Case **Number** 507973/95 and others
501570/95 and others

THE INDUSTRIAL TRIBUNALS

BETWEEN:

Claimants		**Respondent**
507973/95 & others Mr M J Croft & others	**and**	1. The Planning Inspectorate 2. The Minister for the Civil Service
501570/95 & others Ms H T Shepherd & others		1. The Office for National Statistics 2. The Minister for the Civil Service

At a Hearing

Held at:	**Birmingham**		
before	**Mr J K Macmillan, Chairman**	Members:	**Mr J Bonham** **Mr M Blick**
on:	**11, 12 & 13 October 2004**		

judgment being reserved, the tribunal now gives judgment as follows:

JUDGMENT

The Claimants' complaints that they were excluded from the Principal Civil Service Pension Scheme in breach of the equality clause implied into their contracts by Section 1(1) of the Equal Pay Act 1970 fail and are dismissed.

....
Chairman
Date:

REPRESENTATION

For the Prospect Claimants:	Mr J Cavanagh QC
For Mr M J Croft:	In person
For the remaining Claimants:	No representation
For all Respondents:	Mr N Paines QC and Mr R Hill of Counsel

REASONS

A. Introduction

1. These are complaints by 41 survey interviewers from the Office of National Statistics and 24 contract planning inspectors that they have been excluded from membership of the Principal Civil Service Pension Scheme (of which the Minister for the Civil Service is the rule making authority), by virtue of their status as fee paid, such exclusion being unlawful by virtue of section 1 of the Equal Pay Act 1970 and Article 141 of the Treaty of Amsterdam on the grounds that it is indirectly discriminatory against women. Many of the claimants are members of the Prospect trade union and they have been represented by Mr John Cavanagh QC. The only claimant not a member of Prospect who has taken an active part in the litigation is Mr Croft, to whose industry many of the statistics which have been placed before the tribunal are directly attributable and we and the other parties are extremely grateful to him. Mr Nicolas Paines QC and Mr Raymond Hill appear for the respondents.

2. These cases are a subset of, or perhaps more accurately run in parallel with, cases brought by many tens of thousands of claimants, mostly women, complaining of their exclusion from occupational pension schemes, including all of the State schemes, because of their status as part-time employees. This litigation, known as the part-time worker pension cases, has one fundamental difference from the cases before us today. In the test cases held before me in June and July 2002, the Secretary of State, for whom Mr Paines then appeared,

and all of the employing respondents, conceded that a term in an occupational pension scheme restricting membership to those who worked above a certain minimum hourly threshold was indirectly discriminatory against women and therefore, unless objectively justified, unlawful. No such concession, however, is made in respect of any of the claimants in these cases, nor in a number of similar cases affecting other government departments brought by other claimants excluded from the Principal Civil Service Pension Scheme on a variety of grounds.

3. The offending provision of the PCSPS is Rule 1.4 of the 1972 edition of the rules which provides, so far as material, as follows:-

> *"1.4 Except where otherwise stated, this Scheme applies to all persons serving full-time or part-time in the Civil Service except the following:*
>
> *(i) casual staff;*
> *(ii) staff engaged (including former Civil Servants re-employed) on a fee-paid basis or sessional basis;*
> *(iii) staff whose terms of appointment state them to be outside the Civil Service superannuation arrangements."*

Both the contract planning inspectors and the survey interviewers are excluded from the Scheme by virtue of clauses 1.4(ii) and (iii).

4. On the 23rd March 2004 at a Case Management Discussion I gave directions in respect of all the PCSPS cases. This exercise included, in the case of the Planning Inspectorate and the Office of National Statistics, the identification of the issues which a tribunal would be called upon to resolve. Before turning to those issues (which have in fact changed somewhat) it is necessary to say a little more about the law.

B. The law

5. Section 1 of the Equal Pay Act 1970 has the cross-heading *"Requirement of equal treatment for men and women in same employment"*. It provides:-

> *"(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.*
>
> *"(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract") and has the effect that*
>
> *(a) where the woman is employed on like work with a man in the same employment*
>
> *(i) if (apart from the equality clause) any terms of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable; and*
> *(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term."*

Section 1(2)(b) includes similar provisions in respect of work which is rated as equivalent, (which has no application here), and subparagraph (c) where work is of equal value.

6. Subject to one point which the Secretary of State reserves for future argument but which does not arise in the case of the contract planning inspectors and may not arise in the case of the survey interviewers, namely that for there to be a breach of the equality clause there must be at least one person having the benefit of the pension scheme doing like work with or work of equal value to, the claimant, the respondents concede, following the ruling of the European Court of Justice in ***Allonby & others -v- Accrington & Rossendale College & others*** *(case C-256/01) [2004] IRLR 224 ECJ*, that there is no need for the claimants to identify a comparator, this being a statutory or state scheme. The respondents also concede (subject to other points not before us on this occasion and which will only arise for consideration if we find against the respondents) that because the contracts of the claimants did not permit them access to the PCSPS whereas the contracts of others did permit such access, there is a breach of the equality clause.

7. The battle ground is Section 1(3):-

> *"An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor*
>
> *(a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material*

difference between the woman's case and the man's; and
(b) in the case of an equality clause falling within subsection (2)(c) above may be such a material difference."

The material factor relied upon by the respondents is that the claimants were both fee-paid and employed under contracts which expressly excluded entitlement to access to the scheme, that is clauses 1.4 (ii) and (iii) of the PCSPS rules. The claimants allege that such clauses are indirectly discriminatory against women and therefore do not afford the respondents a defence to the claims.

8. The concept of indirect discrimination originates in the law of sex discrimination rather than equal pay but it can be engrafted onto it with little difficulty. We pause to remind ourselves, although the point scarcely arises in these cases, that both European and UK law is concerned with equality of pay as between the sexes, not fair pay. To amount to indirect sex discrimination there must be a requirement, condition, provision, criterion or practice which is ostensibly applied equally between men and women, but which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it. This is known as disproportionate impact and its existence or otherwise is demonstrated by identifying the group or pool of people to whom the requirement is applied and establishing the proportions of men and women in the group who can comply (the advantaged group) and the proportion of men and women who cannot comply (the disadvantaged group). If a considerably smaller proportion of women than men can comply, indirect discrimination is established. Precisely what all of the elements of the concept entail we will consider in the course of these reasons.

C. The issues

9. The issues which I identified on the 23rd March in respect of both the Planning Inspectorate and the Office of National Statistics (ONS) were, broadly speaking, the same, namely what is the correct pool for determining disproportionate impact and whether, once identified, the statistics applicable to that pool demonstrated disproportionate impact. In the case of the Planning Inspectorate, Mr Cavanagh proposed two alternative pools; the whole of the Planning Inspectorate or only the planning inspectors themselves. He offered no similar alternatives in respect of the ONS. Mr Paines, however, now submits that the correct pool for both groups of claimants is the whole of the Civil Service. Mr Cavanagh accepts that it is open to Mr Paines to take that point.

