same time. In cross examination she was very reluctant to accept the accuracy of the respondent's documents and the fallibility of her original purported recollection of events, and did so only with obvious reluctance.

27. The underlying assumption which Mrs Winch seems to have made, and which there is clearly a risk that the other claimants will also have made, is that she must have joined the scheme as soon as she became aware of her right to do so and therefore she only became aware of that right shortly before she joined. Although she started these proceedings in May 1995 all she said in her originating application was that the company was not prepared to back date her pension membership from the starting date of her employment. The first time she will have applied her mind in detail to the events of 1992 therefore seems likely to have been when she was asked to produce her first witness statement for this hearing.

28. This brings another factor into play which can only serve to undermine the credibility of the claimants' evidence. The process of reconstructing the memory is being undertaken so long after the event that in certain very real senses the reconstruction can be said to be being done by a different person to the one who

experienced the event. The most obvious sense in which this is true is that the older person doing the reconstructing inevitably has a different view of life's priorities from the young (or certainly younger) person whose recollection and beliefs are being reconstructed, in particular, the priority to be given to the need to provide security for one's old age. But it is also true that even if the number of years which have elapsed between the event and its reconstruction are not great, to any extent that the factors which would have influenced the decision when it first fell to be taken have changed or lapsed, the reconstruction is likely to be flawed. If this is true to any extent of the decision to join the pension scheme on first becoming eligible, it must be true to a significantly greater extent when it comes to attempts by, for example, Mrs Eddy, who did not become eligible to join until 1993 when she was 53, to reconstruct in 2005 at the age of 65 how she might have reacted if she had been eligible to join the pension scheme when she first joined Boots in 1976 when she was 36. Even if one is conscious of the need to do so, it would be almost impossible to successfully think oneself back into the frame of mind one would have been in when the earlier decision would have had to be taken.

28. The claimant's evidence is therefore less compelling than at first sight it may appear not because it is dishonest, but because if it is accepted, as in our judgment it must be, that with the passage of time it is very likely that live memory of a low key, relatively unimportant event will have been replaced by the processes which we have described, then the resulting evidence must necessarily be flawed. And it must be remembered that the starting point for these claims is that the claimants did not know that they were eligible to join at an earlier date, so it is much more than they would believe that that was the case, wouldn't they: it is that they must believe that it was the case. The underlying assumption which justifies their attitude is that no-one declines the chance to join a pension scheme when invited to do so. But on the evidence that is clearly not the case. As we shall see when we examine the events of 1988, not only did approximately one-third of those who then became eligible to join expressly declined to do so, over 400 existing members for whom membership had hitherto been compulsory, took advantage of the newly created freedom to opt out.

29. As in all such cases, the tribunal looks to other evidence for assistance in resolving the dilemmas created by the lack of genuinely reliable first hand evidence. Were other employees at the claimant's place of work joining the scheme at the time they claim they were not being made aware of their right to join? Were there other obvious triggering factors at the time they joined which had not been present when they became eligible? What was the overall success rate of the respondent's recruitment drives? Are the claimants' explanations for the delay in joining credible?

E. The respondent's system

30. There is no real dispute about what the respondent's system was – or perhaps more accurately, systems were - only the extent to which practice did not replicate theory, although the details of how the system worked pre-1988 when it was computerised are largely surmise. We are concerned with four different scenarios: claimants who became eligible to join when their hours increased either to full time or above the then current threshold for membership of the scheme before April 1988; claimants who became eligible to join as a result of the reduction in the threshold from 30 hours per week to 20 on the 1st April 1988; claimants who became eligible to join

on an increase in hours post April 1988; and claimants who became eligible when the threshold was reduced to 8 hours on the 1st September 1993. None of these claimants (nor as we understand it any of the 29 stayed cases) fall into a fifth category, those who only became eligible on the final abolition of the threshold in 1997 about which we have heard some evidence but on which we propose to make no findings.

Pre April 1988

31. Our understanding of the system pre-April 1988 is derived entirely from the documentary record of the steps which were taken in preparation for the major changes which then took place and from the very brief evidence of Mrs Prest about the eligibility rules for the scheme over the years. Neither side has called direct evidence on the point. We have not been told how old the scheme is but it was undoubtedly well established prior to the 8th April 1976, the earliest date which is relevant for part-time worker pension claims. In the case of employees who had completed their probationary periods before 6th April 1978 membership was optional for all women employees below the age of 30 and for married women employees over 30. It was also optional for men aged between 55 and 60 on recruitment and women (whether single or married) recruited between the ages of 50 and 55. For permanent employees who completed their probationary period after 6th April 1978, as a result of the statutory obligation to equalise eligibility rules [Social Security Pensions Act 1975 section 53(2)] the scheme was optional for both sexes between the ages of 21 and 25 and for employees between 5 and 10 years from normal retirement age when recruited. A system to allow employees to opt in must therefore have been in place throughout. The Pensions Advisory Committee was in existence and obviously well established before 1988 although again we have no date for its creation.

32. It seems that for many years the respondent has promoted their pension scheme through a system of Pension Agents, an employee based in each work place, part of whose job is to deal with pension queries from the workforce and, specifically, to interview those newly entitled to membership of the scheme and encourage them to join. That the Pension Agent was not invented for the 1988 'campaign' and that their function was too well established to require elaboration, is clear from a document prepared on the 19th February 1988 by Mrs Marjorie Prest, the personnel officer responsible for designing the administrative side of the April 1988 changes, entitled 'Social Security Act 1986 – Pension Scheme Implications'. At the conclusion of section 1 'Action required' Mrs Prest wrote: *'Pension Agents will be notified and should undertake counselling in the usual way.'* There is every reason to suppose therefore, and Mr Hobson does not submit to the contrary, that the April 1988 campaign was constructed on and was an elaboration of, an established and well understood administrative and promotional platform. There is no evidence to suggest that the basic post April 1988 procedure was different from that which preceded it.