10. Although not expressly identified as an issue, Mr Cavanagh forewarned us that the question of where the burden of proof lay would also be one of the matters which the tribunal would have to decide. This might well be of central importance given the likelihood that few, if any, reliable statistics would exist for many of the years in question in this litigation. That burden of proof should be an issue at some point in the litigation was therefore unsurprising and I had in fact dealt with it at a preliminary hearing on the 2nd December 2002 in which I was asked to consider two test issues. The first was where the burden of proof lay; the second, the extent to which respondents could be required to make disclosure of relevant statistical information. In respect of the first issue, I ruled thus:-

"Where, in the context of a genuine material factor defence under Section 1(3) of the Equal Pay Act 1970 an applicant alleges that the factor has disproportionate impact and supports the allegation with particulars sufficient to demonstrate that the allegation is not vexatious or mischievous, the burden is upon the respondent to disprove it."

11. The Respondents, for whom Mr Paines had appeared, did not appeal that ruling. However, some four months later in ***Nelson -v- Carillion Services Ltd [2003] ICR 1256 (CA)***, the Court of Appeal ruled that under both section 1(1) and (3) of the 1970 Act, the burden of proof was on the claimants to establish disproportionate impact. My decision of the 2nd December (***Travers -v- The Planning Inspectorate***) was drawn to the Court's attention. They considered it and overruled it. Mr Cavanagh, however, submits that the Respondents are nonetheless bound by my ruling because of their failure to appeal it.

12. The issues before us therefore become (and by agreement with the parties are dealt with in this order):

1. The correct pool for determining whether there is disproportionate impact.
2. Upon whom the burden of proving disproportionate impact lies.
3. The conclusions to be drawn from such statistics as are available. Mr Cavanagh asks us, in the event that we are against him on his preferred pool, the planning inspectors themselves, to reach conclusions in respect of the other potential pools as well.

D. Choosing the pool

13. Although we will look in a moment at the authorities from which this proposition is drawn, it does not seem to be controversial that the correct approach to selecting a pool in an indirect discrimination case

involves two stages. The first is to identify the requirement or condition, provision, criterion or practice complained of. The second follows from the first because, to be meaningful, the pool must include all persons to whom the requirement or condition applies whether they be disadvantaged by it or not, and must exclude all persons to whom the requirement or condition does not apply. The inclusion of any from the latter group would obviously be absurd. As Mr Paines submits, when one is considering the effect of a requirement which applies only to teachers, one does not consider the position of nurses. But the reverse would also severely skew the result: when considering a requirement or condition which applies to all teachers, one would not get a reliable outcome if one omitted from the statistical analysis some teachers.

14. There is no dispute between the parties about the offending requirement blocking access to the PCSPS. For the sake of simplicity it is best expressed as a negative. It is a requirement not to be fee paid. The dispute between Mr Cavanagh and Mr Paines focuses exclusively on the meaning of the "persons to whom this requirement or condition applies". Mr Paines submits that because what is under consideration are the rules of the Principal Civil Service Pension Scheme and those rules are applicable throughout the Civil Service, the only correct pool is the Civil Service. Mr Cavanagh submits that it is necessary to draw a distinction between the mere existence of a requirement and its application. The requirement only applies for the purposes of indirect discrimination when a managerial policy decision is taken to appoint persons to a grade or job category on the basis of being fee-paid. Unlike the authorities upon which Mr Paines relies, to which we will now turn, in which, Mr Cavanagh submits, the existence and application of a requirement or condition were coextensive, because of the special circumstances of this case, the requirement is merely contingent until the policy decision is taken. To put it more colloquially, the requirement simply does not come into play, does not come into the reckoning, and therefore must be ignored until such time as the policy decision is taken. In his turn, Mr Croft submits that the comparison should relate only to people in similar relevant circumstances, that is the planning inspectors.

15. In ***Regina -v- Secretary of State for Employment ex parte Seymour-Smith & another (case C-167/97) [1999] ICR 447 ECJ*** the issue before the European Court of Justice was whether the then minimum qualifying service to complain of unfair dismissal of two years was indirectly discriminatory against women, there being, it was said, significantly fewer women than men who could comply with it. On the question of the correct pool, Mr Paines relies on paragraphs 58 and 59 of the judgment of the Court (at 490e and f):-

> *"58. As regards the establishment of indirect discrimination, the first question is whether a measure such as the rule at issue has a more unfavourable impact on women than on men.*
>
> *"59. Next, as the United Kingdom government was right to point out, the best approach to the comparison of statistics is to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirements of two years employment under the disputed rule and of those unable to do so, and on the other to compare those proportions as regards women in the workforce. ..."*

As Mr Paines submits there is no suggestion of a need to import into the concept of the pool the requirement for those being compared to be doing work of equal value or like work. Indeed, there is no such suggestion in any of the authorities (although many of the authorities do in fact involve such pools). Mr Croft's submission is therefore not correct.

16. In ***Rutherford -v- Secretary of State for Trade & Industry [2004] EWCA Civ1186***, the question before the Court of Appeal was whether the statutory upper age limit for bringing proceedings for unfair dismissal and for entitlement to a redundancy payment was indirectly discriminatory against men. The employment tribunal had decided that the correct pool was men and women in the age range between 55 and 74 because these were the people for whom the retirement age of 65 had "some real meaning". Having quoted paragraphs 58 to 64 of the European Court of Justice's judgment in ***ex parte Seymour-Smith*** Mummery LJ (at paragraph 25) said:-

> *"My reading of the passage cited as applied to this case is that in general the relevant statistical comparison involves (a) taking as the pool "the workforce" (i.e. the entire workforce) to whom the age limit is applicable, not taking just a small section of the workforce confined to those who are adversely affected by being over 65 or within 10 years of the age of 65 ..."*

17. In his conclusion he said:-

> *"29. In my judgement, the employment tribunal erred in law, as it failed to adopt the approach to disparate adverse impact laid down in* **Seymour-Smith***. It should have taken the statistics for the entire workforce, to which the unfair dismissal and redundancy pay requirements of being under 65 applied. It should then have primarily compared the respective proportions of men and women who could satisfy that requirements. It should not have defined and distorted the relevant pool by excluding the "figures" relied on by the Secretary of State as not relevant for it to consider and by referring only to those who were disadvantaged by the disputed upper age limit requirement ...*

30. Instead and in error the employment tribunal treated the statistics concerning the advantaged group as irrelevant to its consideration of the disparate adverse impact point. .... In concentrating exclusively on the statistics for those who cannot comply and on the older members of the workforce, for whom it was thought that requirement has "a real meaning", instead of on the entire workforce and primarily on those in it who can comply with the requirement, the tribunal reduced the size of the pool and thereby departed from the approach laid down in **Seymour-Smith** *and in the line of Court of Appeal cases leading up to* **Seymour-Smith***; see for example* ***University of Manchester -v- Jones [1993] ICR 474 ... London Underground -v- Edwards [1995] ICR 574 EAT and (No. 2) [1999] ICR 1994 CA ..****".*

18. ***University of Manchester -v- Jones*** concerned a requirement or condition that applicants for a post must be both graduates and of a certain age. The age requirement was said to be indirectly discriminatory against women. At page 493 to 494, Ralph Gibson, LJ, commenting on the proper application of Section 1(1) of the 1970 Act said:-

"In order to compare the proportion of women who can comply with the requirement with the proportion of men who can comply with it, it is necessary to determine the relevant total. In my judgement, the relevant total is the number of men and women referred to in the subsection, i.e. those men and women to whom the person - in this case the employer - applies or would apply the requirement. In this case, that means all men and women graduates with the relevant experience. I do not accept that the relevant total is all men and women; the employer would have no occasion to apply the requirement to any men or women other than those who are able to comply with the requirements of the advertisement other than the requirement in question.

19. In ***London Underground Ltd -v- Edwards (No. 2) [1999] ICR 494 CA***, the requirement or condition was the need to comply with a new roster exclusively directed at train drivers, which involved working more unsocial hours. The employment tribunal had determined the correct pool to be train drivers who were single parents, the comparison being between those who were male single parents and those who were single female parents. At paragraph 23 of his Judgment, Potter LJ said:-

"The first or preliminary matter to be considered by the tribunal is the identification of the appropriate pool within which the exercise of comparison is to be performed. Selection of the wrong pool will invalidate the exercise: see for instance Edwards (No. 1) [1995] ICR 574 and University of Manchester -v- Jones [1993] ICR 474 and cf. the Judgment of Stephenson LJ in Perera -v- Civil Service Commission (No. 2) [1983] ICR 4, 437 in the context of racial discrimination. The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied. In this case, the pool was all those members of the employer's workforce, namely train operators, to whom the new rostering arrangements were to be applied. ... It did not include all the employer's employees. Nor did the pool extend to the wider field of potential new applicants to the employer for a job as a train driver. That is because the discrimination complained of was the requirement for ***existing*** *employees to enter into a new contract embodying the rostering arrangements."* [emphasis in the original]

20. Mr Cavanagh places great reliance on that passage from ***London Underground -v- Edwards*** and on the passage from ***University of Manchester -v- Jones***. They demonstrate, he submits, although these are our words not his, that 'application' of a requirement necessitates a decision by the employer to impose on a sector of his or her workforce the requirement or condition complained of. Thus, he submits that, in ***London Underground -v- Edwards***, the relevant requirement or condition applied only to train drivers because that was the group to which the employer chose to apply it. The employer could equally well have applied it to other grades such as station staff but chose not to do so. In the PCSPS cases, it was entirely a matter for the management of the Planning Inspectorate who to make fee paid and thus to exclude from the pension scheme. Mr Cavanagh does not seek to impugn the rule in the PCSPS itself but only the discriminatory effect of its application in certain circumstances.

21. Mr Paines submits that Mr Cavanagh is guilty of a fundamental error in equating the Planning Inspectorate's policy to recruit contract inspectors on terms which included being fee paid, with the exclusionary provision in the PCSPS itself. We agree. They are quite separate. The policy decision merely has the consequences which it does because of the exclusionary provision. But it is not the exclusionary provision which has at least the potential to affect others not covered by that policy.

22. In our judgement this error causes an unbridgeable gap in Mr Cavanagh's reasoning. His arguments become attractive if he can succeed in passing through the gateway which separates the Inspectorate from the rest of the Civil Service. Once across that threshold it becomes more logical to describe the pool only in terms of those to whom the policy has some application - the planning inspectors; the salaried inspectors

being able to comply with the requirement while the contract inspectors could not, none of the support staff being engaged on fee paid contracts. One therefore has an advantaged and a disadvantaged group and a statistical comparison is possible. But given that it does not appear to be his case that the only branches of the Civil Service to engage people on a fee paid basis are the Planning Inspectorate and the ONS, Mr Cavanagh has signally failed to demonstrate how his arguments carry him across that all-important threshold. If, as appears highly likely, other branches of the Civil Service also recruit on a fee paid basis, and, which is unarguably the case, all civil servants are potentially affected by the exclusionary provision, what is the warrant for considering the Planning Inspectorate in isolation?

23. Is there in fact a real difference between the existence and the application of a requirement or condition? Returning to the facts of ***Seymour-Smith*** for example, if Mr Cavanagh is right, a more logical pool than the entire workforce would have been merely that portion of the workforce who in any statistical year had been dismissed. They are the ones to whom the requirement or condition complained of (a requirement created, as here, by government) is in practice applied (as here, by their employer exercising managerial prerogative). There would however, continue to be an advantaged and a disadvantaged group as some would have the two year qualifying service while some would not, and a statistical comparison is therefore possible. But not so in the case of ***Rutherford***. If our analogy between ***Seymour-Smith*** and Mr Cavanagh's submission is appropriate, it also holds good for ***Rutherford***. But applying it to ***Rutherford*** produces only a disadvantaged group, those who have been dismissed at or above the age of 65, all of whom are equally affected by the requirement. For everyone else the requirement merely exists contingently.

24. But such analogies can at best be only indicative that Mr Cavanagh's principal submission is flawed. However, the way in which he argues his case on behalf of his respective client groups proves both that the analogy is sound and that his submission is indeed flawed. The clue is to be found in the terms of the directions which I gave on the 23rd March. In respect of the planning inspectors, Mr Cavanagh advanced two alternative pools; on the one hand the whole of the Planning Inspectorate and on the other the planning inspectors themselves. In connection with the survey interviewers he did not advance an alternative to the whole of the Office of National Statistics and he does not now do so. His preferred pool for the Planning Inspectorate is the planning inspectors alone and he has characterised his principal submission in favour of that proposition as the two work forces argument. It is logical, he submits, to separate the Planning Inspectorate into two workforces because there was one workforce - the inspectors - to whom the relevant requirement had been applied and the other workforce - in crude terms the administrative and support staff - to whom the requirement had not been applied. Moreover, the work of the two workforces is entirely different and while the work of the contract inspectors is admitted to be of equal value with the work of the salaried inspectors, the work done by the group to which the fee paid contract is never applied is not of equal value with either.

25. However, subject to one vital difference, precisely the same argument appears to be available for use in the ONS cases, or if it is not Mr Cavanagh has not explained why. There are clearly two workforces: the survey interviewers and everybody else. Only the survey interviewers are fee paid, none of the other staff are. As with the planning inspectors, the nature of the work done by the survey interviewers is very different from the work done by the rest of the ONS staff. Why then does Mr Cavanagh not apply the two workforce argument to the ONS? The answer, it seems, is because if he did so he would only have a disadvantaged group. Unlike the planning inspectors, some of whom are salaried, all of the field survey interviewers are excluded from the PCSPS because all are fee paid.