33. The pension agent was either the personnel and training officer if the work place had one, or a manager, and all received training from central personnel on appointment. All large stores (of which there were some 400, a large store generally being one with more than 40 employees) had their own personnel and training officer. The pension agents in the distribution depots (known latterly as CSRs) were supported by a personnel manager from the warehousing and distribution team, and the small stores managers were supported by area personnel managers. Managers at the

various operations on the main Beeston, Nottingham, site were supported by central personnel.

34. A Staff Council, two Divisional Staff Councils (both of which sent elected representatives to the Pensions Advisory Committee), Area and District Staff Committees and Staff Committees, each with their employee representatives, regularly discussed personnel issues which, when appropriate, would include matters relating to pensions. We reject the evidence of Mrs Hudson (who was called on behalf of the claimants) that pension matters were never discussed. Each large store and manufacturing unit had its own committee and each small store district of 14 or 15 stores, each of which was expected to send a representative, had a district committee. The CSRs however, do not appear to have had staff committees until much more recently, for example at Chester not until 2000. Staff committee members were expected to brief their workplace colleagues and copies of the minutes were displayed on notice boards in each workplace. In the late 1980s when Mr David Kissman was Director of Personnel of Boots the Chemist, he devised a model notice board which included a dedicated space for the display of such minutes and another for new notices.

Eligibility on increase of hours

35. When an employee became eligible to join the scheme upon an increase in their hours, an Employee Transfer Form was completed by their manager. This form, which recorded any changes to the employee's place of work and job title as well as hours, had a number of carbon copies one of which went to central personnel. Central personnel then sent to the personnel officer responsible for the administration of applications to join the scheme, a blank pension application form and (at least from April 1988) a 'decline' form together with a form showing the employees new eligibility. These were then sent to the employee's Pension Agent (who may well have been the same manager that had completed the Employee Transfer Form) who would then meet the employee to discuss membership of the scheme. Pension interviews could only be conducted by Pension Agents or an authorised member of the personnel department.

36. If neither an application or 'decline' form was received after two months, the system automatically generated a reminder which was sent to the responsible personnel officer who sent a reminder to the Pension Agent to ensure that the interview had taken place and one or other form completed. The responsible personnel officer and the Agent would also sometimes be prompted by telephone calls. After April 1988 the opportunity to join remained open for two years and at the end of that period any employee who had not joined was sent a final invitation to join, again communicated via the Pension Agent. We accept the evidence of Trevor Hunt who was the responsible personnel officer for some years, that there was a strong corporate culture of encouraging employees to join the pension scheme and that he and other personnel officers and the Pension Agents took their responsibilities in this respect seriously.

35. It is easy to criticise the respondent for not notifying employees individually of their right to join the scheme by means of a letter, but this would be to ignore the

context. In fact the use of the personal face to face interview instead of the impersonal letter says much about the respondent's attitude to its pension scheme and its employees in general. It seems to have adopted a generally paternalistic stance, and was genuinely concerned to encourage as wide a membership of the scheme as possible. The pension was a product which it was at pains to sell and the face to face interview was the best means of doing so. The only criticisms of the system which can be made, and only then with the benefit of hindsight, is that all 'decline' forms were destroyed long ago and the pension records of an employee who ultimately joined the scheme records only that fact, not that he or she may have expressly declined to do so on previous occasions.

The April 1988 campaign

36. Major changes to occupational pensions were brought in with effect from the 6th April 1988 by the Social Security Act 1986. This prohibited compulsory membership of occupational schemes, introduced the State Earnings Related Pension Scheme (SERPS) and paved the way for the selling of private pensions to individuals on a much wider basis than hitherto. The respondent was concerned that these changes would impact adversely on its scheme through loss of existing members and place them and its other employees at risk of being sold less satisfactory private pensions instead. In addition to the changes to the scheme imposed by the Act the respondent decided to make only minor alterations to the scheme rules, the only relevant ones for our purposes being the abolition of the three months waiting period after first joining the company before becoming eligible for membership and the reduction of the hours threshold from 30 to 20.

37. The respondent determined on a positive strategy, based on the existing system of face to face interviews by Pension Agents, both to recruit newly eligible members and retain existing ones. The strategy included the production of a video to be shown not only to Pension Agents and other managers but eventually to all employees who would be eligible to join. (The respondent has its own video production unit at its main Beeston, Nottingham, site and was well used to communicating with its employees by means of video presentation in connection with health and safety matters, company results and so on). An explanatory booklet was produced to be given to all existing and newly eligible members, articles were to appear in the in-house newspaper Boots News in February and April 1988 and there were to be presentations made at a variety of meetings starting with the Central Staff Council and cascading down the pyramid which we have previously described. If notices were produced for display on company notice boards, none have survived.

38. Reports were drawn up, known as 'sweep-up' reports, listing all the newly eligible employees and we are grateful to Mrs Prest, its designer, for her detailed explanation of how this process worked and what it was designed to achieve. As the changes approached (Boots opted for the 1st rather than the 6th April) each Pension Agent was sent a package consisting of the 'sweep-up' report for the employees for which they were responsible, and a copy of the new booklet and an accept and a 'decline' form for each one. The covering letter asked the Agent to speak to each of the employees on the list, get them to complete either the acceptance or 'decline' form, and return it in the envelope provided.