26. Mr Cavanagh is therefore seen to be arguing not from principle but pragmatism. The principle which he so boldly advances on behalf of the planning inspectors and their two workforces has a fatal flaw when advanced in respect of the two workforces which equally readily identify themselves in the ONS. The principle therefore plainly cannot be right in respect of the planning inspectors either. In our judgement, the distinction between the existence and the application of a requirement is a purely semantic rather than a legal or a logical one. Mr Cavanagh's submission, ingenious though it undoubtedly is, is merely another attempt to do that which the Court of Appeal in ***Rutherford*** has plainly said is impermissible, to some way limit the logical pool to a narrower group for whom the objectionable term or condition has "a real meaning".

27. The requirement not to be fee paid in order to be eligible for membership of the PCSPS is applied to all members of the Civil Service. The correct pool, therefore, must be the entirety of the Civil Service, embracing those who can comply with it and those who cannot.

E. The burden of proof

28. Mr Cavanagh submits that because the Respondents did not appeal my ruling on the first of the test issues which were before me in December 2002, they and the tribunal are bound by it, notwithstanding the subsequent disapproval of the Court of Appeal in ***Nelson -v- Carillion*** He relies, for this at first sight rather startling proposition, on a series of cases brought against the Labour Party under the Race Relations Act 1976 by claimants who had failed to be selected to contest parliamentary or local government seats or to achieve other positions within the Labour Party. The case on which he relies is ***Carter (General Secretary of and on behalf of the Labour Party) -v- Ahsan EAT/0907/03***.

29. In brief, the history of the matter is that when Mr Ahsan's complaint was first before an employment tribunal in the summer of 1998, it rejected a submission by the Labour Party that the tribunal had no

jurisdiction to entertain it as the Labour Party was not a qualifying body or otherwise fell within Section 12 of the Race Relations Act. The Labour Party appealed and in May 1999 its appeal was dismissed. The EAT's Judgment concluded:-

> *"If no notice of appeal is lodged within the prescribed or any duly extended time, then the matter is to be relisted at the employment tribunal to be heard on its merits."*

That sentence also appeared in the formal Order of the EAT. The Labour Party did not appeal further and the matter was therefore duly remitted to the tribunal and reheard.

30. However, before the tribunal could promulgate its decision, the identical jurisdictional point under Section 12 of the 1976 Act had found its way to the Court of Appeal in a case brought by a Mr Ali against Mr Carter's successor as General Secretary of the Labour Party. This time Mr Cavanagh was leading counsel for the Labour Party and he argued successfully that the Labour Party was not a qualifying body for the purpose of Section 12 and the employment tribunal therefore had no jurisdiction to entertain Mr Ali's complaint. A necessary consequence of that decision by the Court of Appeal was that the employment tribunal had been wrong to hold that they had jurisdiction to hear Mr Ahsan's complaint and the EAT had been wrong to dismiss the Labour Party's appeal against that holding.

31. The Labour Party then unsuccessfully applied to the employment tribunal in Mr Ahsan's case not to promulgate its decision. The tribunal had been alerted to the appeal in Ali and pending its outcome had withheld promulgation. The tribunal, however, dismissed the Labour Party's application on the ground that it had been ordered by the EAT to hear Mr Ahsan's case on its merits and the Labour Party having not appealed it, the order was unaffected by the outcome of the Ali appeal. The Labour Party appealed to the Employment Appeal Tribunal which dismissed the appeal, the outcome being that the tribunal's decision in Mr Ahsan's case was duly promulgated. However, after his first complaint to the employment tribunal, Mr Ahsan had brought two fresh complaints against the Labour Party arising out of fresh circumstances. Neither of these two further complaints were the subject of the EAT's Order nor any similar order and it was conceded on Mr Ahsan's behalf that those could not now be pursued following the Judgment in Ali.

32. The arguments of Mr Robin Allen, QC for Mr Ahsan, which the Employment Appeal Tribunal found persuasive, appear at paragraphs 23 and 26 of the transcript:-

> *"23. ... There was, he said, (i) a collateral attack on a judgment which could not be tolerated (see **Hunter -v- Chief Constable of West Midlands Police [1982] AC 529 HL**) (ii) a perversion of the doctrine of precedent and an undermining of the ordinary principles of court process. The simple fact was that there was not simply a <u>Judgment</u> of the Employment Appeal Tribunal in this case which had been overruled but an order of the Employment Appeal Tribunal which has not been set aside. That <u>order</u> of the EAT sealed on the 14th July 1999 that: "The matter is to be relisted at the employment tribunal to be heard on its merits" has not been set aside and must be complied with. The <u>Judgment</u> will not be followed in future and no similar order will be made by any other court ...... As a matter of principle, litigants who have lost cases where there is a subsequent law change cannot simply disregard the orders made against them and can only seek to avoid the consequence of such an order if they are permitted, on application to the Court, to review or appeal that order out of time. ….. If orders which remain in force can simply be ignored, then that is a recipe for chaos."* [Emphasis in the original].
>
> *26. Mr Allen QC submits that there is no such distinction [between the jurisdiction of the High Court which is non-statutory and the employment tribunal which is statutory]. The statutory structure, by virtue of Sections 1 to 3, 21, 35 and 37 of the Employment Tribunal's Act 1996 is that [which] ... controls the employment tribunals: and we agree with Mr Allen QC that the time at which the jurisdiction falls to be tested is the time at which the order, in this case the order of the appeal tribunal, directing the employment tribunal what to do, was made. An order made, which at the time when made is within the jurisdiction of the Employment Appeal Tribunal or the employment tribunal, must be complied with until set aside, in the same way as an order of the High Court. For example in cases in which, prior to the decision in **Dunnachie -v- Kingston upon Hull City Council (No. 1) in the Employment Appeal Tribunal [2003] IRLR 384** ... employment tribunals made orders for compensation for non-economic loss which the Employment Appeal Tribunal thus concluded in Dunnachie that they had no jurisdiction to do. The orders by those other employment tribunals would not automatically have become void and have no effect. They would require themselves to be appealed as has subsequently been occurring. The same a fortiori would apply to ancillary orders for costs if they were made. The same chaos, the same uncertainty, the same lack of order, would apply in relation to orders of statutory tribunals as to orders of courts if it could become uncertain as to whether they were binding, the moment there is some decision in another case (if known about) overruling the Judgment or changing the law, upon which those orders were based."*

33. Mr Paines rather half-heartedly invited the tribunal to review my original decision but we declined as there seemed no permissible basis for so doing. If the ruling was to be challenged it had to be challenged on appeal

on a point of law.