39. Mr Paines has made much of the two articles in Boots News, describing them as eye catching and suggesting that it would be most unlikely that anyone who read Boots News (sufficient copies were printed for every employee as we understand it) would fail to see them and read them if they were at all interested in pensions. We do not agree. The announcement that the qualifying threshold had been reduced was buried in the articles and did not feature in the headlines. The articles seem to have been aimed principally at existing members and were designed to encourage them not to opt out of the scheme. Someone who was not eligible to join the pension scheme could understandably have assumed that the article had no relevance for her and ignored it.

39. The success of the 1988 campaign was monitored. Overall, the total number of employees newly eligible to join as a result of the changes was 11,654. Of this number 33.4% joined, 30.3% declined and 36.3% did not respond. In the group with which we are specifically concerned, the part-timers who worked between 20 and 30 hours, the response was slightly better with 36.8% joining, 29.1% declining and 34.1% not responding. Mr Hobson naturally points to the one-third of the newly eligible who did not respond and invites us to conclude that this is evidence of a breakdown in the system. It may of course be just that, but there is no evidence of any store or other work place where the Pension Agent was not doing their job – no information black holes as it was described during the hearing. In the cases of all of these claimants who became eligible to join on the 1st April 1988 at least one, and often several, work place colleague joined before they did.

40. What, if any, conclusions can be drawn about the one-third who did not respond? Mrs Prest suggested that Pension Agents who were personnel and training officers were rather better at making sure that employees signed one form or the other than Pension Agents who were store or CRS managers, and Catherine Wormald who joined the personnel department in December 1992 and thereafter conducted numerous pension interviews, very quickly realised that if an employee was allowed to take the forms away with them to think about it or discuss it with their husband, the chances of later getting a signed 'decline' form as opposed to an acceptance form were slight. Within the one-third who did not respond, there may well be some who for one-reason or another did not have a face to face interview, but a more likely explanation is that they were 'don't knows' who having asked for time to consider didn't return a form, or decliners whose Pension Agent didn't press them to sign a form.

41. Every newly eligible employee who did not join the scheme was sent a final invitation to join via their Pension Agent shortly before the two year window was to close. The computer programme introduced for the 1988 changes produced a report at the start of each month of those for whom the window was about to close. Thus a report produced on the 1st June would list those due to receive their final invitation by August giving ample time for action both by personnel to send the information to the Agent, and the Agent to speak to the employee. A document in the bundle (document 33) to which our attention was not drawn in evidence, suggests that Mrs Prest had previously sent a reminder, presumably via their Pension Agent, to all non-joiners as early as late November or early December 1988.

42. The closed window was re-opened following changes to the benefits which the scheme provided which were announced in Boots News for August 1990. An amnesty was offered until the end of the year to, amongst others, employees who had not accepted the final invitation to join which presumably had been given to them in March or the beginning of April at the latest. Notices were put up on company notice boards in October and as a result 154 people (of whom 80% were women) joined.

The September 1993 changes

43. In contrast to the great campaign of 1988, the way the 1993 reduction in the qualifying hours threshold on the 1st September to 8 per week was handled was rather low key. There was no video, it did not involve the Pension Agents and relied on Boots News, notices and staff committees and their representatives to get the message across to those newly eligible. The hours reduction was brought in as part of a package of improvements to the scheme and the headline in the September Boots News article trumpeted only the improvements, not the reduced hours. As in 1988, someone not previously eligible for the scheme would not have been alerted to the fact that they had become eligible.

44. However, the notices which went up on Mr Kissman's model notice boards in September could not have been clearer both about the reduction in hours and how to join the scheme. Employees were advised to contact their personnel officer or store manager (the Pension Agents) to each of whom had been sent two copies of the posters, contact details to obtain application forms and Pension Choice leaflets, and the instruction to raise the changes at team briefings. The recognised trade union USDAW produced its own poster (which may only have been distributed around the main Beeston site) mentioning, though not conspicuously, the reduction in the threshold and concluding *'Usdaw says 'Yes' to Boots pension Scheme'.*

45. A further amnesty for those who had declined their final invitation to join was announced by way of the notice boards, to run initially until 1st April 1994 but, because of the adverse coverage in the press of the miss-selling of private pension plans, was later extended to 30th September, the extension again being announced by way of a very clear notice.

46. Low key the promotion of the September 1993 changes may have been but it seems to have succeeded. Each of the claimants (other than Mrs Shone) who became eligible to join at that time but who did not do so promptly, had at least one and frequently more than one, colleague who did. A graph charting new joiners between April 1976 and April 2001 shows a modest but definite increase in September and October 1993 and a more marked one in the period leading up to what was expected to be the end of the amnesty on the 31st March 1994. It seems from the evidence of Mrs Machin that employees were warned, at least by their USDAW representatives, that their last chance to join was approaching.

F. The significance of the system

47. It is important to understand the issue at which the evidence of system is, and just as importantly, is not, directed. The reasonableness of the steps which the respondent took to draw the fact of their newly attained eligibility to an employee is not what we are concerned with. The claimants cannot be fixed with imputed or implied or

constructive knowledge of their right to join the scheme, simply because the respondent has done (indeed exceeded) that which the reasonable employer would have done in the same circumstances. The relevant question for the tribunal is not whether the claimants should have known of their rights as a result of the respondent's many steps to inform them, but whether, as an individual, this claimant, on the balance of probabilities, did in fact know that she had become eligible to join the scheme. Once that is established the adequacy or otherwise of the steps which an individual Pension Agent took to explain the benefits of membership or to persuade the claimant to join the scheme, is also irrelevant. The evidence of the system is therefore only to be weighed in the balance against the claimant's assertion that in their particular case, the message was not received.