34. Mr Cavanagh submits that there is no distinction to be drawn between an order of the EAT and a decision of the employment tribunal, “Decision” being the word used to described the ruling which I made on the preliminary issue. Orders and decisions are to be equated for this purpose. In response, Mr Paines referred to Regulation 2(2), the interpretation provisions, of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (the rules of procedure in force in December 2002), which provide:-

> *“”Decision” in relation to a tribunal includes -*
>
> *a declaration,*
> *an order,*
> *…….”*

Mr Paines submits that a distinction is clearly drawn between the range of outcomes to a hearing, all of which carry the title ‘Decision’ and submits that my Decision of 2002 was not an order but a declaration and therefore no parallel can be drawn with **Carter -v- Ahsan**.

35. We agree. The first decision in ***Carter -v- Ahsan*** created rights as between the parties, i.e. the right of Mr Ahsan to bring the proceedings. It is thus identical in its effect with an unappealed order by an employment tribunal to compensate an unfairly dismissed claimant for injury to feelings or damages for psychiatric illness. My decision in 2002 merely declared the state of the law on a specific issue. It did not by itself create any rights between the parties. We do not even agree with Mr Paines when he was prepared to concede that his position might be difficult if in addition to making that declaration as to the state of the law, I had ordered that the matter be set down for hearing on a certain date on that basis. That seems to be an artificial distinction for once again no rights would have been created between the parties. The hearing at which rights may or may not be created as between the parties is this hearing. It would then indeed be true, if we found in favour of the claimants and the respondents did not appeal, that they remained bound by any order consequent upon that determination of rights, notwithstanding that, following a change of heart, they successfully appealed a similar decision by us in respect of a hearing involving a different subdivision of the Civil Service in the future. Such hearings are in the offing and therefore this is not a mere theoretical possibility.

36. The normal doctrine of precedent applies. The Court of Appeal has said, not merely by inference but by specific reference to it, that the declaration which I made as to the state of the law on the burden of proof is, in law, incorrect. It would therefore be an error of law for us to follow that declaration, the law being otherwise. The burden of proof is therefore upon the claimants not the respondents.

F. Disproportionate impact.

37. If we are right that the correct pool is the whole of the Civil Service and that the burden of proof is on the claimants, all of these claims must fail. But this would also be the outcome if the whole of the Civil Service is the correct pool, even if Mr Cavanagh is right about the burden of proof as the claimants have not supported *‘the allegation with particulars sufficient to demonstrate that the allegation is not vexatious or mischievous’* in respect of that pool, as required by my ruling. In consequence, the burden has not shifted to the respondents to disprove disproportionate impact. In respect of the whole of the Civil Service, not only are there no relevant statistics before us, as we understand it, no relevant statistics exist or could be compiled. At least none exist for any years before the early to mid 1990s and what does exist before 1996 is unreliable. We will look at the history of record keeping in a little more detail when we examine each of Mr Cavanagh’s proposed alternative heads of claim, but chief amongst the complications faced by the claimants is the fact that those paid by the fee were not regarded as civil servants at all and therefore no statistics in respect of them were kept. As will be seen when we consider in detail Mr Cavanagh’s various alternative pools for which some limited statistical information has been compiled, no consistent picture emerges from which we could make assumptions or draw analogies. The existence of disparate impact on a Civil Service-wide basis is therefore unprovable.

F1. The law

38. We have been referred to paragraphs 58 to 62 of the Judgment of the European Court of Justice in ***Seymour-Smith***; to the Judgment of the Court of Appeal in ***Rutherford (No. 2)***; to the Judgment of the House of Lords in ***Seymour-Smith (No. 2) [2000] ICR 244*** in particular to the speech of Lord Nichols; to the judgment of Lindsay P in the EAT in ***Harvest Town Circle -v- Rutherford [2002] ICR 123***; and to the judgment of the House of Lords in ***Barry -v- The Midland Bank [1999] ICR 859***. From all of these cases the following propositions can be drawn. The relevant comparison is of the proportion of men able to satisfy the requirement and the proportion of women able to do so. To amount to disproportionate impact the proportion of women able to satisfy the requirement must be considerably smaller than the proportion of men. What is ‘considerable’ cannot be determined only by reference to previous authority as there are no bench marks as such. There would also be indirect discrimination if although the difference between the proportions was not considerable, it is nonetheless persistent and relatively constant over a long period of time and the statistical samples are not insignificant. It is a matter for us to assess whether the statistics are valid and can be taken into account; or whether they illustrate purely fortuitous, short-term phenomena; whether they appear to be significant; and whether they are reliable. It is not only permissible but desirable in cases where the

comparison of proportions alone does not provide an obvious answer or produces a questionable answer, for the tribunal to look at raw numbers in both the disadvantaged and advantaged groups and at the respective proportions the advantaged groups have to each other expressed as a ratio.

39. Because of their importance, it is necessary to set out in full paragraphs (v) to (vii) of what Mr Cavanagh describes as Lindsay P's synthesis and extension of the authorities in ***Rutherford*** in the EAT (at para. 18):-

> *"(v) As more cases of indirect discrimination are heard, a better feel, a more soundly based assessment of what is or is not properly to be regarded as a considerable or substantial disparity will develop. For example, in cases similar to it regard will doubtless be had to the fact that in Seymour-Smith the Court of Justice found the 1985 disparity of 8.5% to be not considerable ... and when the case returned to the House of Lords, see Lord Goff ... and Lord Nicholls ... Unfortunately, those seeking a simple and universal touchstone must be disabused; as numbers as well as proportions will be likely, save in the most obvious cases, to be taken into account and as different forms of comparison, of their nature, throw up different scales of difference, it would be a mistake (even leaving aside the cases of persistent but constant smaller disparities) to think that any disparity of less than 8.5% must necessarily be found not substantial or not considerable.*
>
> *(vi) No distinction is to be drawn between a considerable and a substantial disparity. That being so, it would be a mistake to conclude that anything that was merely not trivial or de minimis sufficed.*
>
> *(vii) The employment tribunal, in such less obvious cases, after looking in detail at such figures as should have been laid before it, must then stand back, as it were, and, assimilating all the figures, is then to judge whether the apparently neutral provision, criterion or practice in issue has a disparate impact, be it on men or women, that could fairly be described as considerable or substantial."*

F.2 Office of National Statistics - the facts

40. We heard evidence from Mr J R Davis, a senior executive officer employed by the ONS. The ONS is an executive agency and a department of the Chancellor of the Exchequer, formed in 1996 on the merger of the Office of Population, Census and Surveys, the Central Statistical Office and some statistical divisions of the Employment Department. The Central Statistical Office in its turn had been formed in 1989 from statistical divisions of the Cabinet Office, the Department of Trade & Industry and the Department of Employment.

41. As at June 2004, the ONS employed some 5,340, of whom 4,003 were office-based staff. The survey interviewers numbered 1,337 in total, of whom 608 were men and 729 were women. They worked on either an hourly paid contract or (from 2002 only) an annualised hours contract. They are split between four field forces, although prior to 1996 they all worked for the Office for Population, Census and Survey. Interviewers in the general field force and the labour force survey work from home; those in the international passenger survey are based at various air and sea ports throughout the country and those in the telephone unit are based at Titchfield in Hampshire. Prior to 2002 all were hourly paid, there was no guarantee of work and offers of work could be turned down. Although interviewers were expected to make themselves available to work between two and five days or two and five shifts a week, unlike the contract planning inspectors, they are not paid a retainer.

42. Prior to 1976, the survey interviewers as a group were overwhelmingly, if not exclusively, female. In fact, there seems to have been discrimination against men. Since 1976, as the 2004 figures show, there has been increasing recruitment of men, although the numbers are not yet equal. Such statistics as Mr Davis has been able to gather are set out in Table 1 below. The numbers in the 'permanent' column are the advantaged group, i.e. those who are eligible to join the Scheme. The numbers in the disadvantaged group are obtained by deducting that figure from the total figure in the next column.

Table 1 – the Office of National Statistics

Year		Permanent (plus in 2002/2003 Annualised)	Total	Eligible	Permanent (plus in 2002/2003 Annualised)	Total	Eligible	Ratio
		Males			Females			
2004	ONS	1957	2125	92.10%	2632	2983	88.20%	95.8
2003	ONS	2207	2515	87.80%	2832	3372	84.00%	95.7
2002	ONS	1592	2004	79.40%	2189	2882	76.00%	95.6
2001	ONS	1269	1831	69.30%	1945	2671	72.80%	105.1

2000	ONS	1230	1766	69.60%	1822	2500	72.90%	104.6
1999	ONS	1253	1638	76.50%	1836	2430	75.60%	98.8
1998	ONS	1253	1589	78.90%	1816	2382	76.20%	96.7
1997	ONS	1241	1567	79.20%	1812	2359	76.80%	97
1996		NA	NA		NA	NA		
1995	OPCS	652	929	70.20%	1174	1704	68.90%	98.2
1994	OPCS	699	996	70.20%	1288	1819	70.80%	100.9
1993	OPCS	739	1025	72.10%	1322	1815	72.80%	101
1992	OPCS	803	1064	75.50%	1429	1891	75.60%	100.1
1991	OPCS	783	885	88.50%	1447	1808	80.00%	90.5
1990	OPCS	780	824	94.70%	1446	1751	82.60%	87.2

43. Before interpreting the figures, a number of points need to be made about their availability and reliability for a number of the years in question. Apparently no records were kept in 1996, that being the year the ONS was created from its constituent bodies. No evidence is available on numbers and gender split of the survey interviewers prior to 1990. The keeping of this information was not a central requirement and was not needed for operational reasons. In consequence, it is not possible to produce figures showing what proportion of the total number of staff in the ONS could comply in those years. The figures between 1990 and 1993 are unreliable. Some records were held electronically, others were paper-based. They were only brought together as a single coherent set of records in 1994. Although from 1992 onward the figures show a fairly consistent pattern, we accept Mr Davis's evidence that it would neither be safe to conclude that that pattern had occurred in the years prior to 1990 nor, because, for example, of the increasing numbers of men in the survey interviewers, that it had not occurred. There is simply no way of knowing.

44. The figure in the final column is the comparison of the proportion of men who can comply expressed as a ratio with the proportion of women who can comply. If the figure is below 100, the female group is disadvantaged; if it is above 100, the male group is disadvantaged. Even taking into account the years about which the health warning is most strenuously given, it is quite clear that there is no consistent pattern of disparate impact on either sex. Apart from 1990 and 1991, the ratio of disadvantage to females is never higher than 95.6 to 100 and the ratio of disadvantage to males never higher than 105.1 to 100 and the pattern which emerges is one of approximate equality between the sexes. From 1992 men are disadvantaged in 5 years and women in 8 years.

F.4 Office of National Statistics - conclusions

45. Because of the burden of proof, the absence of reliable information in 1990 and 1991 and the absence of significant relevant information for earlier years are necessarily fatal to the claimants' case. Thereafter, the figures quite clearly demonstrate that there was disproportionate impact on either sex on any of the available bases of analysis. If, therefore, the appropriate pool for comparison had been the Office of National Statistics, the complaints would also have failed.

F.5 The Planning Inspectorate – the facts

46. We heard evidence from Mr Alan Payne, who is a grade 7 civil servant in the Planning Inspectorate, and currently the head of its Corporate Planning Branch. From 1990 to 2003, he was head of the Inspectorate's Human Resources Branch. For our purposes, there are two sorts of planning inspector. There are the full-time

permanent salaried inspectors who are eligible for membership of the pension scheme and the contract inspectors who are paid an annual retainer in exchange for which they guarantee to make themselves available to the Inspectorate for (normally) 36 weeks a year. In addition to their annual retainer, which is quite modest, they are paid a fee for each day worked. There is no guarantee of any work or any payment above the retainer.

47. ‘Contract Inspector’ is a relatively new breed which did not come into existence until the mid 1980s when a growing backlog of work led to the decision to create an additional body of planning inspectors who would be available to respond to demand as required. There is no dispute that the contract inspectors’ work is of equal value to the vast majority of the work of salaried inspectors. In January 1996 and again in 1998, there was a concerted recruitment from contract inspectors into the salaried Inspectorate.

48. There is one final group, the consultant inspectors, who are exclusively fee paid on a case by case basis and about whom we need say nothing more.

49. As with the ONS, historically record keeping in the Inspectorate has been patchy. Prior to 1992 when the Inspectorate had been a directorate of the then Department of Environment, records of contract inspectors, who were not regarded as civil servants, were not kept. Thereafter, the Inspectorate set up its own electronic record keeping system which did enable records of both the contract and consultant inspectors to be maintained alongside those of the salaried inspectors. However, the record was apparently never made fully comprehensive and there are likely to be gaps. The Inspectorate’s paper records are equally incomplete.

50. Mr Croft has been able to supplement the Inspectorate’s own statistics by a detailed analysis of contemporary material about, in particular, new recruits, which he describes as intake data. We should say at once that we do not accept Mr Croft’s submission that intake data is preferable to data on the overall composition of the relevant workforce at a particular point in time, i.e. snapshot data. We will say more about this when we deal with the planning inspectors as a potential pool. We also do not accept, and do not propose to set out in these reasons, many of Mr Croft’s calculations based on the information he has gathered, as they do not address the issue of disproportionality in accordance with ***Seymour-Smith***. Indeed, with respect to Mr Croft, they are little more than juggling with figures to produce a favourable outcome.

51. Mr Croft’s figures are accepted as accurate as far as they go, although, because of the gaps in their own records, the Inspectorate cannot say whether there are also gaps in Mr Croft’s records. One set of statistics provided by Mr Croft which are expressly not agreed and which we therefore have paid no regard to, are, in his own terminology, merely estimates of the number of contract inspectors in post between 1986 and 1995. They are, as such, no more than educated guess work.