G. The individual claims

48. In the hope that it will be of greater assistance to the parties in applying these reasons to the stayed cases, we will deal with the claimants in this order: pre-1988 eligibility on change of hours; the April 1988 campaign; claimants who first became eligible on changing hours between April 1988 and September 1993; the September 1993 campaign.

Pre 1988 eligibility: Mrs Houltby

49. Mrs Houltby started her employment with the respondent at its Lincoln store in October 1973. She became eligible to join the pension scheme when she accepted the offer to become the store's first perfume consultant on the 22nd April 1985 which required her to work full time. She did not apply to join the pension scheme until over 7 years later on 28th May 1992. She claims that she joined as soon as she was told that she was eligible which was when the personnel manager at the store, Jill Measures, called her into her office to ask why she wasn't a member.

50. The probabilities are stacked against Mrs Houltby. She was interviewed for her new position by the store manager Mr Griffey, who she describes as extremely good, with the personnel officer, who would have been the Pension Agent for the store, sitting in. Mrs Houltby is adamant that nothing was said about pensions but, in the circumstances, that seems unlikely. She was undertaking a completely new role and, as she agrees, would therefore almost certainly have received at some point either a letter of appointment or new terms and conditions. It seems improbable that such a document would have made no mention of her eligibility to join the pension scheme. Although no-one at the Lincoln store joined the scheme at the time that Mrs Houltby became eligible, about 15 months later a Mrs Fulford who also worked in the perfume department, went full time and joined the scheme within two weeks. Although the gap between Mrs Houltby and Mrs Fulford becoming eligible to join the scheme is such that only limited conclusions can be drawn, there is no doubt that the system worked exactly as intended in the latter case.

51. Mrs Houltby points to the steps which she took to secure a private pension as evidence of her willingness to join the Boots scheme, but in truth such evidence rather points the other way. She did not take out her first private pension plan until March 1992 very shortly before she joined the Boots scheme, and continued to make private savings arrangements for several years after she had joined.

52. Before joining Boots she had been the headmistress of a school for mentally handicapped children and as such had automatically been a member of the Teacher's Pension Scheme. She was therefore well versed with the concept of pensions. It is difficult to believe that she did not know that as a full time employee of Boots she was entitled to join the pension scheme – indeed she has said as much in her evidence, qualifying it only by saying that she assumed that she had to wait to be invited to join. Had she been interested in joining the scheme in 1985, in the unlikely event of the respondent's system having broken down so that she was not invited to join, she would almost certainly have asked if she could.

53. On the balance of probabilities we are satisfied that Mrs Houltby was made aware that she could join the scheme when she became full time but, perhaps because she already had some pension provision of her own and her husband had his own very good company pension, she decided not to do so. We accept that when she did apply to join 7 years later she had genuinely forgotten having been invited to do so in 1985. From that we can only conclude that she would not have joined the scheme before 1985 if the rules had been such as to allow her to join.

54. There has therefore been no breach of the equality clause in Mrs Houltby's case and her complaint therefore fails and is dismissed.

The April 1988 campaign: Mrs Conway; Mrs Jackson; Mrs Wilson.

55. **Mrs Conway**. As explained in paragraph 4 above, on the concession of the respondent, Mrs Conway's claim succeeds in full and the tribunal is therefore prepared to grant a declaration that she is entitled to retrospective membership of the Boots pension scheme between the 1st July 1977 (being three months after she started to work for them, that being the qualifying period at the time) to the 31st March 1988.

56. **Mrs Jackson.** Mrs Jackson worked in the Bradford store from October 1973. It was a large store with its own personnel officer. Her recollection of events beyond the surviving records was very limited. She thinks she moved to the cash office on the third floor in 1984 but cannot be sure, but having made the move continued to work there until she retired last year. She became eligible to join the scheme when the threshold was lowered on 1st April 1988 but did not apply to do so until 1st December 1988, her hours having increased from 25 to 35 a week on the 24th October. She explains that she had always known that employees who worked more than 30 hours a week were eligible to join and that no-one had told her in the April that that had been reduced to 20. When her hours went above 30 no-one told her she could join the scheme, she just knew that she could.

57. She claims that she would have remembered someone talking to her about the pension scheme and she does not. She is not adamant – she just doesn't remember. Given her limited, and it has to be said, very hazy, recollection of events, it seems highly probable that she would have forgotten such a conversation if she had not then been interested in joining the scheme.

58. A Mrs Stewart who worked on one of the sales floors and who Mrs Jackson knew from the days before she moved to the cash office, also became eligible to join

the scheme on the 1st April and applied to join as soon as the 14th April. It can therefore be safely presumed that the Pension Agent was doing her job in Mrs Stewart's case which makes it difficult to accept that she would not also have been doing it in Mrs Jackson's case.

59. On the balance of probabilities we find that Mrs Jackson was interviewed as part of the April 1988 exercise but did not then wish to join the scheme. She only joined because her hours later increased to 35 when, presumably, membership of the scheme became an affordable option for the first time. We are not satisfied that she would have joined the pension at any earlier date even if the minimum hours threshold had been such as to permit her to do so. There was therefore no breach of the equality clause and her complaint fails and is dismissed.