52. The Inspectorate’s and Mr Croft’s combined figures are set out in Table 2, those for August 1990 and January 1992 are based on information supplied by Mr Croft, the remainder on information supplied by the Inspectorate.

Table 2 – the Planning Inspectorate

Date	**Males**			**Females**			
	Salaried	**Total**	**Eligible**	**Salaried**	**Total**	**Eligible**	**Ratio 100:**
1 April 2002	440	447	98.40%	265	266	99.60%	101.2
1 April 2001	438	452	96.90%	269	270	99.60%	102.8
1 April 2000	445	459	96.90%	249	251	99.20%	102.4
1 April 1999	431	453	95.10%	225	227	99.10%	104.2
1 April 1998	421	472	89.20%	236	242	97.50%	109.3
1 April 1997	403	469	85.90%	230	239	96.20%	112
1 April 1996	381	431	88.40%	211	221	95.50%	108
January 1992			86.27%			90.90%	105.4
August 1990			86.68%			94.44%	108.9

53. Once again the ratio column is the proportion which one eligible group bears to the other, figures below 100 showing disadvantage to women; figures above 100 disadvantage to men. Here, in each year, it is the males who are the disadvantaged group. As at 2002, there is virtual parity but it is not the case that the further back in time one goes, the greater the gap becomes. Although there is a tendency to that effect, it is uneven. The highest disparity is in 1997 and although the lowest is in 1999, the next lowest is 1992.

54. Mr Paines submits that the authorities demonstrate that the approximate cut-off point for determining

whether there is substantial disproportionate impact is a female/male ratio of 100 to 90, which mathematically is the same as a male/female ratio of 100 to 111.11. Only one of the available figures exceeds that margin. We do not accept Mr Paines's submission that there is any such cut-off point. Quite clearly each case depends on its own circumstances and in some cases a higher or a lower margin would suffice. But aside from the ratios, what of the proportions themselves? The worst year was 1997 when the proportion of men who could comply was 10.3% lower than the proportion of women. By itself, if the figures were entirely reliable, that would appear to fall on the wrong side of the dividing line and be regarded as a disproportionately adverse impact on men. The next highest figure is 1998 where the percentage difference is 8.3%. Thereafter, it does not exceed 8% with 1990 being the closest at 7.76%. But in 1992 the difference was as low as 4.63%.

F.6 The Planning Inspectorate - conclusions

55. For the years for which statistics are available, we are in borderline territory by and large. However, if the 8.5% disparity which in ***Seymour-Smith*** was held by a majority of 3 to 2 in the House of Lords to be sufficient to demonstrate disproportionate impact, but said by the European Court of Justice to be probably insufficient, can be taken as an indicator (rather than a cut-off point), only one year falls above it and only two other years come significantly close to it. In his 'synthesis' of the authorities in ***Rutherford*** Lindsay P (at para. 18(iii) said that: *"In such less obvious cases it will be proper for the employment tribunal to look not merely at proportions (as proportions can be misleading) but also at numbers …"*. Looking at the proportions in the context of the numbers involved in a borderline case is of assistance to this extent at least: if the pool is the entire workforce, a disparity of 8.5% means that thousands, perhaps tens of thousands of people are disadvantaged, whereas the disparity of a little over 10.3% in the Planning Inspectorate in 1997 represents 66 men compared with 9 women. Moreover, the smaller the raw numbers involved, the greater the impact on the proportions of even a small variation in those numbers.

56. However, the principal difficulty is once again that the great majority of the statistical evidence required to prove disproportionate impact is simply not available and that which is available is of questionable reliability. But that aside, in our judgement, the statistics do not, at the end of the day, demonstrate a considerable or substantial disparate impact on men, even for the years in which figures are available. Therefore, if the Planning Inspectorate were the correct pool, the claims would again fail.

F.7 The Planning Inspectors

57. One has only to glance at the statistics to understand why this is Mr Cavanagh's pool of choice. On their face they unquestionably demonstrate a substantial adverse impact on women. But that very fact immediately calls into question whether what might seem the inevitable conclusion can be drawn from them, for, as Mr Paines rightly points out, both the advantaged and disadvantaged groups, the salaried inspectors and the contract inspectors, are overwhelmingly male as is the group of claimants. Of the 24 claimants, only five are women, yet in order to succeed, the male claimants must rely on statistics showing a disproportionate impact on women. Mr Cavanagh submits that there is nothing wrong with that in principle. Leapfrog claims are permitted and this being an issue of equal pay, it is necessary only to show that the offending term in the PCSPS adversely impacts on one or other gender.

58. Whilst that is technically right, the picture of the claimant's case based on the Planning Inspectors pool as (it has to be said, entirely accurately) painted by Mr Paines, is straight from the Gilbertian world of topsy turveydom. At the very least, it suggests we should pay very careful attention to the statistics. Is there some explanation for them which the tribunal is entitled to take into account to show that they are or may well be unreliable, or, per ***Seymour-Smith***, fortuitous?

59. Mr Croft has produced from source material which is not controversial Table 3, the gender composition of inspector intakes to Planning Inspectorates 1986 - 1996.

Table 3 - Gender composition of Inspector intakes to Planning Inspectorate, 1986 - 96 inclusive

Date	Salaried Inspectors			Contract Inspectors		
	Male	Female	Total	Male	Female	Total
Aug 1986	-	-	-	9	-	9
Dec 1986	-	-	-	7	4	11
Mar 1987	10	1	11	-	-	-
Jun 1987	11	-	11	-	-	-
Sep 1987	6	-	6	8	-	8
Jan 1988	1	-	1	8	3	11
Apr 1988	12	2	14	-	-	-
Jun 1988	13	-	13	-	-	-
Jul 1988	-	-	-	6	1	7

Nov 1988	-	-	-	7	2	9
Jan 1989	-	-	-	11	1	12
Totals Aug 1986 to Jan 1989	53	3	56	56	11	67
	94.64%	5.36%	100.00%	83.58%	16.42%	100.00%
Apr 1989	-	-	-	4	-	4
Jul 1989	5	-	5	1	-	1
Oct 1989	6	-	6	2	-	2
Jan 1990	2	-	2	-	-	-
Apr 1990	2	-	2	2	-	2
Jul 1990	1	1	2	5	1	6
Oct 1990	13	-	13	2	3	5
Jan 1991	10	1	11	-	1	1
Apr 1991	6	-	6	6	1	7
Jul 1991	5	-	5	7	1	8
Oct 1991	10	1	11	1	2	3
Jan 1992	1	1	2	1	1	2
Sep 1995	-	-	-	8	4	12
Nov 1995	-	-	-	10	1	11
Totals Apr 1989 to Nov 1995	61	4	65	49	15	64
	93.85%	6.15%	100.00%	76.56%	23.44%	100.00%
Totals Aug 1986 to Nov 1995	114	7	121	105	26	131
	94.21%	5.79%	100.00%	80.15%	19.85%	100.00%
Jan 1996	-	-	-	9	1	10
Jul 1996	2	-	2	3	-	3
Sep 1996	8	1	9	3	-	3
Oct 1996	3	-	3	12	-	12
Totals Jan 1996 to Oct 1996	13	1	14	27	1	28
	92.86%	7.14%	100.00%	96.43%	3.57%	100.00%
Totals Aug 1986 to Oct 1996	127	8	135	132	27	159
	94.07%	5.93%	100.00%	83.02%	16.98%	100.00%