60. **Mrs Wilson.** Mrs Wilson was born in 1936 and will be 70 on the 28th May this year. To the other problems with reliability of memory which we have already discussed must, in her case, therefore be added that of age. She worked throughout her career at the Aberdeen store, starting on the 18th November 1974, at Union Street and moving to the Bon Accord Centre when the Union Street store closed at the beginning of April 1990. She claims that it was immediately after this move that she was told by the personnel officer for the store, Donna Reid, for whom she (mysteriously her statement uses the masculine pronoun) was full of praise. She remembers being given a booklet about the scheme from which she learned of the earlier rule change and as a result decided to join. She doesn't remember being told that this was her last chance to join but accepts that she may have been.

61. Two important points need to be made about the date on which Mrs Wilson claims she first learned of her right to join the pension scheme. The first is that she did not apply to join until 2nd July 1990, some 3 months later, a delay for which she has no explanation: the second is that it strongly suggests that this was the final invitation to join being made at the conclusion of the April 1988 campaign. If that is right it again suggests a Pension Agent who was following the system.

62. There is uncertainty over whether Donna Reid had also been the personnel officer two years earlier and it would therefore be wrong to make the assumption that the personnel officer in April 1988 was as punctilious as she had been in 1990. However, between April 1988 and the end of 1989, four of Mrs Wilson's colleagues joined the scheme, although none did so promptly. Three joined over a four week period in March and April 1989, and the other in the September. At some stage therefore, whether in April 1988 or early 1989, it seems clear that someone was talking to the part-time employees about joining the pension scheme.

63. On the balance of probabilities we are not satisfied that Mrs Wilson first learned of her right to join the scheme in April 1990 as she claims. Whilst it may be that the change in the threshold was not communicated to the part time employees in April 1988, something clearly prompted her colleagues into action in the early part of 1989. It is therefore very difficult to believe that, whenever it took place, all of the part-timers were not told of the change. Mrs Wilson's unexplained delay of three months after the date when she claims to have first known she could join the scheme does not suggest any sense of urgency on her part. We are satisfied that Mrs Wilson would not have

joined the scheme at an earlier date even if she had been eligible to do so: there was therefore no breach of thee quality clause and her claim fails.

Claimants becoming eligible between April 1988 and September 1993: Mrs Betts; Mrs Main; and Mrs Winch

64. **Mrs Betts.** For the reasons explained in paragraph 4 above, the respondent concedes that Mrs Betts' claim succeeds for the period 12th October 1982 to 31st March 1988, and that she is entitled to a declaration for that period. The period in dispute is short, from 1st April 1988 when compulsory membership of the scheme was abolished, to the 2nd January 1989 the day before she became eligible to join the scheme when her hours increased from 17½ per week to 20. She did not apply to join the scheme until 28th March 1990, 14 months later.

65. She worked in the D82 building on the Beeston site initially on the twilight shift. In her witness statement she explained that the shift had closed in January 1990 and she transferred to the afternoon shift. It was shortly afterwards that she learned that she could join the pension scheme through a conversation with workmates. She asked for details of how to join and having completed the application form was told that April would be her joining date, some three months after she first expressed an interest in joining.

66. Mrs Betts' is another case of lost memory reconstruction from a known event, for her move to afternoons had in fact happened exactly a year earlier, in January 1989. Her personnel records show that she was sent an invitation to join the scheme on 3rd January 1989 as a result of the receipt by personnel of an Employee Transfer Form recording her change of hours. This requires a little additional explanation. Although the record is a computerised one, unlike the April 1988 campaign where the date on which the invitation to join the scheme was entered automatically in every relevant case by the computer programme, in the case of individuals who became eligible thereafter, the invitation date had to be entered by a personnel officer. To that extent therefore in the case of anyone who became eligible to join the scheme after 1st April 1988 the appearance of an 'invitation sent' date in their personnel records can be regarded as reliable. However, as we have already said, the system required that the invitation, the pension pack, be sent to her Pension Agent, not to the employee direct.

67. A Mrs Todd, who Mrs Betts recollects, had increased her hours for the same reason as Mrs Betts on the previous day, the 2nd January, and had applied to join the scheme 7 weeks later on the 21st February. Her Pension Agent was her new manager who would also have been Mrs Betts' Pension Agent. The system therefore clearly worked for Mrs Todd and as exactly the same people would have been involved with interviewing Mrs Betts a mere day later, it is very difficult indeed to believe that the system did not work in her case.

68. We are therefore satisfied on the balance of probabilities that Mrs Betts was made aware of her right to join the scheme in early January 1989 and that her failure to apply to join until 14 months later means that there was no breach of the equality clause in respect of her earlier exclusion from the scheme. Her claim therefore fails to the extent that it is not conceded by the respondent.

69. **Mrs Main.** Mrs Main worked as a dispenser at the very small South Road, Liverpool store which had only 10 employees. She became eligible to join the pension scheme when her hours increased from 19½ to full time on the 15th August 1988. Although her hours reduced in the following January to 30 and fluctuated below that level thereafter, she remained above the qualifying threshold for membership of the scheme. Invitations to join the scheme were not sent to employees whose increase in hours was known to be temporary and Mrs Main has emphasised that the records suggest that the uplift to full time was only ever intended to be temporary. We have heard nothing about the reason for the temporary uplift to full time, nor her subsequent return to part-time, albeit enhanced, hours. However, Mrs Main's personnel records show that she (in fact her Pension Agent on her behalf of course) was sent an invitation to join the scheme on the 18th August 1988 and, for the reasons which we have given in respect of Mrs Betts, that record is likely to be accurate. Mrs Main did not apply to join the scheme until the 16th July 1990, 23 months after first becoming eligible.

70. She was a forceful witness, clearly honest in terms of her recollection of events and convinced that she joined the scheme as soon as she had become aware that she could. But once again it seems likely that the basis for this firm belief is the reconstruction of memory from a known event, the date on which she joined the scheme, but this time supported by another event which, apart perhaps from the date when it happened, she appears to have some live memory of. She recollects the store manager, Dennis North calling an impromptu meeting on the shop floor just before the store opened. He produced literature about the pension scheme and said that it was the last chance to join. She is certain that that was the first she had heard of her eligibility to join and that had she learned earlier she would have joined earlier. As evidence in support of her interest in her future pension entitlement she cites the cancellation of her reduced married woman's rate contribution to the National Insurance scheme in 1978.

71. Mrs Main was aware as a part-timer that there was a pension scheme with a qualifying hours threshold which, she claims, as far as she knew, was 30 hours per week. It is therefore surprising that if she was keen to join the pension scheme she did not ask anyone if she had become eligible as a result of her increased hours which stayed above 30 for 10 months. We do not of course know whether when she took up the extra hours she knew what the future held, but the personnel department seems to have assumed that the increase was to be permanent and there is nothing on the Employee Transfer Form to indicate otherwise. But it is the circumstances of the meeting with Dennis North of which Mrs Main appears to have a good recollection, which we find most helpful.

72. She is clear that this was a meeting involving not just her but other part-timers as well. If Mr North's remarks had been directed at her alone, it would have been reasonable to assume that he was simply doing his job as Pension Agent and reminding her that the two year window of opportunity to join the scheme which had opened when her hours increased was about to close. Which of course raises the question why would he not equally have done his job as Pension Agent when the window opened two years earlier? But Mr North would have had occasion to remind all of the other part-timers that the window was about to close some months earlier, in

late March 1990, in respect of the April 1988 campaign, and he may simply have forgotten that Mrs Main was not included in that group. It seems at least possible that the meeting which she describes took place somewhat earlier than she now believes. If that is right then she delayed for a further 3 months, until very nearly the end of her two year window, before joining. The only other occasion when Mr North might have wished to talk to those not in the scheme collectively was when the amnesty was announced, but that was not until some months after Mrs Main had joined the scheme.

73. Although no other part-timer joined the scheme at around this time at the South Street store following an hours increase, that is hardly surprising given the very small number of employees. Indeed, Mrs Main may well have been the only one to fall into this category. We have no information about numbers becoming eligible to join and joining as a result of the threshold reduction in April 1988.

74. There is however, some evidence of the system working in practice both in Mrs Main's case in particular and at the South Street store in general. In her case there is the Employee Transfer Form and the record of the invitation to join being sent on the 18th August 1988. In the case of the store, there is the evidence of Mr North reminding the part-timers that their time to join was running out. It must therefore be more probable than not that Mr North did inform Mrs Main of her entitlement to join the pension scheme in response to the information pack which, the record shows, was sent to him in August 1988. Indeed, given that he was also the manager who signed the employee transfer form which started the chain of events which led to the sending of the pack, it is reasonable to assume that some discussion about Mrs Main's pension rights would have taken place even before the pack was despatched.

75. We are therefore satisfied on the balance of probabilities that Mrs Main was aware of her right to join the scheme almost two years before she did which strongly suggest that she would not have joined the scheme at any earlier date even if the hours threshold was such as to enable her to do so. There was therefore no breach of the equality clause and her complaint fails.

76. **Mrs Winch.** We have already dealt with the problems of Mrs Winch's recollection of events at some length in paragraphs 25 to 27 above. Her recollection is demonstrably wrong. She joined 7 months after becoming eligible and once the proffered explanation for the delay is rejected, as reject it we must, no other explanation is forthcoming. The burden of satisfying us that she would have joined the scheme at an earlier date if she had been eligible is on her and she cannot discharge it. There is no reason to suppose that the system did not work at the Margate store where she worked just as it had at all of the other stores.

77. Her claim must therefore fail and is dismissed.

The September 1993 campaign: Mrs Burdon; Mrs Eddy; Mrs Fisher; Mrs Machin; and Mrs Shone

78. **Mrs Burdon.** The respondent concedes Mrs Burdon's claim for the period 2nd July 1984 to the 31st March 1988 and she is entitled to a declaration from the tribunal in respect of that period. The period in dispute is 1st April 1988 to 31st August 1993. She applied to join the scheme after a relatively short delay of a little over 5 months on

the 7th February 1994. The difficulty for Mrs Burdon is that she has no explanation to offer for either the length of the delay, the reason why she eventually joined, or the circumstances in which she came to learn of her entitlement to join if it was not at the time the hours threshold was reduced. She claims that there were no briefings at the Spennymoor Distribution Centre where she worked, but given that she and before her 9 of her colleagues joined the scheme (the earliest to do so actually joining as opposed to applying to join, as early as the 1st November 1993) that seems implausible.

79. Mr Paines submits that although the period of delay was comparatively short, there must be some cut off point. We have already rejected the notion of cut off points or watersheds. However, Mrs Burden's case does present a useful opportunity to apply the principles which we have endeavoured to enunciate where the length of the delay might be thought to be sufficiently short to be neutral in its probative value.

80. If a person does not do something which they subsequently claim they have always wanted to do, when the opportunity to do it is given to them, it is only natural that suspicions of the sincerity of their protestations about their earlier inopportunity to do it should arise. It is for them to dispel those suspicions. One may make a decision, including a decision which reverses an earlier decision, at any given moment for any number of reasons. In the context of deciding to join a pension scheme one potential reason is no more complicated than that 'now' appears to be the right time to join the scheme. 'Now' of course is not 'then', and if that was the reason for the decision to join, it negates the suggestion that the operative reason for not being a member of the pension scheme hitherto was because of the scheme rules. The operative reason was because the right time for this particular claimant to join any pension scheme had not yet arrived.