60. Mr Cavanagh adopts Mr Croft's table. Whilst recognising that the issue before the tribunal is disparate impact as regards the planning inspectors as a whole and not just the new entrants, he submits that there is every reason to think that the intake is representative. It would, he submits be very surprising if the gender composition of the intake was unrepresentative of the actual totals during this period. Accordingly, the intake data is an excellent indicator as to the total figures. We do not entirely agree. There must be some correlation between the two of course, but the principal flaw in Mr Cavanagh's submission is that Table 3 gives no indication of turnover, and because the contract inspectors were only engaged on 3 year contracts with no guarantee of renewal, the turnover rate in the contract group is likely to be higher than in the salaried group.

61. Mr Cavanagh invites us to draw the following conclusions from Table 3. In the period 1986 to 1996, there were 8 salaried women inspectors and 27 contract women inspectors so only 8 out of 35 of the women entrants were able to satisfy the eligibility conditions for the pension, a proportion of just under 23%. In the same period, 127 male entrants were able to satisfy the conditions and 132 were not, a proportion of just over 49% in the advantaged group. Both in percentage terms (a difference of 26% in favour of the men) and in ratio terms (8 to 5, i.e. for every 5 men adversely affected there are 8 women) the figures are stark. The disproportionately adverse effect on women is obvious. Mr Cavanagh further submits that Mr Croft's figures show that this disparate effect lasted throughout the period under consideration.

62. We do not propose to add a table compiled by Mr Cavanagh from Mr Payne's statistics which are set out in various tables in his witness statement. For, as Mr Cavanagh rightly concedes, from 1997 onwards, perhaps as a result of the two recruitment drives in 1996 and 1998 which we have already mentioned, the disparity virtually disappears as indeed does the contract inspectorate. Mr Cavanagh confines his submission to saying that given that as almost all of the claims relate to periods prior to 1996 it would be wrong to take these figures into account. We agree and propose to say nothing more about them.

63. Mr Croft's second table, which is set out below at Table 4, is the gender composition of planning inspectors in post in August 1990, January 1992 and March 1994. This version is the last of three produced by Mr Croft and as it is in the Treasury Solicitor's format we will use it in preference to his earlier versions as it makes for easier comparison. We have taken the liberty of adding in brackets in the column 'females salaried + contract' a further figure whose significance will become apparent shortly.

Table 4 - Gender composition of Planning Inspectors in post, August 1990, January 1992, March 1994 (Treasury Solicitor's format)

	Males			Females			Ratio
Date	Salaried	Salaried + contract	Eligible(%)	Salaried	Salaried + contract	Eligible(%)	
Aug 1990	194	239	81.2	12	19 (7)	63.2	77.8
Jan 1992	229	285	80.4	13	28 (15)	46.4	57.7
Mar 1994	232	278	83.5	16	28 (12)	57.1	68.4

F.8 Planning Inspectors - conclusions

64. On the face of it, whether one looks at the ratio or the difference in the percentage of the eligible males and females, the numbers demonstrate a dramatic disadvantage to women. Can these figures be relied upon? We think not. The first and most obvious criticism is that like is not being compared with like. The salaried inspectors were an existing stable group, no doubt with some turnover and no doubt with some built in increase in overall numbers. But the contract inspectors were starting from scratch in 1986. Secondly, as we have already explained, the figures do not give any clue as to the actual number of men and women in the two groups other than for Mr Croft's snapshots at August 1990, June 1992 and March 1994. But given that the contract inspectors were on three year short-term contracts with no guarantee of renewal, it is highly likely that they experienced a higher degree of turnover than the salaried inspectors. This is obviously important given the first of the conclusions which Mr Cavanagh would have us draw from the figures.

65. Thus, for example (taking figures entirely out at random), if all 8 salaried female inspectors had stayed in post after recruitment but the significant turnover of contract inspectors meant that at no stage were there more than, say, 10 females in post at any one time, then a more accurate ratio would be 10 to 8, a proportion of 44% which is close to the male proportion of 49%. Perhaps more significantly (as it may be arguable that what we should be concerned with is the total number of females who became contract planning inspectors between 1986 and 1996 rather than the number of such posts held by females at any one time), are the raw numbers. Given the comparatively high numbers in the overall workforce under consideration, the very small number of women (9.1% at the highest in the snapshot years, 7.3% at the lowest) creates a tendency to statistical distortion.

66. Given that the purpose of the exercise is to establish the comparative difficulty which women have in complying with the requirement, it is perhaps the statistic which we have added to Table 4 which is the most revealing. Under the headings 'males' and 'females' there are two columns, those who, on the date of the snapshot, are eligible to join and the total in post. The missing figure is the number in the supposed disadvantaged group. This is the figure which we have included in brackets. Thus, in August 1990, there were more women in the advantaged group than the disadvantaged group, the same in March 1994. It is only in January 1992 that there are more women in the disadvantaged group than the advantaged group. We appreciate, of course, that the exercise which we are undertaking primarily involves an analysis of proportions not raw numbers, although it is clear from the authorities that when the proportions or the statistics which give rise to them are questionable, amongst the checks and balances which we may employ is to look at overall numbers. It is beginning to look as though the product of the statistics on which Mr Croft and Mr Cavanagh rely is purely fortuitous

67. Following the guidance given by Lindsay P in ***Rutherford*** we have stood back and assimilated all of the

figures and, having done so, we cannot say, for all of the reasons which we have endeavoured to explain, that we are satisfied that the requirement not to be fee paid in order to qualify for the PCSPS has had a disproportionate impact on women if the correct pool is the planning inspectors themselves

G. Summary of conclusions

68. All of the claims fail because none of the prospective pools which the claimants have advanced are correct as a matter either of law or logic. The correct pool is the whole of the Civil Service, that is all those who either are eligible for the PCSPS, or would but for the provision complained of, be eligible. The burden of proof is upon the claimants to demonstrate that within that pool a considerably smaller proportion of women than men can comply with the requirement. They are unable to do so because no relevant statistics exist. In the pools for which the claimants do contend, either the statistics are not available and therefore they fail because the burden of proof is on them, or to the extent that they are available, the statistics do not reliably demonstrate a significant disparate impact.

....
Chairman
Date:
JUDGMENT SENT TO THE PARTIES ON
....
AND ENTERED IN THE REGISTER
....
FOR SECRETARY OF THE TRIBUNAL