81. The first question which must be asked about delay is therefore not is it of such a length as to show that the claimant would not have joined during the period when she was excluded by the scheme rules, but is it such as to raise suspicions about the claimant's failure to join promptly which she is required to dispel. A delay of over 5 months is long enough to raise suspicions and the burden therefore is upon Mrs Burdon to establish, on the balance of probabilities, that she would have joined not merely at an earlier date but the earlier date for which she contends. The starting point for that exercise must, in our judgment, be to satisfy us as to the reason why she eventually joined, why she delayed before joining, and either that the same or similar considerations would have affected her decision whenever the opportunity to join had first arisen or that the circumstances were unique to the time when the opportunity arose and should be discounted.

82. Mrs Burdon can do none of those things because she has no explanations to offer, which means that the explanation that she joined when she did simply because she had decided that now was the time when she ought to join the pension scheme, is as likely to be the true explanation as any other. She has therefore failed to satisfy us that she would have joined the pension scheme at any earlier date had she had the chance to do so: accordingly there was no breach of the equality clause and her claim therefore fails to the extent that it is not conceded by the respondent.

83. **Mrs Machin.** We take Mrs Machin's case out of alphabetical order because it is a very instructive contrast to Mrs Burdon's. She started to work for Boots in July 1987 at the age of only 27. For the reasons explained in paragraph 4 above the respondents concede the first few months of her claim up to 31st March 1988. She became eligible to join the scheme on the 1st September 1993 and applied to join 4½ months later on the 13th January. Given the intervention of Christmas any shorter delay would have been insufficient to shift the burden of proof to her. Indeed Mr Paines himself opines that she appears to have taken the Christmas period to think about it – hardly an indication that the delay has significance in the context of deciding whether she would have joined during the earlier period of exclusion from the scheme.

84. She worked at the D10 building on the Beeston site on the twilight shift. When she started she was told that because of her hours she could not join the scheme and thereafter she and some colleagues regularly raised the question of pensions when what she describes as 'work matters' were being addressed by the company. She tells us that on the twilight shift there were few company briefings and very little contact with management. She learned of her entitlement to join from her USDAW representative and this was the usual channel of communication for company news. She remembers a meeting at which the union rep – Mo Seagrave - took a group of them into a side room. He said the respondent was doing an amnesty and they had a certain amount of time to join and 'we all joined straight away.' She is sure that the meeting was in January because it was the news that she wanted to hear and she did not delay in joining – she had nothing to think about. If the meeting with Mo Seagrave had been a second or reminder meeting, it was the first she had heard of it. She had seen nothing on the notice boards, her short working hours with only a very short break left little time for looking at them, and she did not read Boots News very often.

85. My colleagues recognise the picture which she paints of the twilight shift in any factory being semi-detached from the mainstream of communication and we accept the broad thrust of her evidence, although some of the detail seems to be wrong. Mrs Machin's colleagues in D10 started to join rather earlier than she did and certainly not all at the same time. The first applied on the 18th October, the next on the 4th November, the next on the 2nd December, then Mrs Machin in January, the next two in March 1994 and then no more until 1995. That sequence does not really help us to pin down the date of the meeting with Mo Seagrave and given the language which he used at the meeting, it seems equally possible that it was the first announcement of the changes or a reminder for those who had not previously joined that time was running out, although the former does seem the more likely. However, we accept that she joined the scheme in response to the announcement made at that meeting whenever it was and, whenever it was, it was the first news she had had of the changes.

86. It would be useful to add a little more detail about the way in which the 1993 changes were publicised. There was indeed an amnesty as Mr Seagrave told his members, which ran from 1st September to 31st March 1994, but exactly when it was first drawn to the attention of those newly eligible to join is unclear. Any delay in doing so in the context of Mrs Machin's failure to apply to join until mid-January would be important. On the 24th August Mrs Prest wrote to the Secretaries of the Staff Councils, copied to, among others, Mr P Ward the manager of D10, announcing that the improved benefits for existing members would come into effect on the 1st September

and these improvements would be announced to existing members 'during this week'. As for those newly eligible to join Mrs Prest wrote:

> *"It is anticipated that an article will appear in The Boots Company News, and posters announcing the new hours threshold and the amnesty period will be placed on notice boards. We would be grateful if you could bring this to the attention of staff councillors* ***at your next convenient meeting.'*** [emphasis added]

87. There is a clear contrast with 1988 when the changes were preceded by the showing of the video and the staff councils were engaged in the consultation process long before the changes came into effect. The posters which were eventually placed on notice boards are simply dated 'September 1993' and there is nothing in the bundle to indicate when they were sent out. The process of communication was therefore much less structured than in 1988 and it may well have taken a week or two after the 1st September for the news to begin to reach those newly eligible.

88. Having heard Mrs Machin we are satisfied, notwithstanding the problems with the details in her evidence, that she would have joined the pension scheme if she had been eligible to do so, on the earlier change of hours in April 1988 which, given the respondent's concession in respect of the first few months of her claim, seems to be the relevant date. There was therefore a breach of the equality clause in her case and her claim therefore succeeds in full.

89. **Mrs Eddy and Mrs Fisher.** Mrs Eddy and Mrs Fisher both worked in D95 on the Beeston site and both delayed joining the scheme until early 1995; in the case of Mrs Eddy the 16th March; in the case of Mrs Fisher the 17th January. Their cases are unique among these claimants in that they had both started these proceedings before joining the scheme, on the 19th and 15th December 1994 respectively, and Mr Paines is not, in our judgment, being unduly cynical when he suggests that they only joined because it had been pointed out to them by USDAW that their cases would look very weak indeed if they did not.

90. Both had become eligible with the 1st September 1993 threshold reduction, and both had increased their hours to full time before they eventually joined the scheme, in Mrs Eddy's case on the 19th September 1994, in Mrs Fisher's case the 10th October 1994. In her witness statement Mrs Eddy said that she was aware from the time she joined the company that full time employees were eligible to join the scheme and Mrs Fisher said that after a conversation with a colleague she 'recalled' that full timers were eligible to join. Mrs Eddy therefore delayed for six months beyond the date on which she claims to have first known she was eligible to join and Mrs Fisher for 3 months. In neither case is the explanation for this further period of delay advanced in their witness statements at all convincing and in Mrs Fisher's case – that it was due to the financial constraints of moving from weekly to monthly pay – now accepted by her as untrue. Indeed, in December 1994 she took out an endowment policy.

91. In her witness statement Mrs Eddy said that she learned that she had become eligible to join the scheme shortly before she became full time but did not then join because of the threat of redundancy hanging over the twilight shift on which she worked. That threat was of course lifted as soon as she opted to become full time. If

her statement is correct the delay between her knowing that she was eligible to join and joining becomes longer than 6 months. When this was pointed out to her she responded by saying that both of the relevant paragraphs in her statement were wrong.

92. In D95 a Mrs McBride had joined the scheme in November 1993, a Mrs Spindley in March 1994 and a Mrs Orange in October 1994. They can only have done so, it is reasonable to presume, as a result of the respondent publicising the change in the eligibility rules in September 1993.

93. We do not accept the explanations offered by either Mrs Eddy or Mrs Fisher. On the balance of probabilities we are satisfied that they knew of the rule change in September 1993 and took no action. They would not have joined at any earlier period even if they had been eligible to do so and there was no breach of the equality clause in either of their cases which are accordingly dismissed.

94. **Mrs Shone.** Mrs Shone began working for the respondent at the Chester Distribution Centre on a nil hours contract on the 24th June 1988, becoming a permanent employee on the 5th June 1989. Mr Hobson concedes that because employees on nil hours contracts are still excluded from the pension scheme, any declaration to which she might be entitled can only run from June 1989. She did not apply to join the scheme until the 16th February 1994, 5½ month after becoming eligible. However, the only other person to join at the Chester depot applied to do so only two days before Mrs Shone.

95. Mrs Shone was one of two USDAW shop stewards at the depot and it is tempting to assume that she would in that capacity have received information direct from USDAW about the pension scheme changes. But she tells us that that was not the case, such information at that time being sent directly to branch secretaries, which my colleague Mrs Bullock confirms was likely to have been the case. Mrs Shone's branch was Liverpool Dry Goods and if she required information about anything she had to telephone them. The union had no official presence on the site until 1996 and no meetings were held. She asked to be allowed to put union notices on the notice board in the canteen but permission was refused.

96. As we have already said, we do not believe that the articles in Boots News would readily have attracted the attention of non-members of the scheme (although Mrs Shone says that being a shop steward and health and safety representative as well as doing her own job, she never had time to read it anyway). The other two methods for disseminating the news of the scheme changes were by notices on notice boards and through the staff committees. Crucially, at Chester there was no staff committee at that time. It seems therefore that the speed with which news of the change reached the relevant people would have been entirely dependent on someone with an interest in the scheme discovering the changes by reading a notice and passing the news on. Mrs Shone says that she learned of the changes in just this way, in general conversation with colleagues one of whom had found out about it from someone else. At the very least the absence of any structured process of communication at Chester would have inevitably slowed the process and therefore

makes direct comparisons between the speed at which people joined the scheme there and at other places of little value.

97. Mrs Shone is certain that as soon as she found out she could join she went to see the supervisor. She had never been a member of a company pension scheme before and in her two previous jobs before joining Boots there had been no scheme to join (or which she had been eligible to join) and instead she had increased her NIC contributions. She had been 47 when she became a permanent Boots employee in 1989.

98. We accept Mrs Shone's evidence that she joined the scheme as soon she learned that she could. The system did not – indeed given the absence of a staff council, could not – work at Chester as it worked elsewhere and publicity by notice board alone is never infallible. We also accept her evidence that she would have joined the scheme when she became a permanent employee if it had been open to her. Her claim therefore succeeds but only from the 5th June 1989 to the date on which she became eligible to join the scheme, the 31st August 1993.

H. Summary

99. The complaints of Mrs Eddy, Mrs Fisher, Mrs Houltby, Mrs Jackson, Mrs Main, Mrs Wilson and Mrs Winch fail.

100. The complaint of Mrs Betts succeeds in respect of the period 12th October 1982 to 31st March 1988; the remainder of her claim is dismissed. The complaint of Mrs Burdon succeeds in respect of the period 2nd July 1984 to 31st March 1988; the remainder of her claim is dismissed. The complaint of Mrs Conway succeeds for the full period of claim between 1st July 1978 and 31st March 1988. The complaint of Mrs Machin succeeds for the full period of claim between 27th October 1987 and 31st March 1988. The complaint of Mrs Shone succeeds in respect of the period 5th June 1989 to 31st August 1993; the remainder of her claim is dismissed.

101. The tribunal declares that each of the claimants whose claim succeeds is entitled to be retrospectively admitted to the respondent's pension scheme for the period specified in paragraph 100. The full terms of the declaration are appended to our judgment.

.....
Chairman

Date:

JUDGMENT SENT TO THE PARTIES ON
……
AND ENTERED IN THE REGISTER
……
FOR SECRETARY OF THE TRIBUNALS